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Wartime Sexual Violence as an International Crime

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WARTIME SEXUAL VIOLENCE AS AN INTERNATIONAL CRIME

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Courts and Tribunals

ECCC	Extraordinary Chambers in the Courts of Cambodia
ICC	International Criminal Court
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the former Yugoslavia
SCSL	Special Court for Sierra Leone

Other abbreviations

AFRC	Armed Forces Revolutionary Council (rebel group in Sierra Leone)
CAR	Central African Republic
CDF	Civil Defence Forces (rebel group in Sierra Leone)
CPU	Congolese Patriotic Union
DRC	Democratic Republic of Congo
FNI	Front for National Integration (rebel group in Congo)
FRPI	Front de Résistence Patriotique en Ituri (rebel group in Congo)
ILC	International Law Commission
MLC	Mouvement de la Libération du Congo (rebel group in Congo)
RUF	Revolutionary United Front (rebel group in Sierra Leone)
NPFL	National Patriotic Front of Liberia (rebel group from Liberia)

SUMMARY

Questo lavoro tratta della violenza sessuale in guerra.

L'introduzione ed il primo capitolo sono dedicati alla presentazione di questo fenomeno, delle sue caratteristiche e dell'interpretazione che dello stesso viene proposta, in particolare si sostiene che la violenza sessuale costituisca un'arma di guerra.

La violenza sessuale in guerra è un fenomeno che sin dai tempi antichi riguarda principalmente le donne e, solo in misura minore, anche gli uomini.

Storicamente le donne sono state parte del bottino di guerra, poiché considerate poco più che oggetti di proprietà degli uomini.[1]

La violenza sessuale sugli uomini, invece, specialmente nella forma della mutilazione genitale, costituva un modo per *"celebrare il simbolico e concreto dominio del nemico".*[2]

Nei conflitti moderni invece, la violenza sessuale, che continua ad avere quali vittime principali donne e bambine, ma che coinvolge in numero sempre crescente anche uomini e bambini, non può essere considerata un semplice effetto collaterale del conflitto. Nei conflitti recenti, l'utilizzo sistematico e capillare delle varie forme di violenza sessuale è diventato uno strumento di terrore e distruzione del nemico, una vera e propria arma che fa parte delle strategie di guerra dei gruppi armati, in quanto *"economica, efficace e [costituisce] il crimine di guerra meno condannato."*[3]

In Sudan, nella Repubblica Democratica del Congo, in Bosnia, in Sierra Leone, in Liberia, in Chad, in Ruanda, nel territorio della ex-Jugoslavia, in Colombia, solo per fornire alcuni esempi, la violenza sessuale è stata utilizzata come tattica militare per realizzare scopi politici e militari.

Data la dimensione del fenomeno,[4] il problema non può essere ridotto all'opportunità criminale del singolo soldato di sfogare i propri istinti, ma lo stupro di guerra si caratterizza come un atto premeditato, programmato dai leaders dei vari gruppi armati ed espressivo di potere e controllo sul nemico.[5] In questo senso può argomentarsi che lo stupro sia un *"crimine di dominio",*[6] in quanto "espressione sessualizzata" di dominio. Rachel Schreck ha notato che il *"macchiare"* le donne del nemico sia l'atto di guerra più esplicito nel manifestare il potere di una parte.[7] La "violenza sessualizzata" si fonda su una concezione della mascolinità come dominante e spesso violenta e, contemporaneamente, la rafforza. Lo "sfregio" del corpo della vittima viene a rappresentare lo

[1] Kelly Dawn Askin, "War Crimes Against Women: Prosecution in International War Crimes Tribunals", Martinus Nijhoff Publishers, 1997, pp. 20-21

[2] Valorie K. Vojdik, "Sexual Violence against Men and Women in War: a Masculinities Approach", 14 Nev. L.J. 923, 2013-2014 [di seguito: Vojdik, "Sexual Violence against Men and Women in War"], che riporta: Sandesh Sivakumaran, "Sexual Violence against Men in Armed Conflict", 18 EuR. J. INT'L L. 253, 2007, p. 265

[3] Rachel Schreck, "Rhetoric Without Results: United Nations Security Council Resolutions Concerning Rape During Armed Conflict", 28 Penn St. Int'l L. Rev. 83, 2009 [di seguito: Schreck, "Rhetoric Without Results"]

[4] Vedi infra le Tabelle dei Capitoli 2.2 e 2.6

[5] Marc G. Pufong and Randall D. Swain, "Rape in Militarized Conflicts: variations in international outrage and responsiveness", 4(3) Int.J.L.C. 237, 2008 [di seguito: Pufong and Swain, "Rape in Militarized Conflicts"], che riporta: Regina Graycar and Jenny Morgan "The Hidden Gender of Law", Sydney: Federation Press., 1990

[6] Joshua S. Goldstein, "War and Gender" Cambridge Univ. Press, 2001, p. 362

[7] Anne Llewellyn Barstow, "War's Dirty Secret: Rape, Prostitution, and Other Crimes Against Women", Pilgrim Press ed., 2000, p. 45

"sfregio" della collettività intera.[8] È stato efficacemente sostenuto come *"il corpo delle donne, la loro capacità riproduttiva"* siano spesso usate in guerra *"come un simbolico e vero e proprio campo di battaglia"*.[9]

Il report di Amnesty International del 2004 "Women and War: Rape as a Weapon of War", relativo alla situazione in Darfur, Sudan, per esempio, descrive lo stupro come forma di tortura "sessualizzata" o "basata sul genere" ("gender-based torture"), inflitta per ottenere informazioni, punire, intimidire ed umiliare le donne ed in questo modo, terrorizzare l'intera popolazione.[10] Gli stupri, le mutilazioni genitali, la volontaria trasmissione dell'HIV sono diventati strumento efficace di pulizia etnica.

Nella ex-Jugoslavia, lo stupro è stato sistematico, organizzato e su larga scala: il Relatore Speciale della Commissione dei Diritti Umani sulla ex-Jugoslavia ha denunciato che i Serbi, nel conflitto degli anni '90, avessero utilizzato lo stupro come strumento di pulizia etnica diretto ad *"umiliare, disonorare, avvilire e terrorizzare"*[11] le minoranze etniche non Serbe, in particolare Musulmani e Croati.[12] In Bosnia, le donne furono rapite, per ordine delle gerarchie militari, rinchiuse in centri detentivi ed ivi soggette a ripetuti stupri, spesso di gruppo, al fine di essere "ingravidate". Tutto ciò al fine di "diluire" il gruppo etnico musulmano, sfruttando il fatto che nelle società patriarcali, l'appartenenza etnica dei figli è derivata da quella del padre.

Meredith Turshen, studiando la guerra civile in Uganda, è giunta a simili conclusioni.[13]

Catherine MacKinnon ha correttamente osservato come lo stupro di guerra possa costituire uno strumento di genocidio: *"questo non è stupro fuori controllo, ma stupro sotto controllo [...]. È stupro per sconvolgere la società, per distruggere un popolo."*[14]

In sostanza, le varie forme di violenza sessuale sono strumenti usati per demoralizzare su larga scala le donne, distruggere la loro identità, minando, in questo modo, l'identità della società nel suo complesso: le donne vengono stuprate spesso in pubblico, di fronte alle famiglie, allo scopo di disonorarle; le donne incinte, in quanto "madri del nemico" vengono uccise "strappando" i feti

[8] Vojdik, "Sexual Violence against Men and Women in War", supra nota 2

[9] Amnesty International, 2004, "Lives Blown Apart: Crimes against Women in Times of Conflict: Stop Violence Against Women", disponibile su: http://web.amnesty.org/library/Index/ENGACT770752004

[10] Amnesty International, 2004: "Document - Sudan: Darfur: Rape as a Weapon Of War: Sexual Violence And Its Consequences", disponibile su: http://www.amnesty.org/en/library/asset/AFR54/076/2004/en/f86a52a0-d5b4-11dd-bb24-1fb85fe8fa05/afr540762004en.html

[11] Tadeusz Mazowiecki, Rapporteur Speciale della Commissione dei Diritti Umani sulla ex-Jugoslavia, Report predisposto a seguito della Risoluzione della Commissione 1992/2-1/1 del 14 Agosto 1992, E/CN.4/1993/50, 1993. Complessivamente Mazowiecki ha prodotto 12 rapporti nei quali lo stupro è stato denunciato come strumento per la pulizia etnica in relazione ai crimini commessi nei territori visitati.

[12] Pufong and Swain, "Rape in Militarized Conflicts", supra nota 5; che riporta: Beverly Allen, "Rape Warfare: The Hidden Genocide in Bosnia-Herzegovina and Croatia", Minneapolis: University of Minnesota Press., 1996

[13] Pufong and Swain, "Rape in militarized conflicts", supra nota 5; che riporta: Meridith Turshen, (1998) "Women's War Stories", in M. Tushen and C. Twagiramariya (eds.) "What Women Do in War-time: Gender and Conflict in Africa" London: Zed Books, pp. 1-26

[14] Stanford Encyclopedia of Philosophy, "Feminist Perspectives on Rape", first published on 13 May 2009; substantive revision on 14 August 2013; disponible su: http://plato.stanford.edu/entries/feminism-rape/ [di seguito: Stanford Encyclopedia, "Feminist Perspectives on Rape"]; che cita: C. MacKinnon, "Are Women Human? And Other International Dialogues", Cambridge MA: Harvard University Press, 2006, p. 187

dalle loro pance.[15] Inoltre, per gli uomini incapaci di proteggere le proprie donne, lo stupro rappresenta la sconfitta totale e definitiva.[16] Un report sulla violenza sessuale nella parte orientale della Repubblica Democratica del Congo approfondisce questo argomento: la violenza sessuale è *"l'estrema ostentazione di potere e predominio, […] usato dalle forze nemiche per mostrare la debolezza e l'inadeguatezza degli uomini appartenenti al gruppo sociale o alla comunità presa di mira. Questi uomini recepiscono questo messaggio, percependo la loro incapacità di proteggere le donne dalle aggressioni come la loro definitiva umiliazione nella guerra."*[17]

Peraltro, quando gli uomini sono essi stessi vittime di stupro, agli occhi della società *"è come se non fossero più uomini, a causa d quello che è accaduto loro."*[18] Tutto questo si ricollega allo stereotipo dell'uomo come forte, mascolino e capace di provvedere ai bisogni della famiglia, famiglia che necessita di essere protetta, ma se un uomo non è capace di proteggere nemmeno se stesso, come può essere un vero uomo?[19] La violenza sessuale sugli uomini va quindi ad intaccare il ruolo e l'immagine sociale che ad essi sono tradizionalmente attribuiti. In questo modo si spiega il concetto di arma "sessualizzata" o "basata sul genere" ("gendered weapon").

Perciò l'umiliazione, il dolore, la paura, inflitti attraverso la violenza sessuale sono sfruttate per distruggere la comunità nemica attraverso la distruzione delle singole vittime. In sostanza, *"lo stupro è usato come un'arma per esercitare potere e controllo su una società."*[20]

Ruth Seifert ha criticato l'idea che lo stupro di guerra fosse il semplice effetto collaterale della guerra stessa, infatti, esso può costituire un importante elemento della strategia militare orientato a minare la forza di volontà, il morale, la coesione, l'auto-concepirsi del nemico come una comunità. Si può dire che, in tempo di guerra, sono le donne a "tenere insieme" la famiglia e la comunità, di conseguenza: *"la loro distruzione fisica ed emotiva mira alla distruzione della stabilità sociale e culturale".*[21] In questo modo si rende evidente come la violenza sessuale sia una "gendered weapon". Questo tipo di violenza non ha come obiettivo solo la distruzione delle singole donne, ma più in generale, quella del loro ruolo nella società e, attraverso questo processo, la distruzione dell'intera comunità nemica.

È stato più volte sottolineato a livello internazionale,[22] che sono l'ineguaglianza sociale, la discriminazione cui le donne sono sottoposte anche in tempo di pace, le visioni stereotipate dei ruoli

[15] Pufong and Swain, "Rape in militarized conflicts", supra nota 5, che riporta Ruth Seifert, "War and Rape: A Preliminary Analysis" in Alexandria Stiglmayer (ed.) Mass Rape.Lincoln: University of Nebraska Press, 1994, p. 54-58

[16] Stanford Encyclopedia, "Feminist Perspectives on Rape", supra nota 14, C. MacKinnon, "Are Women Human? And Other International Dialogues, Cambridge MA: Harvard University Press", 2006, p. 223

[17] Vojdik, "Sexual Violence Against Men and Women in War", supra nota 2, p. 947, reporting: Susan Bartels et Al., "Now, The World Is Without Me: An Investigation Of Sexual Violence In Eastern Democratic Republic Of Congo", 2010

[18] J. De Capua, "Both Women and Men Victims of Rape in the Eastern DRC", 26 November 2008, disponibile su: www.VOAnews.com

[19] Will Storr, "The rape of men: the darkest secret of war", The Guardian, 2011, disponibile su: http://www.theguardian.com/society/2011/jul/17/the-rape-of-men

[20] J. De Capua, "Both Women and Men Victims of Rape in the Eastern DRC", 2008, supra nota 18

[21] Stanford Encyclopedia, "Feminist Perspectives on Rape", supra nota 14, che cita: Ruth Seifert, "The Second Front: The Logic of Sexual Violence in Wars", 19 Women's Studies International Forum, 1996, p. 39

[22] Vedi, Vienna Declaration and Programme of Action, 25 June 1993. Vedi anche: Declaration on the Elimination of Violence against Women, A/RES/48/104, 20 December 1993, Preamble. Vedi anche: International Conference on Population and Development Programme of Action. Vedi anche: Beijing Declaration and Platform for Action, (1995). Vedi anche: S/RES/2106 (2013) "Women's Bodies as a Battleground: Sexual Violence Against Women and Girls During the War in the Democratic Republic of Congo South Kivu (1996-2003)", Réseau des Femmes pour un Développement

sociali dell'uomo e della donna, le cause principali del diffondersi di questo tipo di violenza in situazioni di conflitto e militarizzazione.[23] *"Stereotipi e attitudini violente nei confronti delle donne",* già diffusi nella società, *"vengono [infatti] volontariamente sollecitati e manipolati"* dai leaders come strumento per ottenere scopi politici e militari. In definitiva, si può dire che *"la discriminazione di genere e la violenza non si verificano accidentalmente nei conflitti, […] ma sono ordinati, tollerati o condonati come risultato di strategie politiche".*[24]
Di conseguenza, al fine di elaborare politiche efficaci nella lotta alla violenza, sarebbe necessario concepire degli interventi che siano in grado di fornire *"delle alternative concrete ad un modello maschile che trae forza e identità proprio dal poter abusare liberamente del corpo delle donne, sia in tempo di guerra che di pace."*[25]

L'utilizzo della violenza sessuale in guerra è un'arma così efficace a causa delle molteplici e dannose conseguenze per le vittime. Gli effetti di tale violenza sono incalcolabili, alcuni possono variare da comunità a comunità, mentre altri sono costanti.

In generale, le vittime possono contrarre varie malattie sessualmente trasmesse, subire vari danni fisici permanenti a causa delle modalità violente con cui lo stupro viene commesso, a ciò si aggiungono la sofferenza psicologica e quasi sempre la stigmatizzazione e l'emarginazione sociale. Questo è un aspetto particolarmente interessante: sono le vittime, uomini o donne che siano e non invece i carnefici, a venire ostracizzati dalla comunità, a causa della vergogna connessa allo stupro! Questo fenomeno rende difficile l'instaurazione di procedimenti penali a carico dei carnefici, in quanto le vittime spesso non denunciano le violenze sessuali subite. Ancora recentemente, la Rappresentante Speciale del Segretario Generale delle Nazioni Unite per la "Violenza Sessuale nei Conflitti", Zainab Hawa Bangura, ha ribadito la necessità di condannare i colpevoli di tali violenze anche al fine di "spostare colpa" dalla vittima al carnefice.[26] Tuttavia, per fare questo è fondamentale *in primis* che sia portata a termine una svolta culturale, altrimenti la mancanza di denunce continuerà ad impedire i processi e permetterà il perpetuarsi del circolo vizioso attuale per cui la paura dello "stigma sociale" fa sì che le vittime non denuncino, il che rende impossibile l'operare della giustizia che, invece, sposterebbe la colpa sul carnefice, determinando le sue responsabilità criminali. È inoltre necessario osservare che la mancanza di giustizia, a sua volta, favorisce la commissione di ulteriori crimini.

Kelly Dawn Askin ha ben illustrato questo aspetto problematico, scrivendo:

Associatif, Réseau des Femmes pour la Défense des Droits et la Paix and International Alert, 2005, citing: Amnesty International: Human Rights Are Women's Rights, London, 1995. Vedi anche: Amnesty International, 2004, "Lives Blown Apart: Crimes against Women in Times of Conflict: Stop Violence Against Women", supra nota 9

[23] Amnesty International, 2004, "Lives Blown Apart: Crimes against Women in Times of Conflict: Stop Violence Against Women", supra nota 9

[24] Ibid.

[25] Paola Degnani, "Donne, Diritti Umani e Conflitti Armati. La Questione della Violenza nell'Agenda della Comunità Internazionale, Centro di studi e di formazione sui diritti della persona e dei popoli, Università degli Studi di Padova, Research Paper n. 2/2000, disponibile su: http://unipd-centrodirittiumani.it/public/docs/2000_02.pdf

[26] Statement by the Special Representative of the Secretary-General on Sexual Violence in Conflict Margot Wallström Women, Peace and Security: Conflict-Related Sexual Violence, New York, 23 February 2012, disponibile su: http://www.un.org/sexualviolenceinconflict/statement/the-kenya-elections-must-be-free-of-politically-motivated-rape-and-other-forms-of-sexual-violence/

Solo quando riconosceremo che le vittime della violenza sessuale non debbano sopportare lo stigma e la vergogna che la società tradizionalmente attribuisce loro e quando ammetteremo che lo stupro sia un crimine di grande violenza sotto il profilo sessuale, fisico e mentale che merita una reazione effettiva, saremo veramente in grado di contrastare le cause sottostanti i crimini sessuali. Quando ribalteremo lo stigma e gli stereotipi associati ai crimini sessuali, toglieremo ai criminali molto del potere che ora hanno.[27]

Ovviamente, questa stigmatizzazione cui sono sottoposte le vittime, in società in cui sono i mariti a sostenere economicamente la famiglia, relega le donne a situazioni di povertà estrema.

Nonostante l'estrema diffusione di questi crimini, la reazione della comunità internazionale è stata molto tarda, in particolare il capitolo terzo tratta l'evoluzione del quadro legislativo internazionale applicabile in caso di violenza sessuale in guerra, sia nell'ambito dei diritti umani che del diritto internazionale umanitario e del diritto internazionale penale.

Innanzitutto, tardivo è stato il riconoscimento che la violenza sessuale fosse una violazione dei diritti umani. La donna veniva considerata nelle società patriarcali come una proprietà dell'uomo, di conseguenza, fino al medioevo, si parlava di crimine di proprietà: la vittima era l'uomo che esercitava i diritti sulla donna.

Successivamente, questo tipo di violenza è stata riconcepita come crimine contro l'onore, ma la vittima rimaneva sempre l'uomo che esercitava i "diritti sulla castità" della donna. Questa concezione si evidenzia per esempio nell'articolo 46 della Convenzione dell'Aja del 1907, il quale tutela *"l'onore della famiglia",* poiché la salvaguardia di questo onore era concepita come in grado di ricomprendere la protezione da violenze di natura sessuale.

Il passaggio da una concezione della violenza sessuale da violazione della proprietà o dell'onore a violazione della dignità umana,[28] si è verificato al termine della Seconda Guerra Mondiale, con l'inclusione dello stupro tra i crimini contro l'umanità nella Control Council Law n. 10,[29] che costituì la base legale per i processi dei tribunali militari contro i "criminali nazisti minori." In questi processi, tuttavia, non vi furono imputazioni specifiche per stupro.

Peraltro, nonostante le numerose prove che varie forme di crimini sessuali fossero state diffusamente commesse durante la guerra, nella Carta del Tribunale Militare Internazionale di Norimberga, lo stupro non fu inserito tra i crimini nella giurisdizione di questo Tribunale. Di conseguenza, ai processi di Norimberga, riguardanti i "principali criminali di guerra", non vi furono esplicite imputazioni per stupro, ma le varie forme di violenza sessuale furono solo incluse come prova di altri crimini, in particolare dei crimini contro l'umanità di "altri atti inumani" e di "persecuzione sui piani politico, religioso e razziale".[30]

[27] Kelly D. Askin, "Prosecuting Wartime Rape and Other Gender-Related Crimes under International Law: Extraordinary Advances, Enduring Obstacles", 21 Berkeley J. Int'l Law. 288, 2003, available at: http://scholarship.law.berkeley.edu/bjil/vol21/iss2/4

[28] David S. Mitchell, "The Prohibition of Rape in International Humanitarian Law as a Norm of Jus Cogens: Clarifying the Doctrine", 15 Duke J. Comp. & Int'l L. 237, 2005, [di seguito: Mitchell, "The Prohibition Of Rape In International Humanitarian Law"]

[29] Control Council Law Number 10, Art. 2(1)(a). Vedi Capitolo 2.3

[30] Vedi Capitolo 2.3

Egualmente, neppure nella Carta del Tribunale Militare per l'Estremo Oriente, non fu incluso specificatamente lo stupro fra i crimini nella giurisdizione del Tribunale.[31] Ciononostante, il Generale Iwane Matsui, il Comandante Shunroku Hata, il Ministro degli Affari Esteri Kōki Hirota e il Generale Tomoyuki Yamashita furono condannati per i crimini commessi dalle loro truppe, tra i quali lo stupro, in base ad una teoria sulla responsabilità dei comandanti per omissione, ossia per non avere impedito la commissione di tali atrocità.[32] Perciò, lo stupro venne comunque perseguito come crimine di guerra, in particolare tra gli *"atti commessi in violazione dei costumi e delle convenzioni sulla guerra".*[33] Inoltre, lo stupro venne perseguito anche come "trattamento inumano", "violazione dell'onore della famiglia" e forma di "maltrattamento".[34]

Solo nel passato più recente si nota un progressivo riconoscimento della gravità dei crimini sessuali e della necessità di perseguirli efficacemente, superandosi anche l'idea che lo stupro, se confrontato ad altri crimini, fosse meno grave.

Nell'ambito dei diritti umani, dagli inizi degli anni novanta si è registrato un fortissimo impulso verso il pieno riconoscimento dei diritti delle donne, sia in tempo di pace che in situazioni di conflitto. Nel 1993 si è tenuta a Vienna la Conferenza Mondiale delle Nazioni Unite sui Diritti Umani alla cui conclusione sono stati approvati una Dichiarazione ed un Programma d'Azione per la promozione e la tutela dei diritti umani nel mondo che hanno segnato un significativo passo avanti per il riconoscimento dei diritti umani delle donne. Successivamente vi sono state, nel 1994 la Conferenza Internazionale sui Popoli e lo Sviluppo al Cairo e nel 1995 la Quarta Conferenza Mondiale sulle Donne a Pechino (Beijing).

Il capitolo quarto si occupa nello specifico del diritto internazionale penale ed in particolare dei risultati raggiunti dalla giurisprudenza dei tribunali/corti internazionali ed internazionalizzate in merito ai crimini sessuali. In quest'ambito, innanzi tutto, sia il Tribunale Penale Internazionale per l'ex-Jugoslavia (ICTY) che il Tribunale Penale Internazionale per il Ruanda (ICTR)[35] si sono impegnati ad individuare e definire le varie forme di violenza sessuale. Infatti, sebbene le uniche forme di violenza sessuale espressamente previste negli Statuti dei due Tribunali fossero lo stupro e la prostituzione forzata, l'ICTY e l'ICTR hanno individuato anche la schiavitù sessuale, la mutilazione genitale, la nudità forzata, la gravidanza forzata e la sterilizzazione forzata, perseguendone alcune come atti costitutivi di altri crimini. Più precisamente, gli Statuti di entrambi i Tribunali contemplano

[31] Vedi in generale, the Charter of the International Tribunal for the Far East, 1946

[32] "The Tokyo Judgment: Judgment Of The International Military Tribunal For The Far East", B.V.A. Roling and C.F. Ruter eds., 1977, pp. 445-454

[33] "Sexual Violence as an international crime" Anne-Marie de Brouwer, Charlotte Ku, Renée Römkens and Larissa van den Herik (eds.), 2012, Chapter II (Kelly Askin), pp. 38-39, che riporta: "The Tokyo war Crimes Trial: The Complete Transcripts of the Proceedings of the International Military Tribunal for The Far East, eds. R.Pritchard & S. Zaide (New York Garland Publishing, 1981), Vol. I, transcript 29. Vedi Capitolo 5.3.1 relativamente al caso Yamashita.

[34] Ibid., p. 39, che riporta: "International military Tribunal for the Far East, Dissentient Judgment of Justice Pal 624", 1953, pp. 601-603

[35] Il Tribunale penale internazionale per l'ex Jugoslavia, costituito 1993 dal Consiglio di sicurezza delle Nazioni Unite con la risoluzione 827, che ne costituisce lo statuto, giudica "le persone presunte responsabili di gravi violazioni del diritto umanitario internazionale commesse sul territorio dell'ex Jugoslavia dal 1991".
Il Tribunale penale internazionale per il Ruanda, costituito nel 1994 dal Consiglio di sicurezza delle Nazioni Unite con la risoluzione 955, che ne costituisce lo statuto, giudica "le persone responsabili di violazioni gravi del diritto internazionale umanitario commesse nel territorio del Ruanda ed i cittadini ruandesi responsabili delle medesime violazioni compiute nel territorio degli Stati vicini tra il 1 gennaio ed il 31 dicembre 1994".

lo stupro tra i crimini contro l'umanità,[36] soltanto lo Statuto dell'ICTR enumera lo stupro anche tra i crimini di guerra insieme alla prostituzione forzata, in particolare tra le violazioni dell'Articolo 3 comune alle Convenzioni di Ginevra del 1949 e del II Protocollo Addizionale.[37] Si evidenzia inoltre come nessuno di questi Statuti contenga alcuna definizione di questi crimini, di conseguenza, la definizione di stupro è stata elaborata in via giurisprudenziale. È inoltre molto importante ricordare che l'ICTR e successivamente, sulla scia del caso storico contro il Ruandese Jean-Paul Akayesu, anche l'ICTY, hanno riconosciuto che lo stupro e le altre forme di violenza sessuale possano essere atti costitutivi del crimine di genocidio.[38]

Davanti a questi due tribunali internazionali ci sono state accuse/condanne:

- specificamente per stupro, come crimine contro l'umanità (sia ICTY che ICTR) e come violazione della dignità personale, quindi come grave violazione dell'Articolo 3 comune alle Convenzioni di Ginevra del 1949 e del II Protocollo Addizionale, cioè come crimine di guerra (solo ICTR)
- per altri crimini, sulla base di atti che includevano la violenza sessuale: schiavitù, tortura, persecuzione, altri atti inumani come crimini contro l'umanità (sia ICTY che ICTR); cagionare gravi lesioni all'integrità fisica o psichica dei membri del gruppo come genocidio (sia ICTY che ICTR); tortura, trattamenti inumani e cagionare volontariamente grandi sofferenze o gravi lesioni all'integrità fisica o alla salute, come gravi violazioni delle Convenzioni di Ginevra (ICTY); trattamenti crudeli, tortura, violenze contro la dignità personale, stupro come violazioni delle leggi e dei costumi di guerra (ICTY); violenza alla vita, al benessere fisico e mentale delle persone, in particolare trattamenti crudeli come la tortura, mutilazione e ogni altra forma di punizione corporale, come violazioni dell'Articolo 3 comune alle Convenzioni di Ginevra del 1949 e del II Protocollo Addizionale (ICTR).[39]

La giurisprudenza dei due Tribunali internazionali *ad hoc* è stata di grande importanza per l'elaborazione dello Statuto della Corte Penale Internazionale (ICC).[40] Infatti, lo Statuto di Roma è il primo statuto ad includere forme di violenza sessuale ulteriori allo stupro e alla prostituzione forzata: schiavitù sessuale, gravidanza forzata, sterilizzazione forzata e altre forme di violenza sessuale di analoga gravità, come atti costitutivi sia dei crimini contro l'umanità che dei crimini di guerra, commessi sia in conflitti di carattere internazionale che non internazionale.[41] Lo Statuto di Roma, inoltre, è il primo statuto che criminalizza la persecuzione basata sul genere sessuale come crimine contro l'umanità. Inoltre, i crimini sessuali possono costituire atti di genocidio o atti costitutivi di crimini contro l'umanità o crimini di guerra.

[36] Statuto dell'ICTY, Art. 5; Statuto dell'ICTR, Art. 3
[37] Statuto dell'ICTR, Art.4
[38] Vedi Capitolo 4.1.3
[39] Anne-Marie de Brouwer, "Supranational Criminal Prosecution of Sexual Violence: The ICC and the Practice of the ICTY and the ICTR", 2005, p. 17
[40] La conferenza diplomatica tenutasi a Roma tra il 15 giugno e il 18 luglio 1998 si è conclusa con l'adozione dello Statuto (Statuto di Roma) della prima giurisdizione penale internazionale con competenza universale e a carattere permanente. La Corte penale internazionale è dotata del potere di esercitare la sua giurisdizione su persone, in relazione ai crimini più gravi aventi rilevanza internazionale, ossia crimini contro l'umanità, crimini di guerra, crimine di genocidio e crimine di aggressione.
[41] Statuto di Roma, Art. 7 e 8

Gli Elementi dei Crimini, che contengono le definizioni dei vari crimini sessuali, si fondano sugli sviluppi della giurisprudenza dei due Tribunali Internazionali *ad hoc*.

Le più recenti corti internazionalizzate, la Corte Suprema per la Sierra Leone e la Corte e il Tribunale Speciale per la Cambogia, istituite successivamente alla Corte Penale Internazionale, al fine di punire i crimini commessi durante la guerra civile in Sierra Leone[42] e durante il regime degli Khmer Rossi,[43] si sono occupate anche del cosiddetto crimine di matrimonio forzato.

Peraltro, nel terzo capitolo, si sostiene che vi siano ragioni per ritenere che attualmente i crimini sessuali, o almeno lo stupro e la schiavitù sessuale costituiscano crimini *jus cogens*.[44]

Nonostante questo grande sviluppo a livello teorico, perseguire efficacemente i crimini sessuali rimane ancora oggi un problema, come dimostrano le sentenze rese nei primi tre processi svoltisi dinanzi alla Corte Penale Internazionale, quelli dei Congolesi Thomas Lubanga Dyilo, Mathieu Ngudjolo Chui e Germain Katanga, descritti nel capitolo quinto. Infatti, sebbene in tutti questi casi durante il processo fosse stato accertato che crimini sessuali erano stati commessi (anche se non personalmente dagli accusati, ma dai loro sottoposti) e, negli ultimi due casi, lo stupro e la schiavitù sessuale fossero anche stati specificamente imputati, non sono seguite condanne per crimini sessuali.[45] Ciononostante, attualmente, molti degli imputati davanti a questa corte sono leaders politici e militari accusati anche di crimini sessuali, soprattutto stupro, schiavitù sessuale e persecuzione sulla base del genere.[46] La speranza è che i futuri processi siano in grado di accertare le reali responsabilità di questi soggetti e di rendere giustizia alle vittime.

[42] La guerra civile in Sierra Leone è stata un conflitto durato dal 1991 al 2002 che ha visto scontrarsi i ribelli del Fronte Rivoluzionario Unito, sostenuti dalle forze speciali del *National Patriotic Front of Liberia* (NPFL), e le forze governative. L'Accordo istitutivo della Corte Speciale per la Sierra Leone è stato ratificato dalla Sierra Leone nel marzo del 2002 e la Corte speciale ha iniziato i suoi lavori nel luglio 2002; nel giugno 2006 ha aperto i primi processi.

[43] Khmer Rossi è il nome di una autoproclamatasi organizzazione politica comunista rimasta al potere in Cambogia dal 17 aprile 1975 al 9 gennaio 1979. Il termine Khmer Rossi - dall'originale in lingua francese Khmer Rouge - fu coniato dal sovrano Norodom Sihanouk. Il loro nome ufficiale fu Partito Comunista della Cambogia, più tardi Partito della Kampuchea Democratica. Nel 2005, "l'Accordo tra le Nazioni Unite e il Governo Reale della Cambogia per la persecuzione dei crimini commessi durante la Democratica Kampuchea", entrò in vigore e il Tribunale Speciale per la Cambogia fu formalmente istituito.

[44] Mitchell, "The Prohibition Of Rape In International Humanitarian Law", supra nota 28, che riporta: Kelly D. Askin, "War Crimes Against Women: Prosecution in International War Crimes Tribunals", Martinus Nijhoff Publishers, 1997, p. 242: "The greatly increased activity in international law in the 1990s towards affording greater protection, status, and equality to women evidences a universal trend toward *jus cogens* status for gender based abuses, particularly violence". Per un'ampia trattazione del tema, vedi Capitolo 3.5.4

[45] Vedi Capitoli 5.2.1 e 5.2.3

[46] Vedi Tabella Capitolo 5

1. INTRODUCTION

The use of rape in conflict reflects the inequalities women face in their everyday lives in peacetime. Until governments live up to their obligations to ensure equality and end discrimination against women, rape will continue to be a favourite weapon of the aggressor.[1]

Wartime sexual violence had a widespread incidence throughout the history. We could trace attempts to stop it since the ancient times, but the real development in the field of protecting women and girls from such an atrocity, regrettably, started only recently and more precisely in the 1990s.

However, already during the 1970s, the claim for justice for the growing number of victims of wartime sexual violence increased and the issue came to the international attention thanks to the feminist movements. In particular, the feminist Susan Brownmiller noted how rape is mostly a "crime of domination", than of "lust".

In 2008, Kelly D. Askin affirmed that: *"over the last couple of decades, we have witnessed a trend toward using women's bodies as the battlefield."*[2] Indeed, it is fundamental to acknowledge that wartime sexual violence has evolved to become a weapon of war, organized and supervised by military and civil leaders.

In this work, we will see that during the conflicts that have occurred in the territory of the former Yugoslavia, in Colombia, in Sierra Leone, in Sudan, in the Central African Republic, in the Democratic Republic of Congo, in Liberia, in Rwanda, just to mention some examples, sexual violence has been part of the strategy of war.

Practically, in the past, women were subjected to rape as a prize for soldiers, a booty of war; nowadays, as part of the war tactic aimed more at the destruction of the enemy, moral if not physical, than at his conquest. Therefore, it can be argued that the various forms of wartime sexual violence, to which women are subjected all around the world, are not isolated disgraceful incidents disconnected from the contest, they are not consequence of the perpetrator's sudden lust due to the chance to impose a sexual intercourse, but they are crimes of violence and power.

Moreover, we will see that although the scale of the phenomenon is greatly inferior, since ancient times also men are subjected to various conflict-related forms of sexual violence as a symbolic way to celebrate the victory over the enemy. However, nowadays, also sexual violence against men has become a gendered weapon of war, a way to drive the targeted society to collapse.

Therefore, in general, sexual violence is used to affirm domination on the individuals and, on a wider scale, on the community to which the victims belong. The perpetrators take advantage of

[1] "Women's Bodies as a Battleground: Sexual Violence Against Women and Girls During the War in the Democratic Republic of Congo South Kivu (1996-2003)", Réseau des Femmes pour un Développement Associatif, Réseau des Femmes pour la Défense des Droits et la Paix and International Alert, 2005, citing: Amnesty International: Human Rights Are Women's Rights, London, 1995

[2] Kelly Dawn Askin, Senior Legal Officer Open Society Justice Initiative, Testimony before the Subcommittee on Human Rights and the Law Committee on the Judiciary United States Senate, "Rape as a Weapon of War: Accountability for Sexual Violence in Conflict", 2008; available at: http://www.friendsofthecongo.org/pdf/sexual_violence_testimonies.pdf

the role that women and men have in the society; indeed, undermining these roles, they destroy the society itself. As Sarah Clark Miller well observed, rape *"corrupts women's roles as caretakers of relationships, conveyors of cultural practices and sustainers of meaning […]. In these ways, genocidal rapists twist the way in which women are pivotal to the life of a community, rendering them pivotal to its destruction."*[3] As it happens for women, by means of sexual violence, the perpetrators intend to destroy the social role of men as protector of the family and of the community. A man, who is not able to protect even himself, is not considered a man any longer by the community.

Survivors of rape become outcasts in their community because of the stigma connected to rape. Indeed, social norms and taboos are exploited by the perpetrators who know that the survivors of sexual violence will bear the shame and thus, will be outcasts. By this process, the society itself is crumbled. Therefore, it can be said that social norms create a ripple effect that from the victims expands to the community. That is why sexual violence has developed as a weapon of war, or rather a "gendered weapon of war", that is why it is an effective weapon of war, used to show power and to subjugate the enemy.

The legal recognition of the fact that sexual violence is a violation of women's fundamental rights was belated because women were historically considered as men's properties, thus the rape of a woman offended the man who exercised such a right upon her. Subsequently, evolved the conception that such crimes were crimes upon personal dignity, outrages on women's honor, but still the victims were the men who had the rghts on "women's chastity". Moreover, this view is partial, because it is not able to appreciate the complexity of harm and of suffering, both physical and mental, that the victims have to endure, not reducible to the sole social stigmatization.

When, finally, it was recognized that sexual violence violates the fundamental rights of women and that it is a criminal act, was also acknowledged its discriminatory nature.

Susan Brownmiller noted that threat, use and cultural acceptance of sexual force constitute a *"pervasive process of intimidation*" that affects all women.[4] Rape and other forms of sexual violence are commonly committed also in peacetime, but the frequency and savagery multiply during wars. Therefore, the widespread occurrence of conflict-related sexual violence should be considered in the light of the social and cultural context in which it takes place, it shows that the sense of entitlement to women's body and sexuality still exists. Ultimately, it shows inequality.

Inequality and stereotyped gender's roles, according to which women have a subordinate role compared with men, are the real problem.

As long as discrimination and inequities remain so commonplace everywhere in the world, as long as girls and women are valued less, fed less, fed last, overworked, underpaid, not schooled, subjected to violence in and outside their homes, the potential of the human family to create a peaceful, prosperous world will not be realized.[5]

[3] Sarah Clark Miller, "Moral Injury and Relational Harm: Analyzing Rape in Darfur", 40(4) Journal of Social Philosophy 504-523, 2009

[4] Susan Brownmiller, "Against Our Will: Men, Women and Rape", New York: Fawcette Books, 1975, available at: https://www.academia.edu/5832605/Against_our_will_men_women_and_rape_blackatk_

[5] Hillary Rodham Clinton, Remarks to the U.N. 4th World Conference on Women Plenary Session, delivered 5 September 1995, Beijing, China, transcription by Michael E. Eidenmuller; available at : http://www.americanrhetoric.com/speeches/hillaryclintonbeijingspeech.htm

CHAPTER 1: INTRODUCTION

At the Fourth World Conference on Women, which took place in Beijing in 1995, was still necessary to affirm that women's rights are human rights, that their rights are equal to those of men, that they deserve equal opportunities, access to education and full participation in all spheres of society.

"Violence against women is a manifestation of historically unequal power relations between men and women, which have led to domination over and discrimination against women by men" and have impeded the full advancement of women. Violence against women is one of the essential social mechanisms by which women are forced and kept into a subordinate position compared with men.[6] In fact, even when the sexual violence is directed against men, the objective is to "womanize", to "feminize" the victims. When men are raped, they symbolically lose their gender identity as men, which is socially constructed to dominate: they are feminized and socially constructed as female victims.[7] Indeed, they would not be considered men any longer, after that the aggressors "made of them their wives".[8]

Consequently, sexual violence is a powerful and terrible manifestation of the still existing "subordinate" role of women. Addressing sexual violence and granting accountability for the perpetrators are among the most important steps to take in this path towards women's empowerment.

Noteworthy advances occurred in international criminal law, since the last decade of the 1990s. In particular, the two *ad hoc* Tribunals, the International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR), set up respectively in 1993 and 1994, prosecuted sexual violence crimes as crimes against humanity, war crimes and genocide, trying to emphasize the harmful complexion such offences encompass. In addition, the Tribunals recognized that consent to sexual activities is meaningless in a conflict context, in which fear and subjugation's conditions preclude its genuineness; this conclusion constutited an extraordinary achievement on the victims' perspective.

All these jurisprudential achievements were at the basis of the Statute of the International Criminal Court (ICC), which represents the codification of the ultimate developments of international criminal law. The Court has jurisdiction on a wide range of sexual violence crimes, prosecutable as war crimes or crimes against humanity, namely, rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization and any other comparably severe form of sexual violence.[9] Furthermore, the Court has jurisdiction over the crime against humanity of persecution based on gender and the Elements of Crimes explicitly recognized that rape and other forms of sexual violence can amount to the crime of genocide.[10]

The more recent Special Court for Sierra Leone (SCSL) and the Extraordinary Chambers in the Courts of Cambodia (ECCC), which are internationalized courts, dealt with sexual violence crimes. More specifically, the SCSL prosecuted successfully different forms of sexual violence, namely rape, sexual slavery and forced marriages and the ECCC is currenly prosecuting rape and forced marriage.

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[6] A/RES/48/104 (1993)

[7] Valorie K. Vojdik, "Sexual Violence Against Men And Women In War: A Masculinities Approach", 14 Nev. L.J. 923, 2014; reporting: Sandesh Sivakumaran, "Lost in Translation: UN Responses to Sexual Violence Against Men and Boys in Situations of Armed Conflict", 92 Int'l Rev. Red Cross 259, 2010, pp. 265-66

[8] J. Gettleman, "The Symbol of Unhealed Congo: Male Rape Victims", NY Times, 5 August 2009

[9] Rome Statute of the International Criminal Court, Articles 7 and 8

[10] ICC statute, Article 7(h); ICC Elements of Crimes, Art. 6(b), element 1, footnote 3

Some authors even argue that sexual violence crimes, or at least rape and sexual slavery, are currently part of *jus cogens.* In fact, they sustain that *"the greatly increased activity in international law in the 1990s towards affording greater protection, status, and equality to women evidences a universal trend toward jus cogens status for gender based abuses, particularly violence"*. If confirmed, this acknowledgement would imply that sexual crimes, constituting violations of the highest fundamental norms in the international public order, would be subject to increased judicial scrutiny and accountability.[11]

However, as already emphasized, since in case of sexual violence the victims and not the perpetrators are those stigmatized by the society, victims usually prefer not to denounce. In this way, a paradoxical situation is created: survivors, fearing stigmatization, do not report and thus, perpetrators are not prosecuted. Consequently, being prosecution the only mechanism that would shift the stigma from the victims to the perpetrators, clarifying their position as criminals, stigmatization is left upon the victims, law cannot be implemented and, in addition, without any restraint the acts of violence increase. Therefore, I argue that it is necessary also to develop a different cultural model, able to provide concrete alternatives to a male model that draws strength and founds its own identity on the possibility to subjugate women, especially by means of sexual abuse of women's bodies, both in time of war and peace.

In my work, I analyze the most important developments in international law relative to the prosecution of wartime sexual violence, focusing on its use as a gendered weapon of war. In particular, I analyze the developments of the legal framework in the field of international human rights law, international humanitarian law and international criminal law and I consider the jurisprudential approach of the international and internationalized courts and tribunals in addressing such an issue.

In addition, since sexual violence has become a war tactic controlled by leaders and executed by subordinates, I consider how the theories used by the two *ad hoc* Tribunals, in situation in which the accused are not the physical perpetrators of the crimes, influenced the International Criminal Court. More specifically, the theories used to held responsible commanders, for the sexual violence crimes committed by their subordinates or participants in a common purpose, for crimes materially committed by other participants.

I decided to approach the theme of wartime sexual violence because it is a powerful manifestation of the discrimination suffered by women. Equality between men and women is proclaimed, but still not fully realized. The United Nations, recently, launched the campaign "HeForShe". The actress Emma Watson, as the UN Women Goodwill Ambassador, delivered a speech on 20 September 2014: she remembered that the issue of gender-based discrimination is still our issue, that no country in the world has achieved gender equality, because inequality is rooted in social stereotypes that sometimes, even unconsciously, we share and perpetrate.

[11] Kelly Dawn Askin, "War Crimes Against Women: Prosecution in International War Crimes Tribunals", Martinus Nijhoff Publishers, 1997, p. 242

2. FRAMING THE ISSUE

CONTENTS: 2.1 Sexual violence as a gendered weapon of war – 2.1.1 The effects on the individual and on the community – 2.2 The effects on the individual and on the community – 2.2 The dimension of the phenomenon of wartime sexual violence as a weapon of war – 2.3 Historical overview – 2.4 Past indifference and under-recognition of wartime sexual crimes – 2.5 The weak international response – 2.6 Sexual violence against men – 2.6.1 The peculiarities of sexual violence against men as a gendered weapon of war – 2.6.2 The prosecution of sexual violence against men: the problem of re-characterization

2.1 Sexual violence as a gendered weapon of war

Sexual violence has become a tactic of choice for armed groups because it is cheap, effective and the least condemned war crime.[1]

Historically, once a party was defeated, women belonged to the victorious party: they were considered and treated as little more than properties. It has been said: *"to the victor belong the spoils"*[2] and the spoils included women.

Nowadays, instead, wartime rape cannot be considered merely a byproduct of war, but it has been started to be used as a weapon of war. In fact, the issue is not reducible to soldiers' opportunities to rape, but rape has become a premeditated act of power and control, committed often in full impunity.[3] Women became more than prizes, they became the main target in the military strategy.

There is a large consensus in literature on the fact that the second half of the twentieth century witnessed a change in the conceiving of wartime sexual violence: mass rapes began to be employed as a strategy to achieve political and military goals.[4] In particular, the feminist Susan Brownmiller noting this evolution sustained that the exploitation of mass rapes as instruments of terror developed after the World War I.[5]

It can be argued that rape is a *"crime of domination".*[6] Often, wartime sexual violent acts are not committed to fulfil sexual desires.[7] Indeed, rape is a *"sexual expression of aggression",* because through it, the perpetrator displays violence and domination toward the victim.[8] Actually, no act of

[1] Rachel Schreck, "Rhetoric Without Results: United Nations Security Council Resolutions Concerning Rape During Armed Conflict," 28 Penn St. Int'l L. Rev. 83, 2009 [hereinafter: Schreck, "Rhetoric Without Results"]
[2] "To the victor belong the spoils" by New York Senator William L. Marcy
[3] Marc G. Pufong and Randall D. Swain, "Rape in Militarized Conflicts: variations in international outrage and responsiveness", 4(3) Int.J.L.C. 237-275, 2008 [hereinafter: Pufong and Swain, "Rape in Militarized Conflicts"]; reporting: Regina Graycar and Jenny Morgan "The Hidden Gender of Law", Sydney: Federation Press., 1990
[4] Ibid.
[5] Susan Brownmiller, "Against Our Will, Men, Women and Rape", New York: Fawcett Books, 1975, "War Crimes Against Women", available at: https://www.academia.edu/5832605/Against_our_will_men_women_and_rape_blackatk_
[6] Joshua S. Goldstein, "War and Gender" Cambridge Univ. Press, 2001, p. 362
[7] Schreck, "Rhetoric Without Results", supra at 1: See Ruth Seifert, "War and Rape: Analytical Approaches, Women's International League for Peace and Freedom", http:// www.wilpf.int.ch/publications/1992ruthseifert.htm
[8] Ibid.

war illustrates the power of a party better than the *"defiling"* of the enemy's women.[9] Sexualized violence is about masculine dominance and power, a gendered social practice that constructs and enforces masculinity as dominant and often violent. The victim's body is used as a symbol for the larger collectivity, in times of conflict.[10] In fact, it has been said that *"women's bodies, their sexuality and reproductive capacity, are often used as a symbolic and literal battleground."*[11]

This aspect was appreciated also by the International Criminal Tribunal for the Former Yugoslavia, when a testimony reported that Dragoljub Kunarac, during one of the rapes he was accused of, expressed with verbal and physical aggressions, his view that *"the rapes against the Muslim women were one of the many ways in which the Serbs could assert their superiority and victory over the Muslims"*.[12]

In Sudan, in the Democratic Republic of Congo, in Bosnia, in Sierra Leone, in Liberia, in Chad, in Rwanda, in the former Yugoslavia, just to give examples, rape has been employed as a military tactic to achieve political and military objectives.

In fact, often, rape, genital mutilation and intentional HIV transmission are specifically inflicted on women as an instrument of ethnic cleansing. Moreover, rape serves as an instrument to demoralize women and their cultures, exploiting the social role of women: the violence can be directed to the women's role as mothers, "mothers of the enemy", thus, women are raped in front of their families to dishonor them, their bodies are mutilated and pregnant women are killed.[13] Further, for the men not able to protect the women of their community, rape represents the totality of defeat.[14]

The 2004 report of Amnesty International, "Women and War: Rape as Weapon of War", regarding the situation in Darfur, for instance, stated that rape is used in armed conflicts as a form of gender-based torture to obtain information, punish, intimidate and humiliate women and thus terrorize and control their communities.[15]

In the former Yugoslavia, rape was systematic, organized and massive: the Special Rapporteur, named by the United Nations Commission on Human Rights, noted that rape, employed as a method of ethnic cleansing, was *"intended to humiliate, shame, degrade and terrify the entire*

[9] Anne Llewellyn Barstow, "War's Dirty Secret: Rape, Prostitution, and Other Crimes against Women", Pilgrim Press ed., 2000, p. 45

[10] Valorie K. Vojdik, "Sexual Violence against Men and Women in War: A Masculinities Approach," 14 Nev. L.J. 923, 2013-2014 [hereinafter: Vojdik, "Sexual Violence against Men and Women in War"]

[11] Amnesty International, "Lives Blown Apart: Crimes against Women in Times of Conflict: Stop Violence Against Women", 2004, available at: http://web.amnesty.org/library/Index/ENGACT770752004

[12] Prosecutor v. Dragoljub Kunarac et al., IT-96-23-T&IT-96-23/1-T, Trial Judgment, 22 February 2001, para 583

[13] Pufong and Swain, "Rape in militarized conflicts", supra at 3, reporting Ruth Seifert, "War and Rape: A Preliminary Analysis" in Alexandria Stiglmayer (ed.) Mass Rape.Lincoln: University of Nebraska Press, 1994, pp. 54-58

[14] Stanford Encyclopedia of Philosophy, "Feminist Perspectives on Rape", first published 13 May 2009, substantive revision 14 August 2013 [hereinafter: "Feminist Perspectives on Rape"], reporting: C. MacKinnon, "Are Women Human? And Other International Dialogues", Cambridge MA: Harvard University Press", 2006, p. 223, available at: http://plato.stanford.edu/entries/feminism-rape/

[15] Amnesty International, "Document - Sudan: Darfur: Rape as a Weapon Of War: Sexual Violence And Its Consequences", 2004 [hereinafter: Amnesty International, "Sudan: Darfur: Rape as a Weapon Of War"], available at: http://www.amnesty.org/en/library/asset/AFR54/076/2004/en/f86a52a0-d5b4-11dd-bb24-1fb85fe8fa05/afr540762004en.html

ethnic group."[16] It was documented that rape was employed as a military tactic to achieve the Serbian purpose of ethnic cleansing: a tool to intimidate survivors of ethnic group minorities in this case, the Muslims and Croats, forcing them to vacate a geographical location.[17] In fact, the military hierarchy coordinated and implemented the mass rapes of Bosnian women as part of their political and military policy of ethnic destruction. Wartime rape creates fear, shame and demoralization. In Bosnia, Muslim women were abducted, gang raped and repeatedly raped until impregnated and then impeded to abort the child. These acts were aimed at the dilution of the Muslim community, which was in fact patriarchal.

Studying the civil war in Uganda, Meredith Turshen came to a similar conclusion: rape is one of the methods used by military commanders to terrorize civilians and force them to leave their lands.[18] Turshen observed that rape, in perspective, deprives women of economic, social and political resources; in fact, the family and the community usually ostracize the victims.[19]

The 2004 report of Amnesty International, "Lives Blown Apart: Crimes against Women in Times of Conflict", stated that factors that contribute to violence against women in situations of conflict and militarization have their roots in the discrimination to which women are subjected even in peacetime.[20] Indeed, *"stereotypical or violent attitudes"* towards women, already prevalent in society, are *"consciously inflamed or manipulated"* by the leaders to reach political and military goals. Therefore, "*gender-based discrimination and violence are not incidental to conflict, […] but are ordered, condoned or tolerated as a result of political calculations".*[21]

This report denounces that, despite its scale and nature, violence against women in the context of militarization and conflict have been largely ignored by historians, peacemakers and the international community.

Solely incidentally, the report revealed another problem, even more overseen: the sexual violence directed against men and boys as a gender-based crime, because the target is not the individual victim, but rather his role in society. Thus, women can also be perpetrators of abuses or, as in the case of girl soldiers, both victims and perpetrators simultaneously.[22]

Although its high incidence, wartime sexual violence has been regrettably considered as a common aspect of war, a byproduct, something inevitable and thus, tolerated: *"War is Hell".*[23] Nevertheless, although rarely, the occurrence of conflict-related sexual violence is limited. Sometimes, the armed groups themselves, prohibit their combatants to commit sexual violence,

[16] Tadeusz Mazowiecki was the Special Rapporteur of the Commission on Human Rights, Report Pursuant to Commission Resolution 1992/2-1/1 of 14 of August 1992, E/CN.4/1993/50, 1993

[17] Pufong and Swain, "Rape in militarized conflicts", supra at 3; reporting: Beverly Allen, "Rape Warfare: The Hidden Genocide in Bosnia-Herzegovina and Croatia", Minneapolis: University of Minnesota Press., 1996

[18] Pufong and Swain, "Rape in militarized conflicts", supra at 3; reporting: Meridith Turshen, "Women's War Stories", 1998, in M. Tushen and C. Twagiramariya eds., "What Women Do in War-time: Gender and Conflict in Africa", London: Zed Books,1998, pp. 1-26

[19] Ibid.

[20] Amnesty International, "Lives Blown Apart: Crimes against Women in Times of Conflict: Stop Violence Against Women", 2004, supra at 11

[21] Ibid.

[22] Ibid. For details on sexual violence against men, see Chapter 2.6

[23] "War is hell": this quote originates from William Tecumseh Sherman's address to the graduating class of the Michigan Military Academy, 19 June 1879

LTTE Sri Lankan insurgencies may constitute an example.[24] This difference in the frequency of sexual violent acts is sufficiently large to exceed the likely error bars in the reporting.[25]

Trying to understand the reason why, in some conflicts, war-related sexual violence is quite absent, can help to understand why in others is so systematic and most importantly emphasizes that rape is not a necessary incidental aspect of war, but it is avoidable.

A sort of justification of the phenomenon of widespread sexual violence during armed conflict, which is sometimes given, is based on combatants' sexual exigencies.[26]

For example, Japanese military authorities sustained that the reason of the rapid expansion of a system of military brothels, the so-called "comfort-women system", was to avoid rape of civilians, after the widespread rape of civilians that occurred in Nanking.[27] However, this explanation is not satisfactory, in fact, the Revolutionary United Front (RUF) of Sierra Leone engaged in frequent rapes of civilians despite the fact that they detained many women as sex slaves.[28]

Similarly, it has been also sustained that the cause of mass rape in the eastern Democratic Republic of the Congo, was that combatants did not have money to pay prostitutes.[29] It is evident that this argumentation does not account for the recorded targeting of particular groups of women, nor for the acts of extreme violence that often accompany the rape, nor for the occurrence of forms of sexual torture different from rape, nor for the reports of rape even when military forces have access to prostitutes or to sex slaves.[30]

Ruth Seifert criticized this common view of rape as simply a regrettable byproduct of wartime social breakdown and lack of military discipline due to sexual exigencies of men, arguing that rape can be an important element of military strategy, aimed at undermining the will, the morale, the cohesion and the self-conception of the enemy as a community. She observed that, during wartime, women are those who hold the families and the communities together. *"Their physical and emotional destruction aims at destroying social and cultural stability […] in many cultures [the female body] embodies the nation as a whole […]. The rape of women of a community, culture, or nation can be regarded […] as a symbolic rape of the body of that community".*[31] When sexual violence is used as a gendered weapon of war, the target of the violence is not only the single woman, but her role in society and through the destruction of her social role, is obtained the destruction of the entire community.

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[24] Elisabeth Jean Wood, "Armed Groups and Sexual Violence: When Is Wartime Rape Rare?", 37(1) Politics Society 131-162, 2009 [hereinafter: Wood, "Armed Groups and Sexual Violence"]

[25] Elisabeth Jean Wood, "Variation in Sexual Violence during War," 34(3) Politics & Society 307-41, 2006; and Elisabeth Jean Wood, "Sexual Violence during War: Toward an Understanding of Variation" in Order, Conflict and Violence, ed. Stathis Kalyvas, Tarek Masoud and Ian Shapiro, Cambridge, UK: Cambridge University Press, 2008, pp. 323-51

[26] Wood, "Armed Groups and Sexual Violence", supra at 24: A version of the substitution argument is made by evolutionary psychologists Thornhill and Palmer: Men will develop a genetic predisposition to rape as they will be better off in propagating their genes if they rape women. See also Wood, "Variation in Sexual Violence," supra at 25, for a discussion of this and other biological arguments for rape.

[27] Wood, "Armed Groups and Sexual Violence", supra at 24: "On the Issue of Wartime 'Comfort Women'" by the Japanese Cabinet Councillors' Office on External Affairs, August 4, 1993 (E/CN.4/1996/137, p. 14)

[28] Wood, "Armed Groups and Sexual Violence", supra at 24

[29] Ibid.

[30] Ibid.

[31] "Feminist Perspectives on Rape," supra at 14, 2013; citing: Ruth Seifert, "The Second Front: The Logic of Sexual Violence in Wars", 19 Women's Studies International Forum 1, 1996, p. 39

Therefore, military leaders need to control the type and degree of violence used by combatants: they can decide to forbid sexual violence or to follow a strategy that encompass its systematic use as a method to terrorize civilian populations, in this second case, they define targets and timing.[32]

Whether the decisions of the leadership are then effectively enforced, depends on the strength of the military hierarchy, in particular, on leaders' capacity to identify and punish transgressors. However, the irregular warfare strategy adopted by many non-state armed groups, can affect the ability of the hierarchical mechanism in implementing leaders' decisions: the various units may operate independently for long periods, without contact with superiors.[33]

It has to be considered that incoming recruits have cultural backgrounds concerning the opportunity of different forms of violence, including sexual violence, but to organize an efficient armed group, recruits have to become combatants through training and socialization. Training and socialization take place both through the experience of boot camps and through initiation rituals.[34] The experience of combat drills, dehumanization through abuses and then "rebirth" as group members, through initiation rituals, blend recruits: the result is a strong conformity and submission to the orders of the commanders.[35] The brutalization of recruits is aimed at enforcing their inclination to aggression, aggression that the discipline of drill is then intended to control.[36] Usually, training is fund on gendered stereotypes that reshape individual identities and create group cohesion.

The result is the desensitization of combatants and the dehumanization of victims.

If leaders believe that sexual violence could have negative effect to their purposes and if the hierarchy is strong enough, sexual violence will be infrequent.

A case to take into consideration is the civil war in Sri Lanka, which consisted of a secessionist ethnic conflict. Its distinctive trait was that neither side appeared to use sexual violence as a strategy of war, except for the use of sexual torture of detainees and some rape of Tamil girls and women during military operations by state agents.[37] Particularly interesting is the fact that the Tamil

[32] Wood, "Armed Groups and Sexual Violence", supra at 24; reporting: Among many other sources, "The direction, operation, and control of a human organization whose primary function is the application of violence is the peculiar skill of the officer"; Samuel P. Huntington, "The Soldier and the State: The Theory and Politics of Civil-military Relations", Boston: Belknap Press of Harvard University Press, 1957

[33] Wood, "Armed Groups and Sexual Violence", supra at 24

[34] Wood, "Armed Groups and Sexual Violence", supra at 24: For an argument emphasizing the importance of collective drills over horizontal bonds for group cohesion and performance in state militaries, she referred to Anthony King, "The Word of Command," 32(4) Armed Forces & Society 493, 2006; as well as the subsequent debate, Anthony King, "The Existence of Group Cohesion in the Armed Forces," 33(4) Armed Forces & Society 638, 2007; and Guy L. Siebold, "The Essence of Military Group Cohesion," 33(2) Armed Forces & Society 286, 2007

[35] Wood, "Armed Groups and Sexual Violence", supra at 24: On informal rituals and hazing, see Donna Winslow, "Rites of Passage and Group Bonding in the Canadian Airborne," 25(3) Armed Forces & Society 429, 1999; Hank Nuwer, "Military Hazing," in The Hazing Reader, Bloomington: Indiana University Press, 2004, pp. 141-146

[36] Wood, "Armed Groups and Sexual Violence", supra at 24, referring to Grossman, "On Killing" and Osiel, "Obeying Orders"

[37] Wood, "Armed Groups and Sexual Violence", supra at 24: Interviews with human rights experts, Colombo, Sri Lanka, May 2007. See Amnesty International, Sri Lanka: "Torture in Custody", London: Amnesty International, 1999 and Sri Lanka: "Rape in Custody", London: Amnesty International, 2002, both at http://www.amnestyusa.org/countries/sri_lanka/reports.do; Elizabeth Nissan, "Respect for the Integrity of the Person," in Sri Lanka: State of Human Rights, Colombo, Sri Lanka: Law and Society Trust, 1994, pp. 61-88. Forms of

insurgent group LTTE apparently did not engage in acts of sexual violence, despite they subjected civilians to other cruel forms of violence.[38] The possible explanation is that the organization prohibited sexual violence and was able to enforce effectively that decision, through a military hierarchy that granted the punishments in case of transgression.[39]

Conclusively, this interpretation confirms the idea that sexual violence is not a necessary aspect of war, at least if leaders have sufficient control on their troops to impede its commission punishing the occasional rapists. Therefore, in such cases, it can be inferred that if mass rapes are committed, they are the result of a chosen war tactic.

2.1.1 The effects on the individual and on the community

Askin wrote:

Men rape women to humiliate them and the armies who fail to protect them. Men rape women to express their superiority or conquest. Men rape women to avenge the rape of their own women. Men rape women to release tension and anxiety. Men rape women because they are members of the enemy group. Men rape women to satisfy their own depraved cravings. Men rape women to energise them for combat. Men rape women because they are angry or scared. Men rape women because they are producers of children. Men rape women for countless other reasons and purposes.

Irrespective of the intent or the purpose at the basis of the violence, the result is the physical, mental, sexual and social destruction of the victims and of their community.[40]

Sexual violence in conflict is so effective as a weapon of war for its multiple short and long term consequences for the victims and their communities.

Indeed, its impact is incalculable. The effects of sexual violence on victims and their communities can vary in part by the locality, according to the different religious and social norms, but some consequences are universal. In general, victims of sexual violence are affected by physical injuries, disease, psychological damages, emotional torment, stigmatization and isolation, loss of home and community.

The physical consequences of rape differ on the basis of the level of violence suffered, but one of the most terrible is traumatic fistula, that can be caused by the introduction of objects such as broken bottles, bayonets, sticks or gun barrels into victims' vaginas. It often renders victims permanently incontinent.[41] Long-term physical damages can interest the victim's reproductive

violence reported by these sources: rape with plantain flowers soaked in chilies, bottles, or other objects; electric shocks or the application of chilies to the genitals; piercing of male genitals; forced sexual relations with other prisoners; and slamming testicles into a drawer.

[38] Wood, "Armed Groups and Sexual Violence", supra at 24: for LTTE human rights violations, see *inter alia*, the many reports by Human Rights Watch and Amnesty International.

[39] Wood, "Armed Groups and Sexual Violence", supra at 24

[40] "Listening to the Silences: Women and War", edited by Helen Durham, Tracey Gurd, Martinus Nijhoff Publishers, 2005, Chapter 12: Kelly D. Askin, "The jurisprudence of International War Crimes Tribunals: Securing Gender Justice for Some Survivors", p. 127

[41] Jackie Martens, "Congo rape victims seek solace", BBC News, 24 January 2004

system and consist in infertility, miscarriages and complications caused by self-induced abortions.[42] Furthermore, numerous victims contract sexually transmitted infections, including HIV/AIDS.[43]

Rape victims experience notable emotional and psychological trauma. Victims may suffer from anxiety and fear, sleep disorders, nightmares, apathy, loss of self-confidence, self-hate, emotional numbing, memory loss, depression and even commit suicide.[44] In addition, women who become pregnant because of rape, often impeded to abort, experience additional trauma.

In certain communities, especially the patriarchal ones, rape victims are ostracized. Many husbands "disowned" their wives[45] and families abandon their girls, because of the "shame" attached to rape and these girls are often considered unworthy for marriage because of the loss of their virginity. Men also, fear the abandon of wives and ostracism, because after the rape they are no longer viewed as men.[46] Women not able to marry or abandoned by their husbands because of rape, become socially and economically more vulnerable. They will not be able to enjoy the economic support and protection that men traditionally provide.[47] The philosopher and historian Robert Jay Lifton, who studied the psychology of genocide, explained that *"rape sets in motion continuous suffering and extreme humiliation that affects not just the individual victim but everyone around her"*. That happens because *"a woman is seen as a symbol of purity. The family revolves around that symbol. Then here is the brutal attack on that, stigmatizing them all. All this perpetuates the humiliation, reverberating among survivors and their whole families."*[48]

Rape on a mass scale, in the context of conflict, is willingly used to destroy the victims as well as their community. In fact, rape is intended to humiliate, shame, degrade and terrify the entire ethnic group. The feminist Catherine MacKinnon wrote: *"This is not rape out of control. It is rape under control. It is also rape unto death, rape as massacre [...] and to make the victims wish they were dead. It is rape as an instrument of forced exile. [...] It is rape to drive a wedge through a community, to shatter a society, to destroy a people. It is rape as genocide"*.[49] She further observed, *"so long as we say that [rape, sexual harassment and pornography] are abuses of violence, not sex, we fail to criticize what has been made of sex, what has been done to us through sex."*[50]

[42] "The Shame of War, Sexual Violence against Women and Girls in Conflict", A United Nations OCHA/IRIN publication, 2007, reporting: "Lives blown apart: Crimes Against women in times of conflict", Amnesty International, 2004, supra at 11

[43] Ibid.

[44] Schreck, "Rhetoric Without Results", supra at 1: See Geneva Centre for the Democratic Control of Armed Forces, Women in an Insecure World: Violence Against Women: Facts, Figures and Analysis, p. 120

[45] Amnesty international, "Sudan: Darfur: Rape as a Weapon Of War", supra at 15

[46] Sandesh Sivakumaran, "Sexual violence against men in armed conflict", 18(2) European Journal of International Law 253-276, 2007

[47] Amnesty International, "Sudan: Darfur: Rape as a Weapon Of War", supra at 15

[48] Peter Landesman, "A Woman's Work", N.Y. TIMES, 15 September 2002, p. 8, available at: http://www.nytimes.com/2002/09/15/magazine/a-woman-s-work.html?pagewanted=6

[49] Stanford Encyclopedia, "Feminist Perspectives on Rape", supra at 14; citing: C. MacKinnon, "Are Women Human? And Other International Dialogues", Cambridge MA: Harvard University Press, 2006, p. 187

[50] Stanford Encyclopedia, "Feminist Perspectives on Rape", supra at 14, citing: C. MacKinnon, 1987, "Feminism Unmodified: Discourses on Life and Law", Cambridge MA: Harvard University Press, 1987, pp. 86-87

2.2 The dimension of the phenomenon of sexual violence as a weapon of war

The opportunistic rape and pillage of the previous centuries has been replaced, in modern conflicts, by rape used as a strategic combat tool. Sexual violence started to be used as a weapon of war when military leaders noted its effectiveness in destroying not only the single victim, but also her community. Significantly, the Akayesu Trial Chamber stated that *"sexual violence [targeting Tutsi women] was a step in the destruction of the [ethnic] group, destruction of the spirit, of the will to live and of life itself."*[51]

During World War II, women were subjected to sexual violence in Europe and Asia alike.

Nazi soldiers systematically raped, tortured and killed girls and women in ghettos and concentration camps. In this contest, rape was used to dehumanize and demoralize the enemy, but also to decimate the population. Furthermore, Nazis set up military brothels throughout much of occupied Europe. It is estimated that, along with those in concentration camps' brothels, at least 34.140 European women were forced into prostitution/sexual slavery during the German occupation.[52]

In Japan, military forces adopted the "comfort women" system. The majority of historians concluded that the women forced to work as sex slaves for Japanese soldiers were 200,000. More specifically, Chuo University professor Yoshiaki Yoshimi stated that there were about 2,000 centers where Japanese, Chinese, Korean, Filipino, Taiwanese, Burmese, Indonesian, Dutch and Australian women were interned.[53]

Susan Brownmiller affirmed that, during the World War II, rape was used as a *"weapon of terror"*. She wrote that *"rape for the Germans and to similar extent for Japanese played a serious and logical role in the achievement of what they saw as the ultimate object: the total humiliation and destruction of 'inferior peoples' and the establishment of their own master race".*[54] Therefore, according to Brownmiler, in these cases rape was an instrument of genocide.

Red Army soldiers are estimated to have raped around 2,000,000 German women and girls, but also Russian and Polish women and girls, liberated from concentration camps, Belorussian and Ukrainian.[55] According to Antony Beevor, the fact that Soviet troops raped not only Germans, but also their victims, suggested that sexual violence was often indiscriminate and not a form of revenge directed specifically against the Germans. He believed that, by the time the Russians' soldiers reached Berlin, dehumanized by living through years of war, they considered women "*almost as carnal booty"*.[56] He sustained that, in 1945, there was no evidence of the use of rape as a terror tactic; actually, reports of the political departments demonstrate that the Red Army's behavior was

[51] Prosecutor v. Jean-Paul Akayesu, ICTR-96-4-T, Trial Judgment, 2 September 1998, para 732

[52] Nanda Herbermann, "The Blessed Abyss: Inmate #6582 in Ravensbruck Concentration Camp for Women", Cambridge University Press, 2000

[53] Yoshiaki Yoshimi, "Comfort Women: Sexual Slavery in the Japanese Military During World War II", Columbia University Press, 2000

[54] Susan Brownmiller, "Against Our Will: Men, Women and Rape," supra at 5, p. 49

[55] Lees-Knowles Lectures Cambridge 2002-3, Antony Beevor "War and Rape, Germany 1945", p. 7; available at: http://www.culturahistorica.es/beevor/war_and_rape.germany.pdf

[56] Daniel Johnson, "Red Army troops raped even Russian women as they freed them from camps", 24 January 2002 [hereinafter: Johnson, "Red Army troops raped even Russian women as they freed them from camps"], available at: http://www.telegraph.co.uk/education/3293251/Red-Army-troops-raped-even-Russian-women-as-they-freed-them-from-camps.html

not a strategy of terror.[57] Furthermore, he noted that rape, not only against Germans, but also against Russian allies in Hungary, Romania and Croatia was justified by Stalin. Beevor reported that when the Yugoslav Communist Milovan Djilas protested to the dictator for these rapes, he answered: *"can't he understand it if a soldier who has crossed thousands of kilometres through blood and fire and death has fun with a woman or takes some trifle?"* Actually, it was not until the winter of 1946-1947, that the Soviet authorities, worried by the diffusion of diseases, imposed serious penalties on their forces in East Germany for fraternizing with the enemy.[58]

French Moroccan troops, known as Goumiers, committed rapes in Italy after the Battle of Monte Cassino and in Germany. According to Italian sources, victims of the mass rapes committed were more than 7,000 Italian civilians, including women and children.[59]

French Senegalese troops too, known as Senegalese Tirailleurs, who landed on the island of Elba in 1944, were responsible of mass rapes.[60]

Various sources reported that also the British troops frequently engaged in acts of rape, after the invasion of Sicily, in 1943.[61]

Although, the scale was inferior to those regarding mass rapes committed by the Red Army, rapes on German women and girls, were commonly committed also by British and Canadian troops, during the last months of War World II.[62]

Robert J. Lilly estimated that a total of 14,000 civilian women in England, France and Germany were raped by American GIs during World War II.[63]

Although it is somehow controversial the fact that rape was already used as a weapon of war during the World War II, there is no doubt regarding the subsequent conflicts.

Reports of sexual violence regarded either the Bosnian War (1992-95) and Kosovo War (1996-99), parts of the Yugoslav wars, a series of conflicts happened from 1991 to 1999.

During the Bosnian war, it is estimated 20,000-50,000 Bosnian Muslim women were raped by Bosnian Serb soldiers, in a systematic campaign of humiliation and psychological terror.[64] Women were raped in their homes, in the streets or as prisoners in "rape camps". The purpose of these camps was to impregnate the Muslim and Croatian women. All of this happened in a patriarchal society, in which children inherited their father's ethnicity, so the "rape camps" aimed at the birth of a new generation of Serb children.[65] In particular, the United Nations reported on the use of rape as an instrument to terrorize ethnic groups and force them to vacate some territories.

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[57] Antony Beevor, "War and Rape, Germany 1945", Lees-Knowles Lectures Cambridge 2002-3, p. 9; available at: http://www.culturahistorica.es/beevor/war_and_rape.germany.pdf

[58] Johnson, "Red Army troops raped even Russian women as they freed them from camps", supra at 56

[59] "1952: Il caso delle marocchinate al Parlamento"

[60] Romano Bracalini, "Paisà. Vita quotidiana nell'Italia liberata dagli alleati", Mondadori ed., 2008, p. 267

[61] Clive Emsley "Soldier, Sailor, Beggarman, Thief: Crime and the British Armed Services since 1914", Oxford University Press, 2013, pp. 128-129

[62] Sean Longden, "To the Victor the Spoils: D-Day to Ve Day, the Reality Behind the Heroism", Arris Books, 2004, p. 195

[63] Robert J.Lilly, "Taken by Force: Rape and American GIs in Europe during World War II", Palgrave Macmillan, 2007

[64] Gendercide watch, Case Study: Bosnia-Herzegovina, available at: http://www.gendercide.org/case_bosnia.html

[65] Stephanie N. Sackellares, "From Bosnia to Sudan: Sexual Violence in Modern Armed Conflict", 20 Wis. Women's L.J. 137, 2005

During the sixteen months of the Kosovo War, an estimated number of 20,000 Kosovo Albanian women and girls became victims of sexual violence perpetrated by the Serbian and Yugoslav forces.[66] War rape was, again, an instrument of ethnic cleansing used to terrorize the civilians belonging to precise groups and force them to vacate some territories.

Similarly, during 1994 Rwandan Genocide, soldiers of the former government and of the Interahamwe militia raped thousands of women. Between 250,000 and 500,000 women were raped during the 100 days of genocide, from April 6 to July 16 1994. Up to 20,000 children were born as a result of these rapes. More than 67% of the women raped during the genocide were infected with HIV and AIDS.[67]

The civil war in Sierra Leone, which happened between 1991 and 2002, was characterized by different forms of sexual violence, including brutal rapes, forced prostitution and sexual slavery. In fact, women and girls were even detained in order to provide constant sexual services. In some cases, these women were forced to marriage, becoming the so called "bush wives". UN agencies estimate that more than 60,000 women were raped during the civil war.[68]

Rape was a "hallmark" of Liberia's 14-years civil war that ended in 2003. Rape was used as a weapon to infuse terror and humiliate the whole community. It was also used to break the spirit of boy soldiers who were sometimes forced to rape their own mothers, sisters and grandmothers as part of their "initiation". Estimates vary, with some accounts claiming that between 60% and 90% of all Liberian women were raped during the conflict.[69]

In 2003, the Sudanese Government responding to a rebellion in the Darfur region of Sudan, commenced a still ongoing genocidal campaign against the black Africans.[70] During this campaign, rape has been used as a weapon of war aimed at the ethnic cleansing of this people from the region.[71] The major part of sexual violence has been committed by the Sudanese government forces and by the Janjaweed paramilitary groups. Women and girls have been abducted during attacks and forced to stay with the Janjawid, in military camps. Indeed, Amnesty International collected testimonies of sexual slavery.[72] In October 2014, Zainab Hawa Bangura, the Special Representative on Sexual Violence in Conflict, said: *"survivors and health care workers told me heartbreaking stories of rape, gang rape, abduction, sexual slavery and forced marriage. Those who try to fight back against their attackers are often raped with objects instead. Some victims have even been raped to death."* She said that the victims included women, men, girls and boys, with 74 % of them below the age of 18, according to South Sudanese hospital officials. The youngest victim they told to have

[66] Amra Zejneli, "How Long Can You Keep A Secret? For Kosovo's Wartime Rape Victims, The Answer Is: Maybe Forever", 29 May 2014, available at: http://www.rferl.org/content/kosovo-wartime-rape-victims-kept-secret/25403115.html

[67] "Statistics on Rwanda", SURF Survivors fund, available at: http:// www.survivors-fund.org.uk/resources/history/statistics.php

[68] "Background Information on Sexual Violence used as a Tool of War", available at: http://www.un.org/en/preventgenocide/rwanda/about/bgsexualviolence.shtml

[69] Almudena Toral, "History of Violence: Struggling with the Legacy of Rape in Liberia", 30 April 2012, available at: http://world.time.com/2012/04/30/history-of-violence-struggling-with-the-legacy-of-rape-in-liberia/

[70] Amnesty International, "Sudan: Darfur: Rape as a Weapon of War", supra at 15, Chapter 5.1: "Omar al Bashir told us that we should kill all the Nubas. There is no place here for the Negroes any more" (Words of a Janjawid fighter, according to a refugee from Kenyu, interviewed by Amnesty International in Chad, May 2004)

[71] United to End Genocide, "D. R. Congo Backgrounder", available at: http://endgenocide.org/conflict-areas/dr-congo/dr-congo-backgrounder/

[72] Amnesty International, "Sudan: Darfur: Rape as a Weapon of War", supra at 15

treated was 2 years old, Bangura added. She said that both sides in the conflict have committed sexual violence, adding that orders to perpetrate rapes on the basis of ethnicity had been given within the military forces.[73]

Although much of the fighting was declared to have ended in 2003, the eastern part of the DRC continues to remain incredibly unstable and is still the site of most of the rape currently reported. Margot Wallström, the previous UN Special Representative on Sexual Violence in Conflict, affirmed that the DRC is *"the rape capital of the world."*[74] Hundreds of thousands of women, men and even children, have been raped by armed combatants and other perpetrators. A 2011 study released by the American Journal of Public Health reported that over 1,000 women are raped daily, at a rate of 48 women per hour.[75]

Conflicts	Number of female victims
WWII	200,000 Japanese "comfort women"
	2 millions, only the German women abused by the Red Army
	more than 34,000 European women forced into the Nazi brothels
	14,000 women European women abused by GIs
	7,000 Italian women abused by French Moroccan troops, the so called "marocchinate"
Bosnian War	20,000 - 50,000 women abused by the Bosnian Serb soldiers
Kosovo War	20,000 women abused by Serbian and Yugoslav forces
Rwanda	250,000 - 500,000 women abused
Sierra Leone	60, 000 women raped
Liberia	between 60% and 90% of all Liberian women were raped during the conflict
DRC	Women and girls are raped at a rate of 1,000 per day: 200,000 since 1998

[73] Louis Charbonneau, "South Sudan Sexual Violence Rampant, two-year-old raped - U.N.", editing by Andrew Hay and Cynthia Osterman, 21 October 2014, available at: http://www.reuters.com/article/2014/10/20/us-southsudan-un-idUSKCN0I92C320141020

[74] UN News Centre, "DR Congo mass rape verdicts send strong signal to perpetrators – UN envoy", available at : http://www.un.org/apps/news/story.asp?NewsID=37580#.VG9tEjSG9pk

[75] United to End Genocide, "D. R. Congo Backgrounder", supra at 71

2.3 Historical overview

As early as 500 B.C., already existed codes of warfare with the purpose of protecting combatants and, to some extent non combatants, in time of conflicts.[76]

One of the first authors to refer to the concept of "laws of war" was Cicero, who exhorted soldiers to respect the rules of war, because that distinguished the "men" from the "brutes".[77] In this way, he reminded that war was fought by men, so a dehumanization of the enemy should be avoided.

However, at the time, looting the wealth and properties of the defeated was considered legitimate. In this contest, women were viewed as "property" under men's ownership, thus, the rape of a woman was a property crime committed against the man who owned the woman.[78]

The Hebrew, regarded women captured in war as concubines and slaves.[79]

The ancient Greeks considered war rape of women a socially acceptable practice, respectful of the rules of warfare: warriors considered the conquered women a legitimate booty. Excellent examples of this practice can be found in Homer's Iliad, in fact it is notorious the contrast between Agamemnon and Achilles to have the captured Briseis as a slave-concubine.[80]

During the Middle Ages, the great part of the jurists that dealt with war, concluded that there were no limits in the way it should be fought. Atrocities committed against civilians were a constant of wars: women and children were sexually assaulted as *"part and parcel of the war."*[81] In this historical period, women were not protected from abuses neither in peacetime, nor in wartime.[82]

All of this happened notwithstanding the fact that some early military code criminalized rape. The military codes of Richard II (1385) and of Henry V (1419), were two examples: both of them prescribed the capital punishment for soldiers who committed rape during wartime.[83]

During the 15th and 16th centuries, some authors systematized the laws of war, but women remained objectives available to the winning soldiers.

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[76] "Sexual violence as an International Crime: Interdisciplinary Approach", Anne-Marie de Brouwer (ed.), Charlotte Ku (ed.), Renée Römkens (ed.), Larissa van den Herik (ed.), Chapter II (Kelly D. Askin); citing: M. Cherif Bassiouni "International criminal law," A Draft International Criminal Code 5, 1980

[77] Kelly Dawn Askin, "War Crimes Against Women: Prosecution in International War Crimes Tribunals", Martinus Nijhoff Publishers, 1997 [hereinafter, Askin "War Crimes Against Women], p. 19, reporting: Marcus Tullius Cicero (106-43 B.C.), Cicero's Three Books of Offices, or Moral Duties, pp. 21-25

[78] Askin, "War Crimes Against Women", supra at 77, pp. 20-21

[79] Brownmiller, "Against Our Will", supra at 5, Chapter III (War)

[80] Ibid.

[81] Askin, "War Crimes Against Women", supra at 77, p. 24, citing: Susan Brownmiller, "Against Our Will, Men, Women and Rape", New York: Fawcett Books, 1975, pp. 31-113

[82] Askin, "War Crimes Against Women", supra at 77, p. 24

[83] Michelle Seyler, "Rape in Conflict: Battling the Impunity that Stifles Its Recognition as a *Jus Cogens* Human Right", 15 Gonz. J. Int'l L. 1, 2011-2012, reporting: Theodor Meron, "Rape as a Crime Under International Humanitarian Law", 87 Am. J. Int'l L. 424, p. 425, 1993

Only a few jurists, like Alberico Gentili, affirmed that all women, including female combatants, should be protected from sexual assault, in wartime as well as in peacetime.[84]

Similarly, the jurist Lucas De Penna insisted that during wartime belligerents were not at liberty to act without restraints and specified that soldiers should not be free to rape civilians, but punished for the commission of such a crime as it would be in peacetime.[85]

Nevertheless, the practice of war rape continued to be common.[86]

Susan Brownmiller suggested that one of the reasons for the ubiquity of war rape was that, at the time, military circles supported the idea that victorious soldiers conquered rights over all the enemy people. In the late Middle Ages, war rape was even an indicator of a man's success in the battlefield. She commented that the *"triumph over women by rape became a way to measure victory, part of a soldier's proof of masculinity and success, a tangible reward for services rendered […] an actual reward of war*."[87] In such a contest, war rape was not used as a tactic of war to terrorize the enemy, but rather it was an earned compensation for winning a war: a winner's right. In fact, although this practice was tolerated, there is no evidence to suggest that superiors ordered subordinates to commit acts of rape.[88]

Furthermore, the law still considered women and children as a patriarchal property, so the victim was the male proprietor, instead of the woman assaulted. Gradually, sex related crimes began to be viewed more as crimes against sexual purity of women, than crimes against their body, therefore, they were no longer considered property crimes, but still, crimes committed against the man who had the right to the woman's chastity.[89]

In 17th century, Hugo Grotius, who was the first author who tried to systematize the international laws of war, stated that rape *"should not go unpunished in war any more than in peace."*[90]

Although the most progressive nations banned wartime rape, it remained prevalent.[91]

In the late 18th century and 19th century, treaties and war codes began to include vague provisions for the protection of women.

The 1785 Treaty of Amity and Commerce stated that, in case of war, women and children should not be *"molested in their persons".*

The Article 20 of the Order No. 20, an 1847 supplement to the US Rules and Articles of war, enumerated rape among the crimes severely punishable.

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[84] Kelly Dawn Askin, "War Crimes Against Women", supra at 77, p. 26, citing: Alberico Gentili (1552-1608), "*De Iure Belli Libri Tres*", trans. John Rolfe, Vol. II, 1995, pp. 258-259

[85] Richard Shelly Hartigan, "The Forgotten Victim: A History of the Civilian", Chicago, precedent publishing, 1982, p. 50

[86] Askin, "War Crimes Against Women", supra at 77, p. 27

[87] Brownmiller, "Against Our Will", supra at 5, p. 35

[88] Askin, "War Crimes Against Women", supra at 77, p. 28

[89] Ibid.

[90] Hugo Grotius (1583- 1645), *De Iure Belli ac Pacis Libri Tres* (On the Laws of War and Peace), trans. Francis W. Kelsey, Vol. II, 1995, pp. 656-657. The publication of *De Iure Belli ac Pacis* by Hugo Grotius in 1625 had marked the emergence of international law as an autonomous legal science.

[91] Brownmiller, "Against Our Will", supra at 5, p. 35

The 1874 Declaration of Brussels asserted that the *"honors and rights of the family"* should be respected.[92]

Despite their unclear meaning, these provisions were interpreted as referred to the necessity to protect women and children from sexual assault.[93]

By the middle of the 19th century, the treatment of soldiers, prisoners, wounded people, and civilians improved: *"known as customary law, the core elements of the law of the war"* emerged, though they were not yet codified.[94]

Considering the evolution of the international norms prohibiting the sexual crimes, from the 19th century onwards, three periods can be identified:

- an early period, from the adoption of the 1863 Lieber Code up to the World War II;
- a middle period, beginning with the establishment of the Military Tribunals following the World War II and comprehending the jurisprudential enforcement of this issue by the International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR);
- a contemporary period, starting with the creation of the International Criminal Court (ICC).[95] The provisions included in the ICC Statute and in its Elements of Crimes, display the current maturity of the international doctrine forbidding sexual violence.

The early prohibitions against rape were rare, often indirect and vague, based on a patriarchal view of women. The 1863 United States' Lieber Code was the first codification of the international customary laws of land war and it represented an important step in the evolution of humanitarian law.[96] The Lieber Code gave emphasis to the problem of the protection of civilians and prohibited rape under the penalty of death: this was the first explicit ban of rape in customary humanitarian law.[97]

In 1907, at the International Peace Conference in Copenhagen, the Lieber Code constituted the basis for Hague Convention IV, relative to the laws and customs of war on land.[98] Article 46 of the 1907 Convention protected *"family honor",* which was widely understood to include sexual violence.[99]

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[92] The Treaty of Amity and Commerce (1785), Order No. 20 (1847) and the Declaration of Brussels (1874), as reported in: Askin, "War Crimes Against Women", supra at 77, p. 34

[93] Ibid.

[94] Askin, "War Crimes Against Women", supra at 77, p. 33, citing: Telfor Taylor, "The Anatomy of the Nuremberg Trials A Personal Memoir", 1992, p. 8

[95] Ryan S. Lincoln, "Too Rough A Justice: The Ethiopia-Eritrea Claims Commission and International Civil Liability For Claims For Rape Under International Humanitarian Law", 20 Tul. J. Int'l & Comp. L. 385, 2012

[96] David S. Mitchell, "The Prohibition Of Rape In International Humanitarian Law As A Norm Of Jus Co-Gens: Clarifying The Doctrine", 15 Duke J. Comp. & Int'l L. 219, 2005 [hereinafter: Mitchell, "The Prohibition of Rape in International Humanitarian Law as a Norm of *Jus Cogens*"]

[97] Lieber Code, Art. 44

[98] K. Alexa Koenig, Ryan Lincoln, Lauren Groth, "The Jurisprudence of Sexual Violence", a working paper of the Sexual Violence & Accountability Project Human Rights Center, University of California, Berkeley, 2011, p. 5

[99] 1907 Hague Convention IV Respecting the Law and Customs of War on Land, Article XLVI

However, despite the advances made toward prohibiting the rape of women, both the Lieber Code and the Hague Conventions' prohibitions of sexual violence continued to be based on the notion that women should be protected as "subjects of men's rights".[100]

In the course of the World War I, rape was frequent during the first months of the war and then its incidence diminished. When Germans invaded Belgium, in August 1914, rape became the metaphor of Belgian humiliation in the Allied propaganda against Germany. The British historian Arnold Joseph Toynbee, wrote that the *"German Army, deliberately, mounted a campaign of terror in the first three months of the war"* throughout the conquered territories, then, such a method was abandoned, because the war of movement transformed into a stationary war. Susan Brownmiller commented that this assertion was justifiable in the light of the propaganda, but did not correspond to the facts. In fact, she argued, the idea of a tactic of terror by the Germany Army was probably not correct: *"it is logical to believe that rape may have been a deliberate tactic of the German Army during the first few months of the war, or if not deliberate, certainly not discouraged, but it seems more rational to conclude that the [soldiers'] opportunity to rape was effectively cut down by the new system of stationary trench warfare".*[101]

At the end of the World War I, in 1919, a War Crime Commission was established to determine responsibilities of war criminals and to enforce their prosecution.[102] This report accused the Axis Powers of "*extensive violations of the laws of war"* and recommended to prosecute those responsible for war crimes before an international tribunal.[103] The report listed, among the thirty-two violations of law and custom of war, also rape and forced prostitution.

At the 1919 Paris Peace Conference, the Allies created the League of Nations and discussed the possibility to held trials for those considered responsible for causing the war. At the Conference, they signed the Treaty of Versailles, in which they agreed to try German soldiers accused of having *"committed acts in violation of the laws and customs of war".*[104] Rape was not prosecuted explicitly, but included in the concept of crimes committed against civilians. However, these trials, the Leipzig trials, eventually held before German courts, failed their scope, seeming more disciplinary proceedings of the German army than international trials.[105]

[100] K. Alexa Koenig, Ryan Lincoln, Lauren Groth, "The Jurisprudence of Sexual Violence", a working paper of the Sexual Violence & Accountability Project Human Rights Center, University of California, Berkeley, 2011, p. 5

[101] Brownmiller, "Against Our Will", supra at 5, pp. 40, 41, 48

[102] Alona Hagay-Frey, "Sex and Gender Crimes in the New International Law: Past, Present, Future", 2011, p. 61

[103] "Sexual Violence as an international crime" Anne-Marie de Brouwer, Charlotte Ku, Renée Römkens and Larissa van den Herik (eds.), 2012, Chapter II (Kelly Askin), p. 29, citing: Telford Taylor, The Anatomy of the Nuremberg Trials, New York Knopf, Inc. 1992, pp. 14-15

[104] Versailles Treaty, Art. 228

[105] William A. Schabas, "An introduction to the international criminal court", 4th edition, Cambridge 2011, pp. 3-4. See also, "Sexual Violence as an international crime", Chapter II (Kelly Askin), p. 30, citing Remigiusz Bierzaneck,"War Crimes: History and Definition" in "A Treatise on International Criminal Law", eds. Bassiouni & Nandan, Springfield, III.: Thomas Vol. I, 1973, pp. 567-569: in fact, "the result of Leipzig was that of the 901 persons on the list of war criminals accused of the most appalling crimes, 888 were either not tried, acquitted or summarily released and only thirteen were convicted to sentences ranging from six months to four years end even them were not made to serve their terms".

During the World War II, in the 1943 Moscow Declaration, in particular in its "statement on the atrocities" committed by the Nazis, the Allies exposed their firm intention to prosecute them.[106] The United Nations Commission for the Investigation of War Crimes began to investigate on the brutalities committed during the war, prior to the formal establishment of the United Nations itself, which occurred in 1945, when the United Nations replaced the League of the Nations. This Commission elaborated in 1944 a Draft Convention for the Establishment of a United Nations War Crimes Court, which was followed, at the end of the WWII, by the 1945 Agreement for the Prosecution and Punishments of Major War Criminals of the European Axis (London Agreement). The Charter of the International Military Tribunal (IMT), annexed to the Agreement, limited the jurisdiction of the court to three categories of crimes: crimes against humanity, crimes against peace and war crimes. Therefore, despite the evidence that various forms of sexual crimes were widely committed during the war, these macro-cathegories of crimes did not explicitly include them.

In fact, only the Control Council Law Number 10, subsequently adopted by the Allies to furnish the legal basis for the trials held before the military tribunals conducted by the occupying regime and for the later prosecutions held by the German courts relative to "lower level" accused, included rape among the crimes against humanity.[107] This represented an historical turning point: the passage from a conception of rape as a "property or honor violation", to a violation of human dignity.[108] However, there were no explicit charges of rape during the trials held under this law.[109]

Therefore, notwithstanding the fact that evidence of rape, sexual torture, sexual slavery, forced prostitution, forced sterilization, forced abortion, pornography, sexual mutilation, forced nudity and sexual sadism, emerged during the trials,[110] explicit prosecutions for sexual violence crimes did not occur during the Nuremberg Trial. However, various forms of sexual violence were included as evidence of the atrocities alleged and sex crimes were subsumed within the IMT judgments, particularly within the crimes against humanity of "other inhumane acts" and "persecution on political, racial or religious grounds".[111]

Similarly, the Charter establishing the International Military Tribunal for the Far East (IMTFE) did not criminalize rape.[112] However, General Iwane Matsui, Commander Shunroku Hata, Foreign Minister

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[106] "The United Kingdom, the United States and the Soviet Union have received from many quarters evidence of atrocities, massacres and cold-blooded mass executions which are being perpetrated by Hitlerite forces […].
[…] Those German officers and men and members of the Nazi party who have been responsible for or have taken a consenting part in the above atrocities, massacres and executions will be sent back to the countries in which their abominable deeds were done in order that they may be judged and punished according to the laws of these liberated countries and of free governments which will be erected therein."

[107] Control Council Law Number 10, Art. 2(1)(a)

[108] Mitchell, "The Prohibition of Rape in International Humanitarian Law as a Norm of *Jus Cogens*", supra at 96

[109] See Patricia Viseur Sellers, "Rape Under International Law, in War Crimes: The Legacy Of Nuremberg", Belinda Cooper ed., 1999, pp. 159, 162

[110] "Sexual Violence as an international crime" Anne-Marie de Brouwer, Charlotte Ku, Renée Römkens and Larissa van den Herik (eds.), 2012, Chapter II (Kelly Askin), p. 33, reporting: The official documents of the Nuremberg Trial, that are contained in the forty-two volume work, "Trial of the Major War Criminals Before the International Military Tribunal", 14 November 1945 - 1 October 1946 (42 Vols.,1947). Vol. II, transcript p. 139 (pornography). Vol. VI, transcript p. 170 (torture); 178 (torture/rape); 212 (forced sterilization, forced abortion, infanticide); 213-214 (forced prostitution); 404-407 (rape). Vol. VII transcript pp. 453-457, 467 (rape); 494 (rape/torture); 505 (torture/sexual mutilation), 548 (pornography). Vol. XX transcript p. 381 (sexual Assault).

[111] Ibid., pp. 32-33

[112] See generally the Charter of the International Tribunal for the Far East, 1946

Kōki Hirota and General Tomoyuki Yamashita were all found guilty of the crimes committed by Japanese troops, which included rape, through a command responsibility theory, based on their failure to impede such atrocities.[113] Rape was prosecuted as a war crime: *"acts were carried out in violation of recognized customs and conventions of war […including] mass murder, rape […]".*[114] Moreover, the Indictments included rape also within "inhumane treatment", "ill-treatment" and "failure to respect family honor".[115] Unfortunately, these convictions were nothing compared to the failure to prosecute those responsible for over 200,000 "comfort women", held in Japanese rape camps.[116]

Throughout the second part of the twentieth century, a change happened: war parties started to use sexual violence as a weapon of war[117] and, consequently, the international community tried to give an effective response to this situation of emergency.

2.4 Past indifference and under-recognition of wartime sexual crimes

Since sexual violence has become a weapon of war, it is probably one of the most frequently committed wartime atrocities, but one of the least reported, the least investigated, the least prosecuted and, consequently, punished.[118]

As I have emphasized, in the last decades, the international community has witnessed an increase of sexual violence on a widespread scale, during wartime and that, finally, have led to a growing recognition of the importance of prohibiting and prosecuting crimes of sexual violence.

Historically, rape and other crimes of sexual violence have received insufficient attention in international law. Indeed, acts of sexual violence were often viewed as *"a detour, a deviation, or the acts of renegade soldiers […] pegged to private wrongs and […thus] not really the subject of international humanitarian law."*[119] It can be said that wartime rape has long been

[113] "The Tokyo Judgment: Judgment Of The International Military Tribunal For The Far East", B.V.A. Roling and C.F. Ruter eds., 1977, pp. 445-54

[114] "Sexual Violence as an international crime" Anne-Marie de Brouwer, Charlotte Ku, Renée Römkens and Larissa van den Herik (eds.), 2012, Chapter II (Kelly Askin), pp. 38-39, reporting: "The Tokyo war Crimes Trial: The Complete Transcripts of the Proceedings of the International Military Tribunal for The Far East", eds. R.Pritchard & S. Zaide, New York Garland Publishing, 1981, [hereinafter: IMTFE Docs] Vol. I, transcript 29

[115] Ibid., p. 39, reporting: "International military Tribunal for the Far East, Dissentient Judgment of Justice Pal 624" (1953), paras 601-03

[116] K. Alexa Koenig, Ryan S. Lincoln, Lauren E. Groth "Contextualizing Sexual Violence Committed During The War On Terror: A Historical Overview Of International Accountability", 45 U.S.F. L. Rev. 911, 2011 reporting: Yoshimi Yoshiaki, Comfort Women: Sexual Slavery in the Japanese Military During World War II, Suzan-ne O'Brien trans., 2000

[117] Brownmiller, "Against Our Will", supra at 5

[118] Pufong and Swain, "Rape in militarized conflicts", supra at 3, citing: Todd Salzman "Rape Camps, Forced Impregnation and Ethnic Cleansing", 2000, p. 87

[119] Susana SáCouto and Katherine Cleary, "Importance of Effective Investigation of Sexual Violence and Gender-Based Crimes at the International Criminal Court", 17(2) American University Journal of Gender, Social Policy & the Law 337-359, 2009 [hereinafter: SáCouto and Cleary, "Importance of Effective Investigation of Sexual Violence and Gender-Based Crimes at the ICC"]; citing: Patricia Viseur Sellers, "Individual[s'] Liability for Collective Sexual Violence", in Gender And Human Rights, Karen Knop ed., 2004; see also Rhonda Copelon, Gender Crimes as War Crimes: Integrating Crimes Against Women into International Criminal Law, 46 Mcgill L.J. 217, 2000, p. 223, (noting that only after rape began being discussed as a "weapon of war" in the former Yugoslavia was it transformed "from private, off-duty, collateral, and inevitable excess to something that is public or 'political' in the traditional sense")

"mischaracterized" and *"dismissed"* by military and political leaders as a private crime: the opportunistic act of the occasional soldier, less serious if compared to other crimes, such as murder.[120] Therefore, being perceived as private crimes, until recently, sexual violence crimes have received inadequate consideration in humanitarian law instruments,[121] when rarely mentioned. All that has led to a minimization of crimes against women as the unfortunate, but inevitable, byproduct of war.[122] Worse still, being a commonplace, these crimes have been tolerated by commanders during the war and then, condoned at the end of the war.

In this sense, one of the reasons why women's experience of conflict has been ignored, is that women have customarily not been represented in the political, military and international institutions deciding on matters of war and peace. For example, of over 240 representatives to the Diplomatic Conference that adopted the Geneva Conventions, only 13 were women.[123]

Moreover, the recognition of violence against women by the international community as a human rights issue was belated, due to the traditional idea that women were men's properties.

According to Mitchell, the failure in prosecuting such crimes was also due to the ambiguous legal language surrounding rape as an international crime,[124] before the adoption of the Rome Statute.

For example, two of the leading human rights instruments, the Universal Declaration of Human Rights (UDHR) and the International Covenant on Civil and Political Rights (ICCPR), do not explicitly enumerate the prohibition of sexual violence crimes, although the provisions forbidding *"inhuman or degrading treatment"* have been interpreted as including them. The tendency, in international law, to use ambiguous or imprecise language when defining sexual violence and the consequent failure to identify explicitly rape as a serious violent crime on its own, allow states "*to hedge on their international obligations*."[125]

Moreover, the absence of precise norms criminalizing sexual violence has increased the still existing tendency to "re-characterize" sexual violence offences as torture, inhumane treatment or ill-treatment, for example.[126] In fact, these crimes have been traditionally prosecuted as the underlying acts of other atrocities, in this way, the sexual aspect of violence has been under-evaluated. I further

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[120] "Human Rights Watch Applauds Rwanda Rape Verdict", 3 September 1998, available at: http://www.hrw.org/news/1998/09/02/human-rights-watch-applauds-rwanda-rape-verdict

[121] Mitchell, "The Prohibition of Rape in International Humanitarian Law as a Norm of *Jus Cogens*", supra at 96

[122] Mitchell, "The Prohibition of Rape in International Humanitarian Law as a Norm of *Jus Cogens*", supra at 96, reporting: United Nations, "Impact of Armed Conflict on Children", Final Report submitted by Ms. Grac'a Machel, expert of the Secretary-General, pursuant to General Assembly resolution 48/157, A/51/306 of 26 August 1996, para 91 (stating that "while abuses such as murder and torture have long been denounced as war crimes, rape has been downplayed as an unfortunate but inevitable side effect of war")

[123] "Women's Human Rights, Women, War and Peace", Amnesty International, available at: http://www.amnesty.org.uk/sites/default/files/whr_war_and_peace.pdf

[124] Mitchell, "The Prohibition of Rape in International Humanitarian Law as a Norm of *Jus Cogens*", supra at 96. Moreover, although the London Charter and the Tokyo Charter fail to explicitly list rape and sexual assault as war crimes, both documents implicitly refer to them as such under the term "ill treatment".

[125] Ibid.

[126] Prosecutor v. Duško Tadić, IT-94-1-I, Second Amended Indictment, 14 December 1995, Counts 8-11: the Amended Indictment contained charges for torture or inhuman treatment, willfully causing great suffering or serious injuries to body and health, cruel treatment and inhumane acts to subsume the facts of "oral sex acts" and "sexual mutilation" For further details, see Chapter 2.6.2

analyze this problem, which concerns especially male sexual violence, up ahead.[127] However, this cue suggests that also some of the recent prosecutions of sexual violence crimes remained inadequate and that the "specific gendered harms" suffered by the victims is still not completely comprehended.

As Askin noted, *"only recently, the international community is beginning to grasp the moral, social, economic and legal importance of taking adequate measures to prevent and punish gender crimes."*[128]

However, in the recent past, the significance of rape as a crime under international law has been progressively acknowledged. In fact, there was an extraordinary development in gender jurisprudence thanks to the two *ad hoc* Tribunals; this advancement reflected the international community's will to seriously address crimes of sexual violence.[129] Moreover, as I discuss in Chapter 3, there are reasons to sustain that, nowadays, such crimes constitute *jus cogens*.[130] In theory, gender violence has reached a *jus cogens* status through its inclusion as a component of every other *jus cogens* norm and its prohibition in customary international law and domestic law systems.[131] Yet, in practice, effective prosecution for gender-based crimes still remains a problem.[132]

Therefore, although rape is considered a *jus cogens* crime, its prohibition is rarely enforced and the persistence of violence against women continues with remarkable impunity.[133] The problem, I dare say, is that impunity leads to other impunity: victims do not seek justice because

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[127] Mitchell, "The Prohibition of Rape in International Humanitarian Law as a Norm of Jus Cogens", supra at 96.
For further details, see Chapter 2.6

[128] Mitchell, "The Prohibition of Rape in International Humanitarian Law as a Norm of Jus Cogens", supra at 96, reporting: Askin, "Prosecuting Wartime Rape", 21 Berkeley J. Int'l L. 288, 2003 [hereinafter: Askin, "Prosecuting Wartime Rape"] p. 298 (noting that "the international community has been even slower in providing other forms of accountability to victims of sex crimes"); Kelly D. Askin, "The Quest for Post-Conflict Gender Justice", 41 Colum. J. Transnat'l L. 512, 2003, p. 520 (observing that "[d]espite its insidious prevalence during armed conflict, even the most notorious or egregious cases of sexual violence are typically committed with absolute impunity... an overwhelming majority of perpetrators or facilitators of sexual violence are not held accountable for their crimes and few survivors ever receive justice or any other form of accountability or reparation, much less medical, psychological, or financial redress")

[129] Mitchell, "The Prohibition of Rape in International Humanitarian Law as a Norm of *Jus Cogens*", supra at 96: See Askin, "War Crimes Against Women", supra at 77, p. 375; Askin, "Prosecuting Wartime Rape", supra at 128, p. 349

[130] Mitchell, "The Prohibition of Rape in International Humanitarian Law as a Norm of *Jus Cogens*", supra at 96, reporting: Askin, "War Crimes Against Women" supra at 77, p. 242 (noting that '[i]nternational treaties, documents, and U.N. resolutions serve as an indication of the direction international law is heading regarding fundamental norms of international law. The greatly increased activity in international law in the 1990s towards affording greater protection, status, and equality to women evidences a universal trend toward *jus cogens* status for gender based abuses, particularly violence")

[131] Mitchell, "The Prohibition of Rape in International Humanitarian Law as a Norm of *Jus Cogens*", supra at 96

[132] See: United Nations, Preliminary Report Submitted by the Special Rapporteur on Violence against Women E/CN.4/1995/42 (1995), para. 263, p. 64 ("although rape is one of the most widely used types of violence against women and girls [in situations of armed conflict], it remains the least condemned war crime").
See: Mitchell, "The Prohibition of Rape in International Humanitarian Law as a Norm of *Jus Cogens*", supra at 96; citing: Niarchos, "Women, War and Rape", p. 689: "Rape has been prohibited under IHL through many wars, but the prohibition has been largely ignored or unenforced. This dismal state of affairs results from the interplay of two systems. One is a legal system that tends to overlook or dismiss women's pain; the other is a war system in which rape is an effective weapon. Both systems reveal themselves as male-dominated, with little regard for the rights of women."

[133] Mitchell, "The Prohibition of Rape in International Humanitarian Law as a Norm of *Jus Cogens*", supra at 96, reporting: Amnesty International, "It's in Our Hands: Stop Violence Against Women", 2004, (noting that violence against women "is prevalent in every society in the world and cuts across boundaries of wealth, race and culture"), available at: http://web.amnesty.org/actforwomen/reports-index-eng

they know they will not obtain it,[134] obviously this complicates investigations and provokes an underestimation of the dimension of the phenomenon.

Most regrettably, the failure to bring to justice the perpetrators of violence against women contributes to create a context in which such acts are viewed as normal and acceptable, rather than criminal.

Moreover, many victims hide or deny the abuse, fearing social stigmatization or because their coping mechanisms may lead them not to denounce. Social stigma is worsened by the failure of states to prevent and prosecute sexual violence, causing a double victimization, while the victim uselessly attempts to seek justice.

Furthermore, there is another risk for the victims of sexual violence: the incrimination under domestic law, where sex outside of a marital context is forbidden.

Kelly Dawn Askin well comprehended the problem when, in her appeal for greater efforts to prosecute sexual violence, wrote:

> *Only when we accept that victims of sexual violence should not bear the shame and stigma that society traditionally imposes on them and when we acknowledge that rape is a crime of serious sexual, mental, and physical violence that deserves redress will we truly be able to tackle the underlying causes of sex crimes.*
> *For when we reverse the stigmas and the stereotypes associated with sex crimes, we take away much of the power held by the perpetrators of these crimes.*[135]

It can be argued that under-reporting leads to under-recognition of sexual violence and that, to under-punishment.

The international community exhorted for a more effective prosecution of sexual crimes in many occasions. In particular, the United Nations General Assembly adopted the Declaration on the Elimination of Violence Against Women, which required that states "*[e]xercise due diligence to prevent, investigate and […] punish acts of violence against women.*"[136] Moreover, for example, the Security Council, by the Resolution 798 (1992), condemned for the first time[137] the systematic wartime rape of women that occurred in the former Yugoslavia.[138] Then, following this Resolution, the General Assembly expressed the exigency to ensure that *"persons accused of upholding and perpetrating rape and sexual violence as a weapon of war […] be brought to justice […] without further delay*."[139] Furthermore, the Security Council Resolution 1325 (2000), the first ever Security Council Resolution specifically regarding violence against women, *"emphasize[d] the responsibility of all states to put an end to impunity and to prosecute those responsible for genocide, crimes against humanity, and war crimes, including those relating to sexual and other violence against women and girls."*[140]

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[134] Amnesty International, "It's in Our Hands: Stop Violence Against Women", 2004
[135] Kelly Dawn Askin, "Prosecuting Wartime Rape", supra at 128
[136] U.N. Declaration on the Elimination of Violence against Women, U.N. Doc. A/RES/48/104 (1993), Art. 4(c)
[137] S/RES/798 (1992), for the first time, the United Nations condemned the rape of women in wartime: see Kelly Dawn Askin, "War Crimes Against Women", supra at 77, p. 298
[138] S/RES/798 (1992)
[139] A/RES/49/205 (1994)
[140] S/Res/1325 (2000)

2.5 The weak international response

The jurisprudential developments and the experience in the field of the prosecutions of conflict-related sexual violence crimes under the control Council Law No. 10 and before the two International Criminal Tribunals show that the effective investigation and prosecution of such offences do not depend solely on their explicit inclusion in the statutes of the tribunals.[141]

Indeed, despite the evidence that sexual violence largely occurred during the conflicts in Yugoslavia and Rwanda and that often it was ordered, encouraged and generally managed by commanders,[142] the initial treatment of crimes of sexual violence by the ICTY and ICTR differed. Whereas the UN resolution establishing the ICTY specifically condemned rape of women,[143] the resolution creating the ICTR did not mention this issue.[144]

Trying to explain this indifference relative to sexual crimes, I refer to the context: in Rwanda, the attention was initially focused on killings, rather than on rapes, because sexual crimes were perceived as less serious crimes. Then, can be considered the cultural background in Africa that attaches shame to the victims of sexual violence.[145] The difficulty in prosecuting such crimes depended mostly on the difficulty of investigating, caused by the lack of report by the victims who feared stigmatization.

Nonetheless, one of the most important step forward in prosecuting wartime rape was made by the ICTR, prosecuting and condemning Jean-Paul Akayesu for genocidal rape.[146]

As well affirmed by Barbara Bedont and Katherine Hall-Martinez*:*

In the tribunals established after the Second World War to prosecute German and Japanese war criminals, gender crimes were not pursued with the same degree of diligence as other crimes. Rape was included in the indictments of some of the individuals tried by the Tokyo Tribunal but not in any of the indictments of the Nuremberg Tribunal.
As another example, despite the overwhelming evidence of mass rapes during the 1994 genocide in Rwanda, the ICTR did not include any charges of rape in its indictments until 1997, after concerted pressure from civil society.[147]

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[141] SáCouto and Cleary, "Importance of Effective Investigation of Sexual Violence and Gender-Based Crimes at the ICC", supra at 119; citing: Cate Steains, "Gender Issues, in the International Criminal Court: the Making of the Rome Statute," Roy S. Lee ed., 1999, p. 375

[142] Rebecca L. Haffajee, "Prosecuting Crimes of Rape and Sexual Violence at the ICTR: The Application of Joint Criminal Enterprise Theory", 29 Harvard Journal of Law & Gender 201, 2006; reporting: Kelly D. Askin, "A Decade of the Development of Gender Crimes in International Courts and Tribunals: 1993 to 2003", 3 HUM. RTS. BRIEF 16, 2004

[143] S/RES/827 (1993): "Expressing once again its grave alarm at continuing reports […]of massive, organized and systematic detention and rape of women, […]"

[144] S/RES/955 (1994)

[145] Rebecca L. Haffajee, "Prosecuting Crimes of Rape and Sexual Violence at the ICTR: The Application of Joint Criminal Enterprise Theory", 29 Harvard Journal of Law & Gender 201, 2006; reporting: Judith G. Gardam & Michelle J. Jarvis, "Women, Armed Conflict And International Law", 2001, pp. 154-158

[146] Prosecutor v. Jean-Paul Akayesu, ICTR-96-4-T, Trial Judgment, 2 September 1998. For further details, see Chapters 4.1.3 and 4.2.1

[147] SáCouto and Cleary, "Importance of Effective Investigation of Sexual Violence and Gender-Based Crimes at the ICC", supra at 119; citing: Barbara Bedont & Katherine Hall-Martinez, "Ending Impunity for Gender Crimes under the International Criminal Court", 6 Brown J. World Aff. 71, 1999

Analyzing the possible forms of the international reactions to the wartime atrocities committed worldwide, other instruments can be identified in addition to (1) the establishment of an international tribunal to investigate and bring suspected perpetrators to justice. In particular, (2) the condemnation by the international community, usually the United Nations adopt a resolution condemning the crimes committed, the state's action or inaction or the responsible faction within the state; (3) the imposition of economic sanctions or embargos for actions or failure to take action; (4) the intervention of peacekeeping forces.

It has to be remembered that, the United Nations' possibility to effectively intervene with any of these measures, depends on the full support of all the five permanent members of the UN Security Council that hold the power of veto. Thus, the interests of the hegemonic powers are decisive. If during a conflict, gross violations of human rights occur, the backing of hegemonic powers is a discriminating factor in determining the form of international responsiveness or the level of such a response.[148]

Therefore, it can be argued that variation in timing and effectiveness of the international community's reactions to wartime brutalities committed all around the world depends on the presence or the absence of interest by the hegemonic states.[149] This is an additional element to explain the indifference that also nowadays, despite the development of the international law concerning wartime atrocities, surrounds some situations of conflict.

In fact, the context is determinant: gross humanitarian violations may be committed by a functioning sovereign state or by an insurgent group fighting the regime in power. This difference may affect the possibility of an international response: a state that retains its sovereignty and has the support of an hegemonic ally, is capable to avoid or delay any attempts by the UN or other international organizations to intervene within its sovereign territory. The case of Cambodia, where from the 1970s through to the summer of 2007, the Govern avoided the establishment of an international tribunal, with the active support of major powers such as the United States, may be an example.[150]

On the contrary, when the state authorities lose control of parts of the territory to the insurgent forces, the intervention of the international community can be easier.[151]

Consequently, it can be observed that in Bosnia, as well as in Rwanda, for examples, the international community responded to human rights abuses only after the overthrow of the ruling regimes. Thus, it can be argued that governments whose sovereign capacity is unstable or whose governing regimes have been deposed are more likely to be held responsible for the crimes committed than those whose sovereign capacity is stable and have the support of hegemonic allies, like Sudan, which was sustained by China and Russia.[152]

[148] Ibid.
[149] Pufong and Swain, "Rape in militarized conflicts", supra at 3
[150] Pufong and Swain, "Rape in militarized conflicts", supra at 3; reporting: Stephen Marks, "Elusive Justice for the Victims of the Khmer Rouge", 52 Journal of International Affairs 691-718, 1999; Christopher Rudolph "Constructing an Atrocities Regime: The Politics of War Crimes Tribunals", 55 International Organization 655-691, 2001
[151] Pufong and Swain, "Rape in Militarized Conflict", supra at 3
[152] Ibid.

However, from the 1990s on, despite the difficulties, there has been a notable development in documenting wartime abuses committed against women and a significant progress in recognizing these acts as gross violations of international human rights and international humanitarian law. The merit of this result, in great part, belongs to women's rights activists and advocates.

After the 1993 UN Declaration on the Elimination of Violence against Women, the United Nations Commission on Human Rights decided to appoint a Special Rapporteur on violence against women, by the Resolution 45 (1994). The Special Rapporteur was mandated to analyze the contexts, causes and consequences of violence against women worldwide, the first two post holders have devoted particular attention to situations of conflict and instability.

At the UN's 1995 Fourth World Conference on Women, in Beijing, governments renewed their commitment to fight the widespread violence against women in conflict.

It can be said that from the mid-1990s onwards, rape and other forms of sexual violence were increasingly recognized as among the most serious crimes under international law. The leading judgments of the two *ad hoc* International Tribunals as well as the Rome Statute of the International Criminal Court adopted in 1998 emphasized the gravity of rape and of the other crimes of sexual violence.

It is also notable the recognition of the importance of including women in peace processes and post-conflict reconstruction efforts, in particular, by the SC Res. 1325 (2000)[153] and by the subsequent SC Res. 1820 (2008).[154]

Women human rights defenders, have campaigned all around the world for justice, not only by means of the criminalization and the prosecution of the multiple forms of violence against women, but also by means of a change in the structures of societies that marginalize women and make them vulnerable.[155]

Despite this evolution, the shocking scale and persistence of violence against women in today's ongoing conflicts suggest that not enough has been done. Giving an example among all, up to 1,000 Yazidi women in Northern Iraq were recently kidnapped, tortured, held as sex slaves and murdered by ISIS fighters, some as young as 12 years old were sold as wives to Islamist fighters for as little as 25 US dollars or given to fighters as war booty.[156]

Moreover, considering the most recent cases at the attention of the International Criminal Court, we can observe still ongoing problems in prosecuting sexual violence crimes.

The positive developments include the fact that some of the persons charged in connection with the situation in the Democratic Republic of Congo (DRC) have been charged with sexual slavery and rape, both as war crimes and as crimes against humanity.[157]

[153] S/RES/1325 (2000)
[154] S/RES/1820 (2008)
[155] Pufong and Swain, "Rape in militarized conflicts", supra at 3
[156] "ISIS, Torture and World Silence About Women", the World Post, Sempteber 2014
[157] See in general: ICC-Situations and cases, available at: http://www.icc-cpi.int/en_menus/icc/situations%20and%20cases/Pages/situations%20and%20cases.aspx

Rape allegations have been brought against three of the six individuals pursued by the Prosecutor, including Omar Hassan Ahmad Al Bashir, the President of the Republic of Sudan since 16 October 1993.[158]

Similarly, allegations involving rape and sexual slavery are included, among the others, in the arrest warrant against Joseph Kony, the alleged Commander-in-Chief of the Lord's Resistance Army in Uganda.[159]

Regarding the Central African Republic situation, charges of rape as a war crime and a crime against humanity have been levied against Jean-Pierre Bemba Gombo, the alleged Commander-in-chief of the *Mouvement de Libération du Congo* (MLC).[160]

Nevertheless, the Court was still not able to convict of sexual violence crimes the accused tried so far.

In fact, in the Court's first case, that of the Congolese Thomas Lubanga Dyilo, the Office of the Prosecutor failed to include sexual violence charges in the indictment. Consequently, despite the abundant evidence concerning sexual violence crimes, Lubanga was condemned solely for recruitment of children.[161] Carine Bapita Buyangandu, who was one of the legal representatives of victims during the trial, stated that the children in training camps were subjected to various forms of abuses, in particular *"they raped and they were raped."* She also explained that the abuses suffered by girl child soldiers in the training camps, included, in addition to the same training and treatment of boy child soldiers, sexual slavery, unwanted pregnancies, household chores.[162]

Moreover, the Court's second case was subsequently divided into two distinct trials, those of the two Congolese leaders, Mathieu Ngudjolo Chui, who was the leader of the Front for National

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See in particular: Prosecutor v. Bosco Ntaganda, ICC-01/04-02/06-309, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Bosco Ntaganda: Pre-Trial Chamber II unanimously confirmed charges of rape and sexual slavery as war crimes and crimes against humanity

[158] Ibid. See in particular: the warrant of arrest for Omar Hassan Ahmad Al Bashir includes a count of rape as a crime against humanity, the warrant of arrest for Abdel Raheem Muhammad Hussein ("Hussein") lists rape as a crime against humanity and as a war crime; the warrant of arrest of Ali Muhammad Ali Abd-Al-Rahman ("Ali Kushayb") contains a count of rape as a crime against humanity; the warrant of arrest for Ahmad Muhammad Harun ("Ahmad Harun") includes counts of rape as a crime against humanity and as a war crime.

[159] Ibid. See in particular: Kony, (rape and sexual enslavement as crimes against humanity; inducing rape as a war crime), Case information Sheet, available at: http://www.icc-cpi.int/en_menus/icc/situations%20and%20cases/situations/situation%20icc%200204/related%20cases/icc%200204%200105/Pages/uganda.aspx

[160] Ibid. See in particular: Bemba Gombo: rape as a crime against humanity and a war crime, Case Information Sheet, available at: http://www.icc-cpi.int/en_menus/icc/situations%20and%20cases/situations/situation%20icc%200105/related%20cases/icc%200105%200108/court%20records/chambers/pre-trial%20chamber%20ii/Pages/424.aspx

[161] Ibid. See: Mr Lubanga Dyilo was convicted (14 March 2012) of committing, as co-perpetrator, war crimes consisting of enlisting and conscripting of children under the age of 15 years into the Force Patriotique pour la Libération du Congo (FPLC) and using them to participate actively in hostilities in the context of an armed conflict not of an international character from 1 September 2002 to 13 August 2003 (punishable under Article 8(2)(e)(vii) of the Rome Statute, see the Case Information Sheet, available at: http://www.icc-cpi.int/en_menus/icc/situations%20and%20cases/situations/situation%20icc%200104/Pages/situation%20index.aspx For further information, see Chapter 5.2.1

[162] Galya Ruffer, "Testimony of Sexual Violence in the Democratic Republic of Congo and the Injustice of Rape: Moral Outrage, Epistemic Injustice, and The Failures Of Bearing Witness", 15 Or. Rev. Int'l L. 225, 2013

Integration (FNI) and Germain Katanga, who was the leader of the *Front de Résistance Patriotique en Ituri* (Patriotic Force of Resistance in Ituri - FRPI). Although the indictments contained counts of rape and sexual slavery and the Trial Chambers found that the armed groups that the accused commanded had committed these crimes, none of them was found guilty thereof.[163]

Conclusively, it can be argued that, after centuries of disregard, the recognition at the legislative level that rape is one of the most serious crimes and that it is an independent crime, not subsumable into other crimes (such as torture or inhuman treatment), has been fundamental to start to fully comprehend the "gendered harms" it causes. However, this "theoretical" recognition is not enough to ensure accountability and deter future commissions, as it is demonstrated by the ICC's up-to-now incapacity to properly prosecute crimes of sexual violence. The enforcement of the provisions prohibiting these crimes requires a cultural change: it is necessary to eradicate the subordinate role of women in society and to fully comprehend that the gravity of rape and of the other forms of sexual violence is not inferior to those of the other crimes, such as murder or torture.

2.6 Sexual violence against men

Although women and girls are more likely to be victims of wartime sexual violence than men and boys, they comprise a considerable minority of rape victims.[164]

This issue came to the international attention only recently, despite the fact that during wartime sexual violence has been inflicted upon men and boys throughout the history, *"across time, place, and culture"*.[165] For example, the Chinese, the Amalekite, the Egyptian and the Norse armies, practiced the castration and amputation of the penis of male prisoners and enemies.[166] Moreover, similar practices are documented in the conflicts in Ancient Persia and in Ancient Greece. In these cases, sexual mutilations constituted a way to "*celebrat[e] the symbolic and actual domination of the enemy*".[167]

In the past, sexual crimes were ignored and then, the attention was revolted solely to the violence committed against women: men were viewed as perpetrators. This partial vision evidently oversimplifies sex roles during armed conflict. It fails to consider not only women's political activity during periods of crisis and the fact that they can be open supporters of conflict or combatants, but most importantly, it fails to consider the male victims of sexual violence and the fact that also women can be perpetrators, although more often perpetrators are men also in this case.[168] This lack of attention on sexual abuse of men is particularly problematic given the widespread dimension of the phenomenon.

[163] For further considerations on Katanga and Ngudjolo cases, see Chapter 5.2.3
[164] Lara Stemple, "Male Rape and Human Rights", 60 Hastings L.J. 605, 2008-2009 [hereinafter: Stemple "Male Rape and Human Rights"]
[165] Vojdik, "Sexual Violence against Men and Women in War", supra at 10, p. 926
[166] Vojdik, "Sexual Violence against Men and Women in War", supra at 10, p. 357
[167] Vojdik, "Sexual Violence against Men and Women in War", supra at 10; reporting Sandesh Sivakumaran, "Sexual Violence against Men in Armed Conflict", 18 EuR. J. INT'L L. 253, 2007, p. 265
[168] Stemple, "Male Rape and Human Rights", supra at 164, pp. 611- 612

Indeed, sexual violence is largely committed against men and boys during periods of political tension and armed conflict, not only in peacetime. In the last three decades, it is reported at least in 25 cases: Argentina, Burundi, Central African Republic, Chechnya, Chile, Democratic Republic of Congo, East Timor-Indonesia, El Salvador, Greece, Guatemala, Iran, Iraq-Coalition, Iraq-Kuwait, Kenya, Liberia, Northern Ireland, Peru, Rwanda, Sierra Leone, South Africa, Sri-Lanka, Sudan, Turkey, Uganda, the Former Yugoslavia and Zimbawe.[169]

Often, male victims are detainees or people in prison-like conditions, but not only. In fact, Lara Stemple affirmed that sexual torture and rape had been experienced by 80% of the men detained in the 6,000 concentration camp in the Sarajevo Canton. Such an organized use of sexual violence by Serbian soldiers is widely recognized to consist in a form of ethnic cleansing.[170]

The UN Security Council created an international body, the Commission of Experts, to investigate sexual violence crimes that had been committed during the Yugoslav civil war. In addition, the International Criminal Tribunal for the former Yugoslavia instituted a Sexual Assault Investigation Team that reported that men had been castrated and otherwise sexually mutilated, forced to rape, to commit incest, to perform fellatio and other sex acts to guards and to other prisoners, during the civil war.[171]

Moreover, according to a study conducted in 2008, 32.6% of the study's 367 Liberian male former combatants had experienced sexual violence, mostly by soldiers or rebels.[172]

The Journal of the American Medical Association, in a study, calculated that, 23.6% of the Congolese men interviewed had experienced sexual violence during their lives, 64.5% of whom had experienced it in the context of the country's civil wars. Of these cases, 92.5% of the perpetrators were men and 11.1% were women, mostly women combatants in the Eastern Region of the country.[173]

[169] "Sexual Violence as an International Crime" Anne-Marie de Brouwer, Charlotte Ku, Renée Römkens and Larissa van den Herik (eds.), 2012, Chapter IV (Sandesh Sivakumaran), p. 80. For further details: S. Sivakumaran "Sexual Violence against Men in Armed Conflicts", 18 European Journal of International Law, 2007, pp. 257-258

[170] Lara Stemple, "Male Rape and Human Rights", supra at 164; reporting: Therese Mcginn Et Al., Humanitarian Practice Network Paper No. 45, "Reproductive Health For Conflict-Affected People: Policies, Research and Programmes", 2004, (citing Zeljka Mudrovcic, "Sexual and Gender-Based Violence in Post-Conflict Regions: The Bosnia and Herzegovina Case, in United Nations Population Fund, "The Impact of Conflict On Women And Girls: A UNFPA Strategy For Gender Mainstreaming in Areas of Conflict and Reconstruction", 2001)

[171] Stemple, "Male Rape and Human Rights", supra at 164, p. 613

[172] "Care and Support of Male Survivors of Conflict-Related Sexual Violence", Briefing Paper, available at: http://www.svri.org/CareSupportofMaleSurviv.pdf Reporting: Kristen Johnson, "Association of Combatant Status and Sexual Violence with Health and Mental Health Outcomes in post-conflict Liberia", 300(6) Journal of the American Medical Association (JAMA) 676-690, 2008

[173] "Care and Support of Male Survivors of Conflict-Related Sexual Violence", Briefing Paper, available at: http://www.svri.org/CareSupportofMaleSurviv.pdf Reporting: Kristen Johnson et Al. "Association of sexual violence and human rights violations with physical and mental health in territories of the eastern Democratic Republic of Congo." 304(5) JAMA 555-562, 2010

Furthermore, 76 % of Salvadorian male political prisoners[174] and 21% of Sri Lankan Tamil males[175] reported that they had experienced sexual torture, while in detention.

It has to be considered that experts believe that, as with sexual violence in general, these results are underestimated because of the lack of reporting is a problem. Chris Dolan, the director of the Refugee Law Project in Uganda, said, *"female rape is significantly underreported and male rape almost never"*.[176] Fear of stigmatization and shame usually led both men and women to hide the violence endured. The problem is even worse for men victims because they fear they would be perceived as homosexual and homosexuality is still criminalized in many countries. For example, a Human Rights Watch report underlined that *"due to the stigma attached to homosexuality in Sierra Leone, […] few boys were willing to report [the violence]"*, fearing they would be viewed as homosexual.[177]

Furthermore, reports relative to the situation in southern Sudan reveal that boys, held as slaves, are subject to sexual abuses, including violent gang rapes, by the government soldiers.[178] The Report of Sierra Leone Truth and Reconciliation Commission contains many instances on male sexual violence.[179] The Report of the Commission for Reception, Truth and Reconciliation in Timor-Leste documented sexual humiliation and sexual torture as prevailing forms of sexual violence against men.[180] In Cambodia, the predominant form of sexual violence against men was forced marriage and eventually, the indictment of case 002/02 included allegations of forced marriage as rape under crimes against humanity and forced marriage and sexual violence as other inhumane acts under crimes against humanity.[181] In Liberia, slavery was particularly diffused.[182]

Therefore, sexual violence against men displays in different forms. Rape of all sorts, by male or female perpetrators, through the person of the perpetrator or of other victims (family members or stranger; dead or alive), rape with objects, by individuals or gang. Particularly diffused during armed conflict are also enforced sterilization, beatings to genitals, enforced nudity, enforced masturbation, sexual slavery and forced marriage.[183]

Like female victims, men who are subjected to sexual violence suffer serious physical and mental consequences. Survivors experience shame, guilt, anger, anxiety, suicidal thoughts and

[174] Lara Stemple, "The Hidden Victims of Wartime Rape", The New York Times, published on 1 March 2011, available at: http://www.nytimes.com/2011/03/02/opinion/02stemple.html?_r=0

[175] Stemple, "Male Rape and Human Rights", supra at 164; reporting: M. Peel et al., "The Sexual Abuse of Men in Detention in Sri Lanka", 355 LANCET 2069, 2000

[176] Will Storr, "The Rape of Men: the Darkest Secret of War", The Guardian-The Observer, 17 July 2011, citing: Chris Dolan

[177] Human Rights Watch, "We will kill you if you cry", 2003, p. 42

[178] Stemple, "Male Rape and Human Rights", supra at 164: see Maria Sliwa, "Sudan Cries Rape", WORLDNETDAILY, 2 March 2004, available at: http://www.worldnetdaily.com/news/article.asp?ARTICLEID=37387

[179] "Sexual Violence as an International Crime" Anne-Marie de Brouwer, Charlotte Ku, Renée Römkens and Larissa van den Herik (eds.), 2012, Chapter IV (Sandesh Sivakumaran), p. 93, reporting: "Report of the Sierra Leone Truth and Reconciliation Commission", Vol. 2 Chapter 5: List of Victims: victims are "assaulted, tortured, stripped"

[180] Commission for Reception, Truth and Reconciliation in Timor-Leste (CAVR), Chapter 7, para 33

[181] Prosecutor v. Noun Chea et Al., 002/19-9-2007-ECCC/OCIJ, 15 September 2010, para 1445

[182] K. Johnson et al., "Association of Combatants Status and sexual Violence with Health and Mental Health Outcomes in Post Conflict Liberia", 300 (6) Journal of American Medical Association 676, 2008

[183] Ibid.

disinterest in sex. Moreover, they suffer from sexually transmitted infections, including HIV, genital infections, sexual impotence, swollen testicles and abscesses and ruptures of the rectum.[184]

Male survivors may suffer from greater marginalization than females, because of the presence of masculine social norms. Raped women are stigmatized because of the loss of their purity, but the *"rape of women does not subvert social constructions of women*", which typically define women as dependent and in need of men's protection, but undermines it. In contrast, the rapes of men demonstrate to the community that the victims "are not even able to protect themselves", thus, they are deprived of their social role.[185]

Despite the widespread diffusion of the phenomenon and its serious consequences, the present international human rights framework is inadequate for addressing this problem because of a "female-specific" approach to sexual violence, developed in context of the United Nations policymaking.[186] In fact, the international instruments that include the most comprehensive definitions of sexual violence exclude men.

Lara Stemple denounced this use of a "female-specific approach", instead of a "gender-approach", that would be able to explain all the implications that sexual violence have also on men's life. She noted that *"there are well over one hundred uses of the term violence against women intended to include sexual violence in UN resolutions, treaties, general comments, and consensus documents. No human rights instruments explicitly address sexual violence against men."*[187]

For example, the UN Security Council Resolution establishing the International Criminal Tribunal for the Former Yugoslavia explicitly reported the grave concern of the United Nations regarding: *"massive, organized and systematic detention and rape of women."* It did not mention men, notwithstanding the fact that many men in detention were subject to various forms of sexual torture and sterilization.[188]

However, while the understanding of the term "violence against women" do not include violence against men, another concept, i.e. "gender-based violence", could be referred to male also. Nevertheless, regrettably gender-based violence is usually used to describe female victimization, leaving no space for a gender analysis of male rape.[189]

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[184] Vojdik, "Sexual Violence against Men and Women in War", supra at 10, p. 932, reporting Pauline Oosterhoff et al., "Sexual Torture of Men in Croatia and Other Conflict Situations: An Open Secret", 12 Reprod. Health Matters 68, 2004, p. 71

[185] Augusta Del Zotto and Adam Jones, "Male-on-Male Sexual Violence in Wartime: Human Rights' Last Taboo?", Paper presented to the Annual Convention of the International Studies Association (ISA), New Orleans, LA, 23-27 March 2002, available at: http://adamjones.freeservers.com/malerape.htm

[186] Stemple, "Male Rape and Human Rights", supra at 164, p. 619

[187] Stemple, "Male Rape and Human Rights", supra at 164, p. 619

[188] S/RES/827 (1993), 25 May 1993

[189] Just to give an example, the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), defined gender-based violence in its General Recommendation No. 19: "gender-based violence is a form of discrimination that seriously inhibits women's ability to enjoy rights and freedoms on a basis of equality with men." (para 1) The committee further noted that "the definition of discrimination [found in CEDAW, article I] includes gender-based violence, that is, violence that is directed against a woman because she is a woman or that affects women disproportionately."

For example, the United Nations Security Council Resolution 1325 (2000) called upon all parties to armed conflict *"to take special measures to protect women and girls from gender-based violence."*

Stemple noted that, in addition to the definition of gender-based violence as a violence that affects women, the term "violence against women" is defined as a form of gender-based violence, in human rights instruments.[190] For example, the Beijing Declaration and Platform for Action explained that *"the term violence against women means any act of gender-based violence that results in, or is likely to result in physical, sexual or psychological harm or suffering to women."*[191]

Stemple concluded that this *"tendency to use gender-based violence and violence against women to define one another"* perpetuates the typified role of the two sexes, regarding women as victims and men as solely perpetrators, although it is reported that women as well as men have been perpetrators. In Sierra Leone and in Congo, for example, female combatants sexually abused men.[192]

Therefore, in general, an interpretation of the UN instruments as including male victims is rarely possible but, for example, the Convention on the Rights of the Child uses a sex neutral approach to sexual abuse.[193]

Recently, Ms. Bangura, who is the UN Special Representative on Sexual Violence in Conflict, identified several issues relative to male sexual violence that require immediate attention, including the necessity of addressing inadequacies in the legal frameworks that ignore or criminalize male victims and allow perpetrators to enjoy impunity, as well as granting victims access to adequate medical and psychosocial services.[194]

Moreover, the Rome Statute provides a definition of rape that is able to include the victimization of men and contains the first definition of "gender" in an international treaty: *"the two sexes, male and female, within the context of society"*.[195]

Conflict	Number of male victims
Bosnian War	Undetermined number of male victims: a study of 6,000 concentration camp in Sarajevo Canton, calculated that 80% of the men detained were subjected to sexual violence
Liberia	32.6% of the male former combatants studied endured sexual violence
DRC	23,6% of the male population has been abused
El Salvador	76% of male political prisoners experienced sexual torture
Sri Lanka	21% of Tamil males experienced sexual torture

[190] Stemple, "Male Rape and Human Rights", supra at 164, p. 620
[191] Ibid. The Beijing Declaration was adopted in 1995, at the Fourth World Conference on Women
[192] Vojdik, "Sexual Violence against Men and Women in War", supra at 10, p. 928, reporting Physicians For Human Rights, War-Related Sexual Violence In Sierra Leone: A Population-Based Assessment 136 n. 311 (2002)
[193] Convention on the Rights of the Child (1989), Art. 19
[194] UN forum highlights plight of male victims of sexual violence in conflict, 30 July 2013, available at: http://www.un.org/apps/news/story.asp?NewsID=45532#.VIrDftKG9pk
[195] ICC Statute, Art. 7(3)

2.6.1 The peculiarities of sexual violence against men as a gendered weapon of war

Like the rape of female victims, sexual violence against male victims functions to masculinize and empower the perpetrator/collective and feminize/conquer the victim/collective.[196]

Sexual violence of men encompasses both physical and mental abuse, that is why it is so effective as a weapon of war: it shatters the individual and the community.

"The rape of men during war, like the rape of women, is not about sexual desire, but rather masculine domination".[197] In fact, the various forms of sexual violence against men have the purpose to shame and humiliate them: the public nature of many of these acts indicates a concerted attempt to degrade and destroy the victims as well as their role in the community. Rape is used to "emasculate", to "feminize" victims as a way to disempower them.

In Congo, a victim reported that the people in the village insulted him, saying that he was no longer a man, after the men *"in the bush made of him their wife"*.[198] In this respect, sexual violence against men is a gender-based form of violence: the term "gender" refers to the socially constructed roles, behaviors, activities and attributes that a society considers appropriate for men and women.[199] Men rapists, taking advantage of the social perception of feminine and masculine roles, emphasize "*their heterosexual identity by feminizing their victims and enforcing their role as the penetrative partner."*[200] Such a sexual interaction typifies a *"gendered power-play of masculinized dominance and feminized subordination"*.[201]

In a situation in which the perpetrator's role is viewed as masculine and the victim's one as feminine,[202] when men are raped, they symbolically lose their gender identity as men.[203] In fact, not being able to protect themselves, the male victims of rape also lose one of the basic attributes of masculinity, which is the ability to protect the family and the community.[204] This shame is aggravated by the risk for the victims to be viewed as homosexual by the community and even prosecuted for their supposed homosexuality.[205]

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[196] Vojdik, "Sexual Violence against Men and Women in War: a Masculinities Approach", supra at 10, p. 927; reporting: Sandesh Sivakumaran, "Sexual Violence against Men in Armed Conflict", 18 EuR. J. INT'L L. 253, 2007, p. 268

[197] Vojdik, "Sexual Violence against Men and Women in War: a Masculinities Approach", supra at 10; reporting: Sandesh Sivakumaran, "Sexual Violence against Men in Armed Conflict", 18 EuR. J. INT'L L. 253, 2007, p. 276

[198] J. Gettleman, "Symbol of Unhealed Congo: Male Rape Victims", New York Times, 5 August 2009

[199] Definition provided by the World Health Organization, available at: http://www.who.int/gender/whatisgender/en/ The theme of gender is treated also in Chapter 5.1.6

[200] Stemple, "Male Rape and Human Rights", supra at 164, p. 630, reporting: Sasha Gear, "Behind the Bars of Masculinity: Male Rape and Homophobia in and About South African Men's Prisons", 10 SEXUALITIES 209, 2007, pp. 216-17

[201] Stemple, "Male Rape and Human Rights", supra at 164, p. 627

[202] Stemple, "Male Rape and Human Rights", supra at 164, p. 633; reporting: Sasha Gear, "Behind the Bars of Masculinity: Male Rape and Homophobia in and About South African Men's Prisons", 10 SEXUALITIES 209, 2007 at p. 214.

[203] Vojdik, "Sexual Violence against Men and Women in War", supra at 10; reporting: Sandesh Sivakumaran, "Sexual Violence against Men in Armed Conflict", 18 EuR. J. INT'L L. 253, 2007, pp. 265-266

[204] Stemple, "Male Rape and Human Rights", supra at 164, p. 633

[205] Vojdik, "Sexual Violence against Men and Women in War", supra at 10: affirms that homosexuality is still a crime in more than 70 countries.

In such a social context, some heterosexual victims of rape even fear that their sexual orientation alters**:** the fact that society associates the sexual abuse with femininity and homosexuality, leads the victim to feel that his conceptualization of his own "manhood" is threatened.[206]

These findings are confirmed in the fact that also other wartime forms of sexual violence such as nude poses, the use of women's underwear and castration seem to be a directed affront to the victims' masculine identity.[207]

Therefore, the humiliation, the pain and the fear inflicted by the perpetrators serve to dominate and degrade not only the individual victims but also their communities.

It has been properly argued that *"rape had been used like a weapon to exercise power and to have control over a community. The men who have been victims of rape it's like […they are no longer men] because of what it happened to [them]."*[208]

Sexual violence against both men and women works as a *"gendered means of dominance"* used by a group over another. A report on sexual violence in the eastern Democratic Republic of Congo stated that such a form of violence is *"the ultimate display of power and dominance […] used by the opposing force to signify the weakness and inadequacy of the men in the targeted social grouping or community. These men absorb this message, perceiving their inability to protect women against assault as their own final humiliation in the war."*[209]

Moreover, sexual violence against men, like that against women, is an effective instrument of genocide, used to prevent births among a specific ethnic group, through sterilization or the refuse of sex that the victim may suffer after the abuse.

Conclusively, it can be observed that also sexual violence against men is a form of gender-based violence that target the role of men in society. As it is for women, rape is an act of domination and of control, by which the perpetrator wants to affirm his power over the victim and over the victim's community. Therefore, it is possible to characterize wartime sexual violence against both women and men as a "gendered weapon of war",[210] used to terrorize and displace the population.

[206] Stemple, "Male Rape and Human Rights", supra at 164, p. 633, reporting: Sasha Gear, "Behind the Bars of Masculinity: Male Rape and Homophobia in and About South African Men's Prisons", 10 SEXUALITIES 209, 2007, p. 214
[207] Stemple, "Male Rape and Human Rights", supra at 164, p. 614
[208] J. De Capua, "Both Women and Men Victims of Rape in the Eastern DRC", 26 November 2008, available at: www.VOAnews.com
[209] Vojdik, "Sexual Violence against Men and Women in War", supra at 10, p. 947; reporting Susan Bartels Et Al., "Now, The World Is Without Me: An Investigation Of Sexual Violence In Eastern Democratic Republic Of Congo", 2010
[210] Vojdik, "Sexual Violence against Men and Women in War", supra at 10

2.6.2 The prosecution of sexual violence against men: the problem of re-characterization

The current prosecutions of male sexual violence has been dissatisfying.

The ICTY has prosecuted some cases of male sexual violence.

In Prosecutor v. Tadić, the defendant was convicted of various abuses against male detainees, including forcing two prisoners *"to commit oral sexual acts"* and forcing one of them to *"sexually mutilate the other".*[211]

Other instances have encompassed charges for acts such as beating the genitals, *"bit[ing] the penis",* "*forced oral sex", "forcing two brothers to perform fellatio to each other*".[212] Often these crimes took place in front of other detainees and commanders, in order to publicly humiliate the victims.

The ICTR has been far less solicitous in the prosecution of male sexual violence, despite the evidence showing a large diffusion of this form of violence. In fact, the evidence remained at the level of background information,[213] with one exception: the Niyitegeka case. In fact, the Chamber found the accused guilty of other inhumane acts, as crimes against humanity for *inter alia*, his act of encouragement during the killing and castration of a victim.[214]

The Special Court for Sierra Leone (SCSL)[215] prosecuted sexual violence against men only in the Revolutionary United Front (RUF) case. In fact, both the Charles Taylor[216] and the Armed Forces Revolutionary Council (AFRC)[217] indictments referred specifically to "women and girls" as victims of the sexual violence crimes charged and the Trial Chambers found that this restrictive reference could not be considered to have been subsequently corrected to include men and boys. On the contrary, the RUF Trial Chamber observed that, although the Prosecution had not pleaded forms of sexual violence committed against male victims, it had provided clear, timely and consistent notice of sexual violence crimes directed against men and boys able to cure the defect in the indictment.[218] In particular, the evidence referred to an incident in which some captured male and female civilians were ordered to undress, paired up and then ordered to have sex with each other. The sexual violence was combined with sexual mutilations, with the rebels *"slitting the private parts of several male and female civilians with a knife"*.[219]

In relation to sexual violence against men, it can be observed that a problem of approach exists: sexual violence crimes, when prosecuted, are not prosecuted as such, but as the underlying acts of other crimes. This approach is based on the common idea that sexual violence affects only

[211] Prosecutor v. Duško Tadić, IT-94-1-T, Trial Judgment, 7 May 1997, para 206
[212] Prosecutor v. Stevan Todorović, IT-95-10/1-S, Trial Judgment, 2001 paras 36-40; Prosecutor v. Milomir Stakić, IT-97-24-T, Trial Judgment, 2003, para 241; Prosecutor v. Ranko Cesić, IT-95-10/1-S, Trial Judgment, 2004, paras 13-14
[213] Prosecutor v. Mikaeli Muhimana, ICTR-95-1-T, Trial Judgment, 2005, paras 441-444; Prosecutor v. Bagosora et al., ICTR-98-41-T, Trial Judgment, 2008, para 1908
[214] Prosecutor v. Eliéze Niyitegeka, ICTR-96-14-T, Trial Judgment, 2003, para 467
[215] For information on the SCSL and on its cases, see Chapter 4.2.6
[216] Prosecutor v. Charles Taylor, SCSL-03-01-T, Trial Judgment, 18 May 2012, paras 124-134
[217] Prosecutor v. Brima, Kamara and Kanu, SCSL-04-16-T, Trial Judgment, 20 June 2007, para 966
[218] Prosecutor v. Sesay, Kallon and Gbao, SCSL-04-15-T, Trial Judgment, 2 March 2009, para 1308
[219] Ibid., paras 1207 and 1208

women and girls and leads to an underestimation of the same acts of sexual violence, when committed against men.

For example, the charges against Tadić did not categorized neither the forced fellatio nor the castration of male detainees as rape, under Article 5 of the ICTY Statute, but rather as examples of "great suffering or serious injury to body or health," "cruel treatment" and "inhumane acts".[220]

In Prosecutor v. Simić et Al., the ICTY Trial Chamber defined as torture and not as rape the *"ramming [of] a police truncheon in the anus of a detainee" and "forcing male prisoners to perform oral sex on each other [and on one of the perpetrators], sometimes in front of other prisoners"*.[221]

Similarly, in Prosecutor v. Niyitegeka, the ICTR Trial Chamber characterized castration as an inhumane act.[222]

These sexual violence conducts were not characterized as rape, although, in other cases, the ICTY classified forced oral penetration[223] and the penetration[224] of the anus with objects as rape. Therefore, *"charges tend not to be characterized as male rape",* with few exceptions, for example, the ICTY Ĉešić case.[225]

Although rape can be prosecuted as rape or as torture; castration may be prosecuted as torture, enforced sterilization or as willfully causing great suffering; enforced nudity may be prosecuted as inhumane treatment, another inhumane act, another form of sexual violence,[226] the danger is that, when the sexual abuses regard men, the sexual aspect may be ignored.

This re-characterization of sexual violence as torture, inhuman treatments or inhumane acts has several negative effects:

- it ignores the emotional and physical harm suffered by men from the loss of their sexual autonomy and dignity;
- it renders invisible the gendered aspect of sexual violence against men;
- it causes a "normalization," a sort of "legitimation" of the deliberate use of sexual violence by armed forces.[227]

When male sexual violence crimes are prosecuted, they should be characterized as such.

Currently, instances of male sexual violence are within the ICC's concern in the Central African Republic (CAR):

Credible reports indicate that rape has been committed against civilians, including […] against elderly women, young girls and men.

[220] Prosecutor v. Duško Tadić, IT-94-1-T, Trial Judgment, 7 May 1997, para 45
[221] Prosecutor v. Blagoje Simić, Miroslav Tadić, Simo Zarić, IT-95-9-T, Trial Judgment, 2003, paras 728, 772
[222] Prosecutor v. Eliézer Niyitegeka, ICTR-96-14-T, Trial judgment, paras 462, 467
[223] Prosecutor v. Anto Furundžija, IT-95-17/1-T, Trial Judgment, para 183
[224] Ibid., para 185. See also Prosecutor v. Dragoljub Kunarac et al., IT-96-23-T&IT-96-23/1-T, Trial Judgment, para 460. For further information, see Chapter 4.2
[225] Prosecutor v. Ranko Ĉešić, IT-95-10/1-S, Trial Judgment, 2004, para 52: "sexual assault involving two brothers"
[226] "Sexual Violence as an International Crime", Anne-Marie de Brouwer, Charlotte Ku, Renée Römkens and Larissa van den Herik (eds.), 2012, Chapter IV (Sandesh Sivakumaran), pp. 92-93
[227] Vojdik, "Sexual Violence against Men and Women in War", supra at 10

There were often aggravating aspects of cruelty, such as rape committed by multiple perpetrators, in front of third persons, with sometimes relatives forced to participate.
The social impact appears devastating, with many victims stigmatized and reportedly for a number of them, infected with the HIV virus.[228]

Jean-Pierre Bemba Gombo, the former vice-president of Congo and leader of the country's main opposition party, the *Mouvement de Libération du Congo* (MLC), is charged with rape of men, women and children. The Pre-Trial Chamber, in confirming the charges, ascertained that MLC soldiers, on the CAR territory, committed rapes from about 26 October 2002 to 15 March 2003.[229]

Regrettably, although the previous Special Representative of the UN Secretary-General on Sexual Violence in Conflict described the DRC as *"the rape capital of the world"*[230] and it is generally recognized that among the victims there were also men,[231] Thomas Lubanga Dyilo, the leader of the rebel group Congolese Patriotic Union, was not charged with sexual crimes.[232]

[228] Background: Situation in the Central African Republic, ICC-OTP-BN20070522-220-A_EN, 22 May 2007
[229] Prosecutor v. Jean-Pierre Bemba Gombo, ICC-01/05-01/08, Decision pursuant on the Charges of the Prosecutor against Jean-Pierre Bemba Gombo, 2009, paras 171-172, 286
[230] Security Council 6302nd Meeting , 27 April 2010, S/PV.6302
[231] J. Gettleman, "Symbol of Unhealed Congo: Male Rape Victims", New York Times, 5 August 2009, referring a figure of the sexual violence legal clinic in Goma, run by the American Bar Association
[232] Prosecutor v. Thomas Lubanga Dyilo, ICC-01/04-01/06, Decision on the Confirmation of Chargers, 29 January 2007

3. INTERNATIONAL LAW INSTRUMENTS ON SEXUAL VIOLENCE

CONTENTS: 3.1 Introduction – 3.2 International humanitarian law and the protection from sexual violence – 3.2.1 The Geneva Conventions of 1949 and the Additional Protocols of 1977 – 3.3 Human rights law and the protection from sexual violence – 3.4 Further United Nations' efforts to end conflict-related sexual violence – 3.4.1 UNiTE to end violence against women – 3.4.2 UN Special Representative on sexual violence in conflict – 3.4.3 UN Security Council Resolutions – 3.5 The process of criminalization at the international level of war crimes, crimes against humanity and genocide – 3.5.1 The development of the definition of war crimes – 3.5.1.1 The elements of war crimes – 3.5.2 The development of the definition of crimes against humanity – 3.5.2.1 The elements of crimes against humanity – 3.5.3 The development of the definition of the crime of genocide – 3.5.3.1 The elements of the crime of genocide – 3.5.4 War crimes, crimes against humanity, genocide and sexual violence crimes specifically, as *jus cogens* crimes

3.1 Introduction

It is specifically international humanitarian law, commonly referred to as the law of war, the body of international law that attempts to limit the destructive effects of war.[1] It establishes a discipline on the means and the methods of warfare, regulating the conduct of hostilities on the ground, by air and at sea, imposing a distinction between combatants and noncombatants and defining a standard of treatment of wounded combatants and prisoners of war.[2] In particular, it impedes warring parties to target civilians for attacks.[3]

The fundamental international humanitarian law is encompassed in the 1907 Hague Conventions and Regulations and in the four 1949 Geneva Conventions with their annexes and their two 1977 Additional Protocols. International humanitarian law previously regulated international armed conflicts only, but recently has commenced to rule non-international ones, also.[4] Significantly, the ICTY Appeals Chamber in the Tadić Decision on Jurisdiction noted that, as far as the human beings are concerned, the distinction between interstate wars and internal wars is losing its value.[5]

[1] Kelly D. Askin, "Prosecuting Wartime Rape and Other Gender-Related Crimes under International Law: Extraordinary Advances, Enduring Obstacles", 21 Berkeley J. Int'l Law. 288, 2003, Stefan A. Riesenfeld, Symposium 2002 "Crimes against Women under International Law" [hereinafter: Askin, "Prosecuting Wartime Rape"]

[2] Ibid.

[3] See: Articles 48-58 of the Additional Protocol I (Protocol Additional to the Geneva Conventions of 12 August 1949 and Relating to the Protection of Victims of International Armed Conflicts) stipulate requirements for protecting civilians from the effects of hostilities. Essentially, attacks may only be directed against military objectives and precautions must be taken to prevent incidental death to civilians and harm to civilian objects

[4] Askin, "Prosecuting Wartime Rape", supra at 1

[5] Prosecutor v. Duško Tadić, IT-94-1-AR72, Decision on the Defense Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995, para 97

It can be noted that international humanitarian law has substantial similarities and important differences with international criminal law and international human rights law.[6] Although, each body of law grants certain protections to individuals during armed conflicts and there are significant coincidences in the methods indicated to grant such a protection, international humanitarian law can be only applied once an armed conflict is commenced, instead, crimes against humanity and genocide do not require a connection to war, in order to be prosecuted.[7] Both international human rights law and international humanitarian law proscribe torture and slavery, but international human rights law needs state's action or acquiescence to operate, instead, international humanitarian law, demands the connection with an armed conflict.[8] In addition, international criminal law forbid slavery and torture; indeed, there is a growing tendency to recognize the most serious human rights and humanitarian law's violations as international crimes.[9] Furthermore, some treaties, such as the Genocide Convention, explicitly dictate criminal sanctions, in case of transgression.[10]

Therefore, in a context of war, not only international humanitarian law, but also international human rights law provides protection of individuals and, in addition, international criminal law may be an effective deterrent to the commissions of the most serious crimes, by the menace of criminal sanctions.

More in general, the sources of international law[11] are listed in Article 38 of the Statute of the International Court of Justice (ICJ), whose function is to decide in accordance with international law:

1. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;
2. international custom, as evidence of a general practice accepted as law;
3. the general principles of law recognized by civilized nations;

[6] Askin, "Prosecuting Wartime Rape", supra at 1

[7] Ibid.

[8] Askin, "Prosecuting Wartime Rape", supra at 1. See Prosecutor v. Duško Tadić, IT-94-1-AR72, Decision on the Defense Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995, para 70, giving the definition of an armed conflict as "exist[ing] whenever there is a resort to armed force between states or protracted armed violence between governmental authorities and organized armed groups or between such groups within a state." Moreover, "international humanitarian law applies from the initiation of such armed conflicts and extends beyond the cessation of hostilities until a general conclusion of peace is reached; or, in the case of internal conflicts, a peaceful settlement is achieved. Until that moment, international humanitarian law continues to apply in the whole territory of the warring states or, in the case of internal conflicts, the whole territory under the control of a party, whether or not actual combat takes place there.

[9] Askin, "Prosecuting Wartime Rape", supra at 1

[10] For example, Article 1 of the Genocide Convention requires states parties to "prevent and punish" genocide, "a crime under international law." Convention on the Prevention and Punishment of the Crime of Genocide.

[11] The International Court of Justice (ICJ) is the principal judicial organ of the United Nations (UN). It was established in June 1945 by the Charter of the United Nations and began work in April 1946. It has jurisdiction on:

- contentious issues between states, in which the court produces binding rulings between states that agree, or have previously agreed, to submit to the ruling of the court;
- advisory opinions, which provide reasoned, but non-binding, rulings on properly submitted questions of international law, usually at the request of the United Nations General Assembly.

4. the 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.

Sources of international law encompasses treaties, which are the strongest and most binding sources because they are consensual agreements between the states who signed and ratified them, thus, they are contractual in nature. Signatory states may discuss the interpretation or the implementation of a treaty, but its provisions are binding.

Moreover, rules of international law can be found in customary international law, as evidence of a general practice of states that they accept as law. It is difficult to ascertain customary international law because it is based on implied consent, evidenced by a general and consistent practice of states, followed because of a sense of legal obligation, namely the *opinio juris*, since states believe that acting otherwise would be illegal.

The general principles of law recognized by civilized nations include certain legal beliefs and practices that are common to all developed legal systems. They are based on the theory of "natural law," which sustains that laws are a reflection of the instinctual belief that some acts are right whereas others are wrong.

The last two sources of international law are considered *"subsidiary means for the determination of rules of law."* These sources are not by themselves part of international law but, when combined with evidence of international custom or general principles of law, they may help to found the existence of a particular rule of international law. Especially influential are judicial decisions, both of the International Court of Justice (ICJ) and of the national courts. The ICJ is considered an authoritative expounder of law and when the national courts of many countries start applying a certain principle as the legal basis of their judgments, this may prove a developing general acceptance of that principle, thus, it may be considered part of international law.

Legal scholarship, is not really authoritative in itself, but may describe rules of law that are widely recognized all around the world.[12]

Focusing specifically on the opinion of the ICJ concerning the binding effect of the UN Resolutions, the binding effect of General Assembly (GA) resolutions is limited *ratione materiae*, to organizational matters and, *ratione personae*, to the UN member states.[13]

Although GA resolutions are recommendatory as a rule, especially when regarding external relations with member states, the Court has recognized the binding legal effect of GA decisions in case of the admission of new member states, voting procedure, allocation of the budget and, in general, has confirmed that the GA has certain powers of decision. The Court has never clarified if the GA has

[12] Globalization 101, "What Are the Sources of International Law?", available at: http://www.globalization101.org/what-are-the-sources-of-international-law/
See also: Governance and Social Development Resource Centre (GSDRC), "International Legal Frameworks for Humanitarian Action", Topic Guide, available at: http://www.gsdrc.org/go/topic-guides/international-legal-frameworks-for-humanitarian-action/concepts/-principles-and-legal-provisions/introduction-to-international-law

[13] Marko Divac Öberg, "The Legal Effects of Resolutions of the UN Security Council and General Assembly in the Jurisprudence of the ICJ", Oxford Journals, 16(5) European Journal of International Law 879-906, 2005, available at: http://ejil.oxfordjournals.org/content/16/5/879.full#fn-24 [hereinafter: Öberg, "The Legal Effects of Resolutions of the UN"]

any decisional powers in mandate/trusteeship matters; however, the resolutions of the GA have no binding effect in the operational field of international peace and security.[14]

The binding effect of UN Security Council (SC) resolutions, r*atione materiae,* concerns the field of international peace and security and includes enforcement but is not limited to that and, *ratione personae,* covers all UN member states.

Whether a specific SC resolution is binding, is determined, inter alia, *"by the language used in it, the discussions leading to it, the Charter provisions invoked, all with the purpose of establishing the intent of the Security Council"*.[15]

Therefore, it can be observed that international law can be divided in two categories: "soft law" and "hard law". Soft law refers to those weak provisions of international agreements not entailing obligations, whereas hard law refers to actual binding legal instruments.

The following tab reports the most important international legal instruments adopted to put an end to violence against women.

[14] Öberg, "The Legal Effects of Resolutions of the UN", supra at 13
[15] Öberg, "The Legal Effects of Resolutions of the UN", supra at 13

International law instruments applicable to stop violence against women (VAW) in conflict-related situations	
Treaties	UN Charter (1945) UN Convention on the Prevention and Punishment of the Crime of Genocide (1948) 1949 Geneva Conventions and their 1977 Additional Protocols International Covenant on Civil and Political Rights (ICCPR) (1966) UN Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) (1979) and its Optional Protocol (2000) UN Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (1984) UN Convention on the Rights of the Child (1989) Rome Statute of the International Criminal Court (1998)
Regional Human Rights Treaties	Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women (1994) Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (2003) Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence (2011)
Declarations and other Sources	Universal Declaration of Human Rights (1948) UN Declaration on the Protection of Women and Children in Emergency and Armed Conflict (1974) Convention on the Elimination of Discrimination against Women (1979), General Recommendation 19 (1992), Additional Protocol (2000) UN Declaration on the Elimination of Violence against Women (1993) Vienna Declaration and Program of Action (World Conference on Human Rights in Vienna, 1993) Cairo Declaration and Program of Action (International Conference on Population and Development, 1994) Beijing Declaration and Platform for Action (Fourth World Conference on Women, 1995) Durban Declaration and Program of Action (World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance, 2001)
Un Security Council Resolutions	- UN Security Council Resolution 1325 (2000) - UN Security Council Resolution 1820 (2008) - UN Security Council Resolution 1888 (2009) - UN Security Council Resolution 1889 (2009) - UN Security Council Resolution 1960 (2010) - UN Security Council Resolution 2106 (2013) - UN Security Council Resolution 2122 (2013)

3.2 International humanitarian law and the protection from sexual violence

"International humanitarian law comprises a set of rules, established by treaty or custom, that seeks to protect persons and property/objects that are (or may be) affected by armed conflict and limits the rights of parties to a conflict to use methods and means of warfare of their choice".[16] It has two principal sources: (1) the "Law of Geneva," consisting of the four Geneva Conventions of 1949[17] supplemented by the two Additional Protocols of 1977[18] and (2) the "Law of The Hague,"[19] consisting of the Hague Conventions of 1899 and 1907.[20] The "Law of The Hague" and the "Law of Geneva" are not simply treaty law, because they incorporate the customary law of armed conflicts.[21]

In 1899 and then again in 1907, the customary law of armed conflicts was "codified" in the Hague Convention Respecting the Laws and Customs of War on Land. The Hague law consists mainly of restraints on the conduct of hostilities, containing the prohibition of certain methods and means of warfare. This codification is applicable only to states and only in case of conflicts between states.[22]

Therefore, the 1907 Hague Convention did not establish the principle of individual criminal responsibility, but only the principle of compensation, which was "the penalty" for the violating state. In fact, it was only at the end the World War I, but especially at the end of the World War II, that the principles of individual criminal responsibility and of command responsibility under international law became part of customary law.[23] In addition to this original customary law of armed conflicts, a number of international instruments have been adopted.[24]

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[16] GSDRC, International Legal Frameworks for Humanitarian Action, Topic Guide, supra at 12

[17] 1. Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12 1949, (entered into force Oct. 21, 1950), (entered into force with respect to the United States Feb. 2, 1956); 2. Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Aug. 12, 1949 (entered into force Oct. 21, 1950) (entered into force with respect to the United States Feb. 2, 1956; 3. Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, (entered into force Oct. 21, 1950) (entered into force with respect to the United States Feb. 2, 1956); 4. Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, (entered into force Oct. 21, 1950) (entered into force with respect to the United States Feb. 2, 1956)
For further details, see Chapter 3.2.1

[18] Protocol Additional to the Geneva Conventions of 12 August 1949 and Relating to the Protection of Victims of International Armed Conflicts of 8 June 1977 (entered into force 7 December, 1978); Protocol Additional to the Geneva Conventions of 12 August 1949 and Relating to the Protection of Victims of Non-International Armed Conflicts, Dec. 12, 1977, (entered into force Dec. 17, 1978)

[19] Hague Conventions of 1989 and 1907

[20] M. Cherif Bassiouni, "The Normative Framework of International Humanitarian Law: Overlaps, Gaps and Ambiguities", Symposium: International Human Rights at Fifty, 8 Transnat'l L. & Contemp. Probs. 199, 1998 [hereinafter: Bassiouni, "The Normative Framework of International Humanitarian Law"]. See also Antonio Cassese, "Cassese's International Criminal Law", Oxford University Press, 31 January 2013,

[21] Bassiouni, "The Normative Framework of International Humanitarian Law", supra at 20

[22] i.e. international conflicts, but that term was developed subsequently, in the 1949 Geneva conventions (Bassiouni, "The Normative Framework of International Humanitarian Law", supra at 20)

[23] Bassiouni, "The Normative Framework of International Humanitarian Law", supra at 20

[24] Bassiouni, "The Normative Framework of International Humanitarian Law", supra at 20: "Most of these cover the use or prohibition of use of certain weapons in time of war, the prohibition of certain weapons at all times, and the prohibition of emplacement of weapons in certain places at any time; as well as the protection from destruction and pillage of cultural property in the time of war. There is a divergence of views among governments and experts as to which of these treaties rise to the level of a general custom and which do not. Nevertheless, a general custom has

The "Law of Geneva" focuses on the protection of non-combatants, individuals who are not or are no longer taking part in hostilities.[25] This law, at least partly, has risen to the level of general custom,[26] therefore binding on all states, regardless of whether the state has or has not ratified one of the conventions.[27]

International humanitarian law instruments furnish both general and detailed provisions on the treatment of protected persons during wartime but, regrettably, rules protecting specifically women are marginal and inadequate.

In the Hague Conventions and Regulations only Article 46, indirectly, prohibits sexual violence as a violation of "*family honour*".

The four 1949 Geneva Conventions were adopted after the World War II and the subsequent Nuremberg and Tokyo war crimes trials. Despite the fact that during World War II sexual violence was widespread and that the subsequent Nuremberg and Tokyo trials were not capable to prosecute it properly, among the 429 Articles that compose the four 1949 Geneva Conventions, only one sentence of Article 27, explicitly protects women against "rape" and "enforced prostitution" and only a few other provisions, can be interpreted as indirectly referred to the prohibition of sexual violence.[28]

With regard to the two 1977 Additional Protocols to the Geneva Conventions, only one Article each, respectively Articles 76 and 4, explicitly prohibit some forms of sexual violence.[29]

The 1974 Declaration on the Protection of Women and Children in Emergency and Armed Conflict, instead, did not mention of sexual violence.

3.2.1 The Geneva Conventions of 1949 and the Additional Protocols of 1977

The 1949 four Geneva Conventions and their Additional Protocols are international treaties. They incorporate the most important rules focused on restraining the barbarity of wars, thus, they constitute the core of international humanitarian law.[30] They specifically protect noncombatants,

evolved from the cumulative effect of these treaties that weapons that "cause unnecessary pain and suffering" are prohibited even though what these weapons are is still the subject of debate". In particular, Bassiouni listed 35 treaties on the control of weapons.

[25] For further information, see Chapter 3.2.1

[26] Bassiouni, "The Normative Framework of International Humanitarian Law", supra at 20, referring to Theodor Meron, "The Continuing Role of Custom in the Formation of International Law," 90 AM. J. INT'L L. 238, 1996

[27] Bassiouni, "The Normative Framework of International Humanitarian Law", supra at 20: Bassiouni underlined that some states (like the United States) sustain that only portions of Protocols I and II codify customary international law and therefore some of their provisions are considered as part of conventional law, applicable only to states Parties. Obviously, the selection of what is and what is not part of custom, on the basis of political considerations, challenges the legal exercise of these conventions.

[28] Kelly D. Askin, "Prosecuting Wartime Rape", supra at 1

[29] Ibid.

[30] "The Geneva Conventions of 1949 and their Additional Protocols", Overview, 29 October 2010, available at: https://www.icrc.org/eng/war-and-law/treaties-customary-law/geneva-conventions/overview-geneva-conventions.htm

so people who do not take part in the hostilities (civilians, health workers, aid workers) and those who cannot fight any longer (wounded, sick and shipwrecked troops, prisoners of war).[31]

It is important to emphasize that these four Geneva Conventions established that the most serious violations of their provisions,[32] the so-called "grave breaches", encompasses individual criminal responsibility.[33] However, the International Criminal Tribunal for the former Yugoslavia and Rwanda clarified that also other serious violations of the Geneva Conventions, different from the grave breaches, entail individual criminal liability.[34]

The Geneva Conventions entered into force on 21 October 1950.

Ratifications increased through the decades and, at present, states parties are 194, consequently, it can be said that the Geneva Conventions are universally applicable.[35]

In reaction to the increasing number of non-international armed conflicts and wars of national liberation, in 1977, were adopted two Additional Protocols. They strengthen the protection of victims of international (Protocol I) and non-international (Protocol II) armed conflicts and imposed limits in the ways wars should be fought. The Additional Protocol II was the first international treaty, dedicated exclusively to non-international armed conflicts.[36]

The first Geneva Convention protects wounded and sick soldiers on land during war.

This Convention is the fourth revised version of the Geneva Convention on the wounded and sick, successive to those adopted in 1864, 1906 and 1929. It grants protection to the wounded and sick, but also to medical and religious personnel.[37]

The second Geneva Convention protects wounded, sick and shipwrecked military personnel at sea during war.

This Convention substituted the Hague Convention of 1907 for the Adaptation to Maritime Warfare of the Principles of the Geneva Convention. It is similar to the first Geneva Convention in structure and content, but its provisions are specifically referred to war at sea.[38]

The third Geneva Convention covers the protection of war's prisoners.

This Convention replaced the Prisoners of War Convention of 1929. It precisely establishes a standard for conditions and places of captivity, particularly with reference to the labor of prisoners, their financial resources and the judicial proceedings against them. The Convention establishes the principle that prisoners of war have to be released and repatriated at the end of the hostilities. In

[31] Ibid.
[32] Ibid.
[33] See the four Geneva Conventions of 1949 and Protocol I of 1977, each have a definition of what constitutes grave breaches: GC I, Art. 50; GC II, Art. 51; GC III, Art. 130; GC IV, Art. 147
[34] In fact, Common Article 3 to the Geneva Convention and Protocol II do not contain implementation or enforcement provisions. See Prosecutor v. Duško Tadić, IT-94-1-AR72, Decision on the Defense Motion for Interlocutory Appeal on Jurisdiction, 10 August 1995, para 70: "The individual criminal responsibility of the violator need not be explicitly stated in a convention for its provisions to entail individual criminal liability."
[35] "The Geneva Conventions of 1949 and their Additional Protocols", Overview, supra at 30
[36] Ibid.
[37] Ibid.
[38] Ibid.

particular, the Third Geneva Convention grants that prisoners of war remain entitled to respect for *"their persons and their honour"* and referring to women, specifies that they shall be treated with *"all the regard due to their sex"*.[39]

The Fourth Geneva Convention is relative to the protection of civilians, in the occupied territory. It proclaims the principle of respect for the human person and the inviolable character of the fundamental rights of individuals, which, being included in the Convention, acquire the character of legal obligations.[40]

More specifically, Article 27 requires, for the protected person, human treatment and protection against all acts of violence or threats thereof. Moreover, women should be especially preserved from any *"attack of their honour",* in particular, from *"rape, enforced prostitution or any form of indecent assault".*[41]

Similarly, the Additional Protocols I and II affirm that the prohibition of "outrages upon personal dignity" is a fundamental guarantee for civilians and noncombatants in general respectively in international and non-international armed conflict.

More precisely, in the Additional Protocol I, Article 76 clarifies that this prohibition covers in particular *"rape, forced prostitution* and *any other form of indecent assault"*[42] and Article 77 states that children shall be protected against *"any form of indecent assault".*[43]

In the Additional Protocol II, Article 4(2)(e) prohibits "outrages upon personal dignity", which include in particular *"humiliating and degrading treatment, rape, enforced prostitution"* and *"any form of indecent assault".*[44]

Therefore, the Fourth Geneva Convention and the Additional Protocol I require a particular protection for women and children against rape, enforced prostitution or any other form of indecent assault. Notably, the expressions "outrages upon personal dignity" and "any form of indecent assault" can be referred to any form of sexual violence.

Nevertheless, in the Conventions, these forms of violence were conceived as crimes of honor or dignity and not as crimes of violence.

The Common Article 3 of the four Geneva Conventions constituted an innovation because it covered, for the first time, situations of non-international armed conflicts.[45] It was originally intended as dedicated, exclusively, to the treatment of persons in internal conflicts, but it is currently recognized as part of customary international law, applicable to both internal and

[39] Third 1949 Geneva Convention, relative to the Treatment of Prisoners of War, Article 14
[40] Ibid.
[41] Fourth 1949 Geneva Convention, relative to the Protection of Civilian Persons in Time of War, Art. 27
[42] Protocol Additional to the IV Geneva Conventions and relating to the Protection of Victims of International Armed Conflicts (1977, Protocol I) Art. 76.1
[43] Ibid., Art. 77.1
[44] Protocol Additional to the IV Geneva Conventions and relating to the Protection of Victims of Non-International Armed Conflicts (1977, Protocol II) Art. 4.2(e)
[45] "The Geneva Conventions of 1949 and their Additional Protocols", Overview, 29 October 2010, supra at 30

international armed conflicts.[46] The Common Article 3 introduces essential rules that do not allow derogations.[47] It prescribes humane treatment of all prisoners and health care for wounded and sick ones. It specifically prohibits murder, mutilation, torture, cruel, humiliating and degrading treatment, the taking of hostages and unfair trial.[48]

The Common Article 3 of the Geneva Conventions does not explicitly enumerate rape or other forms of sexual violence, but forbids *"violence to life and person",* including cruel treatment and torture[49] and outrages upon personal dignity.[50]

In conclusion, for centuries the laws of warfare have banned, either implicitly or explicitly, rape. Progressively, this prohibition extended to other forms of sexual violence, including sexual slavery, forced impregnation, forced maternity, forced abortion, forced sterilization, forced marriage, forced nudity, sexual molestation, sexual mutilation, sexual humiliation and sex trafficking.

3.3 Human rights law and the protection from sexual violence

"International human rights law comprises a set of rules, established by treaty or custom, that sets the obligations and duties of states to respect, protect and fulfil human rights".[51] The obligation to respect requires states to abstain from interfering with or restricting the enjoyment of human rights. The obligation to protect requires states to prevent human rights abuses against groups or individuals. The obligation to fulfil requires states to take positive actions to facilitate the enjoyment of fundamental human rights.[52]

The United Nations' support for the rights of women began with the Organization's founding Charter, adopted in 1945. Its Preamble affirmed the faith of the members in the "equal rights" of men and women.[53] The first Article of the Charter identified, among the purposes of the UN, the achievement of *"international co-operation […] in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to […] sex, […]."*[54]

Indeed, gender equality was a revolutionary concept when the United Nations was established.

The 1948 Convention on the Prevention and Punishment of the Crime of Genocide did not identify explicitly the various forms of sexual violence as genocidal acts. However, the International Criminal Tribunal for Rwanda, in the Akayesu case,[55] for the first time clarified that in the context of

[46] Askin, "Prosecuting Wartime Rape", supra at 1. See also Prosecutor v. Duško Tadić, IT-94-1-AR72, Decision on the Defense Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995, para 137. For further information, see Chapter 3.5.1

[47] "The Geneva Conventions of 1949 and their Additional Protocols", Overview, 29 October 2010, supra at 30

[48] Common Article 3 of the four Geneva Conventions

[49] Common Art. 3.1(a) of the four Geneva Conventions

[50] Common Art. 3.1(c) of the four Geneva Conventions

[51] GSDRC, International Legal Frameworks for Humanitarian Action, Topic Guide, supra at 12

[52] United Nations Human Rights, Office of the Higher Commissioner on Human Rights, "International Human Rights Law", available at: http://www.ohchr.org/EN/ProfessionalInterest/Pages/InternationalLaw.aspx

[53] Charter of the United Nations (1945), Preamble, available at: http://www.un.org/en/documents/charter/

[54] Charter of the United Nations (1945) Article 1

[55] See Prosecutor v. Jean-Paul Akayesu, ICTR-96-4-T, Trial Judgment, 2 September 1998, paras 507 and 508

ethnical conflicts sexual violence crimes can be acts of genocide, covered by the definition given in the Article 2 of the Genocide Convention.[56]

More specifically, following the Genocide Convention's definition of genocide, sexual violence can constitute genocide when it involves acts *"causing [death or] serious bodily and mental harm to members of the group."*[57] In fact, victims are frequently raped with objects[58] and that can seriously injure them or even provoke their death or the loss of the capacity to procreate. Moreover, often, pregnant women are killed by ripping away the fetus from their womb.[59] In addition, rape can be used as a method to diffuse AIDS[60] or other sexually transmitted diseases and always results in mental suffering and trauma.[61]

Genocidal sexual violence can be committed *"by deliberately inflicting conditions of life calculated to bring about physical destruction [of the group]:"*[62] perpetrators know that rape victims are often ostracized by their community, abandoned by husbands or wives and anyway considers "useless" for marriage.[63] A woman, who was repeatedly raped by the Janjawid, reported: *"My husband could not forgive me after this, he disowned me."*[64] The approach that tends to the blaming of the victim,

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[56] Convention on the Prevention and Punishment of the Crime of Genocide, adopted by the General Assembly of the United Nations on 9 December 1948. Article 2: In the present Convention, genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:
(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.
For further details, see Chapter 4.1.3

[57] Convention on the Prevention and Punishment of the Crime of Genocide (1948), Article 2(a) and (b)

[58] "Women's Bodies as a Battleground: Sexual Violence Against Women and Girls During the War in the Democratic Republic of Congo South Kivu (1996-2003)", Réseau des Femmes pour un Développement Associatif, Réseau des Femmes pour la Défense des Droits et la Paix and International Alert, 2005, available at: http://reliefweb.int/report/democratic-republic-congo/womens-bodies-battleground-sexual-violence-against-women-and-girls
The objects mentioned as having been used were sticks, bottles, green bananas, pestles coated in chili pepper and rifle barrels.

[59] Amnesty International, "Sudan: Darfur: Rape as a Weapon Of War: Sexual Violence and Its Consequences", 2004 [hereinafter: Amnesty International, "Sudan: Darfur: Rape as a Weapon Of War"], available at: http://www.amnesty.org/en/library/info/AFR54/076/2004
The Janjawid are a militia that operate in Darfur, western Sudan and eastern Chad.

[60] Obijiofor AginamIt, "Rape and HIV as Weapons of War", Gender, Human Security Article, 27 June 2012; citing: Margaret Owen in "Widows Expose HIV War Threat", Worldwoman News: "It is obvious that armed militias and combatants may have started using HIV as a weapon of war going by the evidence from the Rwandan genocide and the ongoing conflict in the Democratic Republic of Congo. As already stated, one striking phenomenon of modern-day wars is the "willful" transmission of HIV. Notwithstanding the seriousness of the questions that have been raised concerning whether the actual intent of the perpetrators of rape could have been to infect the victim with the virus, Elbe cites the account of one rape victim in Rwanda who the rapists taunted by saying: "We are not killing you. We are giving you something worse. You will die a slow death". There is also another account that captured women in Rwanda were taken to HIV-positive soldiers specifically to be raped."

[61] See in general: "Women's Bodies as a Battleground: Sexual Violence Against Women and Girls During the War in the Democratic Republic of Congo South Kivu (1996-2003)", supra at 58

[62] Genocide Convention, Art. 2(c)

[63] See "Women's Bodies as a Battleground: Sexual Violence Against Women and Girls During the War in the Democratic Republic of Congo South Kivu (1996-2003)", supra at 58

[64] Amnesty International, "Sudan: Darfur: Rape as a Weapon Of War", supra at 59

instead of the perpetrator, is particularly problematic: *"rape in itself is a heinous human rights violation, but the victims are likely to suffer further because of the shame and the stigma associated to it."*[65]

Furthermore, through sexual mutilation, sterilization, separation of men and women, prohibition of marriages and forced birth control, but also through rape because of its psychological and physical consequences, including especially forced pregnancy, perpetrators can reach their purpose of ethnic cleansing,[66] *"by imposing measures intended to prevent births within the group or by forcibly transferring children of the group to another group."*[67]

In fact, in patriarchal societies, the membership of a group is determined by the identity of the father, thus, a measure used to prevent births within a group is the rape by a man from a different group, aimed at the impregnation of the women belonging to the targeted group.[68]

The United Nations Security Council confirmed this interpretation, years later, in the Resolution 1820 (2008), noting that rape and the other forms of sexual violence can constitute war crimes, crimes against humanity or constitutive acts with respect to genocide.[69]

The 1948 Universal Declaration of Human Rights (UDHR) and the 1966 International Covenant on Civil and Political Rights (ICCPR) have provided an indirect protection from sexual abuses.

More specifically, sexual violence violates several of the principles enumerated in the Universal Declaration of Human Rights.

Indeed, all humans should be treated equally and with dignity.[70] Sexual violence, often used on the purpose to humiliate as well as dominate individuals, evidently contrasts with this principle. On the issue, Andrew Clapham, usefully suggested that concern for human dignity involves at least four aspects: *"(1) the prohibition of all types of inhuman treatment, humiliation or degradation by one person over another; (2) the assurance of the possibility for individual choice and the conditions for 'each individual's self-fulfillment', autonomy, or self-realization; (3) the recognition that the protection of group identity and culture may be essential for the protection of personal dignity; (4) the creation of the necessary conditions for each individual to have their essential needs satisfied".*[71]

The right to be free from slavery is contravened when, principally women and children, but also men, are forced into prostitution or sexual slavery.[72]

Torture and cruel, inhuman or degrading treatments or punishments include rape and the other forms of sexual violence.[73]

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[65] Ibid.
[66] See Prosecutor v. Jean-Paul Akayesu, ICTR-96-4-T, Trial Judgment, 2 September 1998, para 507
[67] Genocide Convention, Art. 2 (d), (e)
[68] Prosecutor v. Akayesu, Trial Judgment, para 507
[69] S/RES/1820 (2008), Article 4, available at: http://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/CAC%20S%20RES%201820.pdf
[70] UHDR, Article 1
[71] A. Clapham, "Human Rights Obligations of Non-State Actors", 2006, pp. 545-546
[72] UHDR, Article 4
[73] UHDR, Article 5

Sexual violence is a gender-based violence and has its roots in the discrimination that the Declaration tries to combat.[74]

Then, the Declaration has granted people protection from attacks on their privacy and honor, which are violated by these forms of violence.[75]

Finally, the Declaration stated that marriage requires the consent of both parties, thus, forced marriages infringe this principle.[76]

In addition, the 1966 International Covenant on Civil and Political Rights (ICCPR) has indirectly provided protection from sexual violence crimes, affirming the right of self-determination,[77] of liberty and of security of person[78] and forbidding all forms of slavery, [79] torture and inhuman or degrading treatment, which include medical and scientific experimentation.[80] Most importantly, the ICCPR, like many other human rights instruments, explicitly affirmed that the rights that it covers are equally provided to women and men.[81]

Therefore, both the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights have prohibited all forms of slavery, torture and inhuman or degrading treatments and have established that the consequential right to be protected from these abuses cannot be derogated. Thus, it is a jus cogens prohibition. Moreover, to the prohibition of torture is specifically dedicated the Convention against Torture and Other Cruel Inhuman and Degrading Treatment or Punishment.[82]

The 1984 Convention Against Torture stated that no exceptional circumstances whatsoever can be invoked as a justification for the use of torture, including war, threat of war, internal political instability, public emergency, attacks, violent crime or any form of armed conflict.[83]

The convention defined torture as any act intentionally directed at the infliction of severe pain or suffering as a means to obtain from the victim or from a third person information or a confession, to punish, to intimidate or coerce the victim or a third person or, because of discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person, acting in an official capacity.[84]

Therefore, torture constitutes an aggravated and most serious form of the prohibited ill-treatments, with a particular stigma attached. In fact, in furnishing the distinction between torture and the other

[74] UHDR, Article 7
[75] UHDR, Article 12
[76] UHDR, Article 16
[77] ICCPR, Article 1
[78] ICCPR, Article 9
[79] ICCPR, Article 6
[80] ICCPR, Article 7
[81] ICCPR, Article 3
[82] The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (the "Torture Convention") was adopted by the UN GA Res. 39/46 on 10 December 1984
[83] Torture Convention, Article 2: the Article emphasizes that the prohibition against torture and inhuman or degrading treatment is a *jus cogens* prohibition.
[84] Torture Convention, Article 1

ill-treatments, the Committee against Torture referred to the purpose element specified in the definition, to the nature and to the "severity" of the treatment, as relevant distinguishing factors.[85]

In the 1990s, feminists such as Catharine MacKinnon claimed strongly how certain forms of violence against women, in particular sexual violence, fit the "recognized profile" of torture.[86]

According to various medical studies, *"the trauma experienced [by rape], in terms of both the physical symptoms and emotional distress, is akin to that of other torture victims."*[87]

On the issue, in the Akayesu judgment, the ICTR affirmed that rape is used, like torture, for the purpose to intimidate, degrade, punish, control or destruct a person. Torture as well as rape are violations of personal dignity. Therefore, it can be deduced that rape constitutes torture when it is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.[88]

The 1989 United Nations Convention on the Rights of the Child defined as child, anyone below the age of eighteen[89] and imposed on states the defense of children from *"all forms of sexual exploitation and sexual abuse"*[90] and from torture.[91]

Not only these general provisions, which can be interpreted as referred to sexual violence, remain applicable in wartime, but also many provisions of human rights instruments focused specifically on women.

The Convention on the Elimination of All Forms of Discrimination against Women (CEDAW),[92] often described as an international bill of rights for women, is a treaty adopted in 1979 by the UN General Assembly.

The Convention has provided the basis to realize equality between women and men. It urged states Parties to combat sex-based discrimination and, in general, pejorative treatment because of sex, through legislation, education and elimination of prejudices and practices that are based on stereotyped gender's roles, such as traditional attitudes by which women are regarded as subordinate to men or that perpetrate widespread practices of violence or coercion against women. Discrimination was defined as *"any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field."*[93]

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[85] See Human Rights Committee, General Comment 20, Article 7 (Forty-fourth session, 1992), Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, U.N. Doc. HRI/GEN/1/Rev.1 at 30 (1994), para 4

[86] Catherine MacKinnon, "Are women human? And Other International Dialogues", 2006, in which the essay "On torture" is republished, p. 17. For further considerations, see Chapters 4.1.1 and 4.1.2

[87] Burgess and Holmström, "Rape Trauma Syndrome" 131(9) American Journal of Psychiatry 981, 1974

[88] Prosecutor v. Jean-Paul Akayesu, ICTR-96-4-T, Trial Judgment, 2 September 1998, para 597
For further details, see Chapter 4.1.2

[89] United Nations Convention on the Rights of the Child (1989), Article 1

[90] United Nations Convention on the Rights of the Child, Article 34

[91] United Nations Convention on the Rights of the Child, Article 39

[92] The Convention on the Elimination of All Forms of Discrimination against Women (Women's Convention, CEDAW), adopted in 1979 by the UN General Assembly Resolution 34/180

[93] CEDAW, Article 1

The CEDAW did not make explicit reference to violence against women, then, in 1992, the Committee on the Elimination of Discrimination against Women adopted the General Recommendation 19, which clarified that the prohibition of gender-based discrimination encompasses violence. The Committee stated that violence directed at a woman "*because she is a woman"* or that *"affects women disproportionately"* constitutes discrimination. Therefore, gender-based violence, which includes acts that inflict physical, mental or sexual harm or suffering, threats of such acts, coercion and other deprivations of liberty, may breach specific provisions of the Convention, no matter if those provisions expressly mention violence.[94] Substantially, the Recommendation established the concept of violence against women as a form of discrimination, which was re-confirmed by other successive human rights instruments.[95]

In 2000, the Optional Protocol to the CEDAW entered into force.[96] It included measures to strengthen the effectiveness of the Women's Convention. In particular, the Protocol contained two procedures: (1) a communications procedure, which allows either individuals or groups of individuals to submit to the Committee claims of violations of protected rights[97] and (2) an inquiry procedure that enables the Committee to initiate investigations if it has received reliable information of *"grave or systematic violations"* of women's rights.[98] Moreover, the Committee has the authority to request the states parties to ensure the protection of those submitting communications.[99]

The principle of nondiscrimination, that includes discrimination based on sex, is preserved throughout all the human rights instruments and it is widely identified as one of the most fundamental principles of human rights law. Consequently, all the human rights instruments have to be interpreted and implemented in a not disparaging way for women.

Three important regional tools aim at the eradication of violence against women, in wartime as well as in peacetime: the Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women, known as the Belém do Pará Convention, the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa and the Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence, known as the Istanbul Convention.

The Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women was adopted at Belém do Pará, Brasil, on 9 June 1994 and entered into force on 5 March 1995. It incorporates regional human rights norms governing North and South America.

[94] General Recommendation No. 19, "Violence against women", U.N. Doc. A/47/38 (1992), Article 6

[95] See infra: the concept of violence against women as a manifestation of the historically unequal power relations between women and men, thus discrimination, is expressed, among the others, in the Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women, in the Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence and in the Declaration on Elimination of Violence against Women.

[96] The General Assembly adopted the Optional Protocol to the CEDAW, A/RES/54/4, (1999)

[97] Optional Protocol to the CEDAW, Article 2

[98] Optional Protocol to the CEDAW, Article 8

[99] Optional Protocol to the CEDAW, Article 11

Article 1 of the Convention defines violence against women as: *"any act or conduct, based on gender, which causes death or physical, sexual or psychological harm or suffering to women, whether in the public or the private sphere."*

Notably, Sates Parties recognized that violence against women is an offense against human dignity and a form of discrimination, namely a manifestation of the historically unequal power relations between women and men. Consistently, Article 6 specified that the right of every woman to be free from violence includes, among others: (1) the right to be free from all forms of discrimination; and (2) the right to be valued and educated free of stereotyped patterns of behavior and social and cultural practices based on concepts of inferiority or subordination.

Regrettably, for long time, this Convention was the only major human rights treaty that expressly listed rape, sexual abuse, torture, trafficking in persons, forced prostitution, kidnapping and sexual harassment as violations thereof. In fact, the second regional treaty, the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, was adopted in 2003 by the African Union and entered into force on 25 November 2005. In general, it linked the eradication of violence against women to the advancement of women in all aspects of life.

More specifically, in Article 11, which is devoted to the protection of women in situations of armed conflict, *"states parties undertake to protect asylum seeking women, refugees, returnees and internally displaced persons, against all forms of violence, rape and other forms of sexual exploitation and to ensure that such acts are considered war crimes, genocide and/or crimes against humanity and that their perpetrators are brought to justice before a competent criminal jurisdiction".*

The third regional treaty, the Convention on Preventing and Combating Violence against Women and Domestic Violence, known as the Istanbul Convention, was adopted on 11 May 2011 and entered into force on 1 August 2014. The Preamble clarified that violence against women is both a cause and a consequence of the unequal power relations between women and men, of male domination over women. Its Article 3 re-affirmed the definition of violence against women as *"a violation of human rights and a form of discrimination against women"*, uncovering the connection between the achievement of gender equality and the eradication of violence against women.

It shows innovative features, if confronted to the other two treaties. In fact, it contains a definition of gender, recognizing that society assigns to women and men particular roles and behaviours. The problem is that certain roles and behaviours can contribute to make violence against women socially acceptable.

Moreover, notably, it requested states to criminalize the various forms of violence against women, including physical, sexual and psychological violence, stalking, sexual harassment, female genital mutilation, forced marriage, forced abortion and forced sterilization.

Taken together, the CEDAW and the three regional treaties create a global human rights legal framework able to address all forms of violence against women.

The United Nations has developed its action to improve the status of women throughout the world also by periodic world conferences that identified issues and developed strategies to improve women's condition. Some of them, specifically, condemned violence against women. The

conferences' documents emphasized the international consensus that governments and society have the necessity and duty to eliminate gender-based violence.

In 1993, the World Conference on Human Rights in Vienna promulgated the Vienna Declaration and Programme of Action.

The Vienna Declaration and Programme of Action expressly recognized that women's human rights are an inalienable, integral and indivisible part of the universal human rights.[100] The Declaration identified numerous gender-specific abuses, including those resulting from cultural prejudice, such as sexual violence, sexual harassment and sexual exploitation, as human rights violations that are incompatible with the dignity and the worth of the human person.[101] This declaration constituted the first statement issued by the General Assembly to recognize and condemn violence against women.

Furthermore, it specifically referred to the violations of women's rights that occur in situations of armed conflict, which include in particular murder, systematic rape, sexual slavery and forced pregnancy. It emphasized that these violations offend the fundamental principles of international human rights and humanitarian law and thus, require a particularly effective response.[102]

Coherently, the Vienna Programme of Action identified as a primary objective of the international community the full and equal participation of women in political, civil, economic, social and cultural life and the elimination of all forms of discrimination based on sex.[103]

In response to this claim, in 1993, the U.N. General Assembly proclaimed the Declaration on Elimination of Violence against Women.[104] The declaration clarified that violence against women is an issue of international concern because it is an obstacle to the achievement of equality, development and peace.[105]

The declaration is not legally binding for states, nevertheless it represented the achievement of a wide consensus on the fact that violence against women constitutes a violation of the fundamental rights of women and consequently, it impairs or nullifies the enjoyment of those rights.[106]

Violence against women materializes in acts of gender-based violence that result in, or are likely to result in physical, sexual or psychological harm or suffering. It includes also the threats of such acts, coercion or arbitrary deprivation of liberty, no matter if occurring in public or in private life.[107]

The Declaration explained that the gender-based violence is *"a manifestation of historically unequal power relations between men and women, which have led to domination over and discrimination against women by men and to the prevention of the full advancement of women".*[108]

[100] The Vienna Declaration and Programme of Action, 1993, Article 18
[101] Ibid.
[102] The Vienna Declaration and Programme of Action, Art 38
[103] The Vienna Declaration and Programme of Action, Art 18
[104] Declaration on Elimination of Violence Against Women was proclaimed by UN General Assembly Resolution 48/104, on 20 December 1993
[105] Declaration on Elimination of Violence against Women, Preamble
[106] Ibid.
[107] Declaration on Elimination of Violence against Women, Art. 1
[108] Declaration on Elimination of Violence against Women, Preamble

In 1994, the International Conference on Population and Development (ICPD) took place in Cairo and adopted a Programme of Action. The ICPD Programme of Action, sometimes referred to as the Cairo Consensus, was remarkable in reaching a consensus that gender equality, the elimination of all kinds of violence against women and the empowerment of women are global priorities.[109] Women's possibility to access to reproductive and sexual health services and rights was considered fundamental for this empowerment, which is the key to a sustainable development. The Programme of Action emphasized the necessity to protect women and children from any abuse, especially sexual abuse, exploitation, trafficking and violence, through the establishment of educational programs and the creation of appropriate conditions and procedures to encourage victims to report violations of their rights and to grant their rehabilitation.[110]

The Programme adopted an innovative point of view; in fact, the purposes identified were approached not only from the perspective of universal human rights, but also, as the necessary steps towards the eradication of poverty and the stabilization of population growth.

In 1995, the Fourth World Conference on Women adopted the Beijing Declaration and Platform for Action.

The Platform for Action reaffirmed the fundamental principle, already set forth in the Vienna Declaration and Programme of Action, that the rights of women and girls are an inalienable, integral and indivisible part of universal human rights.[111]

The part of the Platform for Action devoted to the theme of violence against women recognized that, sill, *"in all societies, to a greater or lesser degree, women and girls are subjected to physical, sexual and psychological abuse that cuts across lines of income, class and culture. The low social and economic status of women can be both a cause and a consequence of violence against women."*[112] Such a status quo is an obstacle to the achievement of equality, developments and peace and it nullifies women's possibilities to enjoy their fundamental rights.[113] Thus, the declared objective of this Platform for Action was the empowerment of all women.[114]

The definition of violence against women, given by the Platform for Action includes *"any act of gender-based violence that results in, or is likely to result in, physical, sexual or psychological harm or suffering […], including threats of such acts, coercion or arbitrary deprivation of liberty, whether occurring in public or private life […]."*[115]

Another part of the Platform for Action, specifically devoted to the condition of women during armed conflict, underlined that, although the entire communities suffer the consequences of armed conflicts, women and girls are particularly affected because of their "status in society" and their "sex". In fact, conflict parties often rape women with impunity, sometimes using systematic rape as a tactic of war and terrorism. *"The impact of violence against women and violations of the human rights of women in such situations is experienced by women of all ages, […] who are victims of acts*

[109] ICPD Programme of Action 1994, Principle 4
[110] ICPD Programme of Action, Chapter 4, para 9
[111] Beijing Platform for Action, 1995, Chapter 1 para 2
[112] Beijing Platform for Action, Chapter 4, para 112
[113] Ibid.
[114] Beijing Platform for Action, Chapter 1, para 9
[115] Beijing Platform for Action, Chapter 4 para 113

of murder, terrorism, torture, involuntary disappearance, sexual slavery, rape, sexual abuse and forced pregnancy, […] especially as a result of policies of ethnic cleansing and other new and emerging forms of violence".[116]

Finally, the Beijing Platform for Action urged all governments to elaborate strategies to implement the Platform locally, thus, to improve the situation of women, including addressing violence against women.

The World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance (WCAR), also known as Durban I, was held in 2001.

The part of its Program of Action concerning "Other Victims" urged states to note that the "intersection" of discrimination on grounds of race and gender makes women and girls particularly exposed to sexual violence,[117] which is systematically used as a weapon of war, sometimes even with the acquiescence or at the instigation of the state. It further stated that sexual violence is a serious violation of international humanitarian law and that, in defined circumstances, constitutes a crime against humanity and/or a war crime,[118] thus, it may encompasse personal criminal liability. Consequently, states were demanded to identify, investigate, prosecute and punish those responsible for war crimes and crimes against humanity, including sexual-related crimes and other gender-based offences against women and girls, especially persons in authority, responsible for committing, ordering, soliciting, inducing, aiding in, abetting, assisting or in any other ways contributing to their commission or attempted commission.[119]

It can be observed that fundamental human rights norms are not suspended, but still applicable during armed conflicts. The confirm is contained in Article 2 common to the 1949 Geneva Conventions and in the so-called Martens Clause of the 1907 Hague Conventions.

In fact, the Common Article 2 of the Geneva Conventions clarified that the Conventions are relevant *"in addition to the provisions which shall be implemented in peacetime."*[120]

The Martens Clause of the 1907 Hague Conventions also affirmed the principle that in case not included in the Regulation, protection for populations and belligerents is granted by the principles of international law, *"as they result from the usages established between civilized nations, from the laws of humanity and the requirements of the public conscience".*[121]

[116] Beijing Platform for Action, Chapter 4, para 135

[117] Beijing Platform for Action, Article 54. The concept of "intersectionality" between gender and race was explored by Catharine A. MacKinnon as a character of genocidal rape, for further information see Chapter 4.1.3

[118] The Program of Action of the World Conference against Racism, Racial Discrimination, Xenophobia and Related Intolerance (WCAR, Durban I), 2001, Article 54

[119] Ibid.

[120] Article 2 common to the four Geneva Conventions, available at: https://www.icrc.org/en/war-and-law/treaties-customary-law/geneva-conventions

[121] Convention Respecting the Laws and Customs of War on Land (Convention IV), The Hague, 18 October 1907, Martens Clause: "Until a more complete code of laws of war has been issued, the High Contracting Parties deem it expedient to declare that, in cases not included in the Regulations adopted by them, the inhabitants and the belligerents remain under the protection and the rule of the principles of the law of nations, as they result from the usages established among civilized peoples, from the laws of humanity, and from the dictates of the public conscience".

Accordingly, Kelly D. Askin argued that international human rights law *"reinforces, supplement and complements"* international humanitarian law.[122] On this issue, the ICTY Appeals Chamber explained that both human rights and humanitarian law focuses on the concern for human dignity, *"which forms the basis of a list of fundamental minimum standards of humanity."*[123]

In conclusion, it can be said that exists a rich body of international law protecting individuals from sexual violence during periods of armed conflict, mass violence or transition. However, unfortunately these instruments are rarely or minimally enforced, as it is demonstrated by the still current widespread diffusion of such a form of violence.

3.4 Further United Nations' efforts to end conflict-related sexual violence

3.4.1 UNiTE to End Violence against Women

In 2008, the UN Secretary-General Ban Ki-moon launched "UNiTE to End Violence against Women", a campaign to prevent and eliminate violence against women and girls all around the world, in peacetime as well as in wartime. In doing so, he stated, *"there is one universal truth, applicable to all countries, cultures and communities: violence against women is never acceptable, never excusable, never tolerable."*[124]

3.4.2 UN Special Representative on sexual violence in conflict

In 2010, following SC Res. 1888 (2009), the Secretary-General appointed Margot Wallström as the Special Representative of the Secretary-General on Sexual Violence in Conflict. She was succeeded, in September 2012, by Zainab Hawa Bangura.

The Special Representative is mandated to organize the strategies and to grant the cooperation and coordination of the UN Action against Sexual Violence in Conflict (UN Action). UN Action unites the work of 13 UN entities with the objective of ending sexual violence in conflict. It represents a *"concerted effort by the UN system to improve coordination and accountability, amplify programming and advocacy, and support national efforts to prevent sexual violence and respond effectively to the needs of survivors".*[125] Ms. Bangura, identified the goals that she intended to achieve:

- ending impunity for perpetrators and seeking justice for victims;
- protecting and empowering civilians who face sexual violence in conflict, in particular women and girls who are targeted disproportionately by this crime;
- mobilizing political leadership to address this issue;
- strengthening coordination and ensuring a more coherent response from the UN system;

[122] Askin, "Prosecuting Wartime Rape", supra at 1

[123] Prosecutor v. Hazim Delalić (Čelebići Camp), Appeal Judgment, IT-96-21-A, 20 February 2001, para 149

[124] Press Release, Secretary-General, Secretary-General Says Violence Against Women Never Acceptable, Never Excusable, Never Tolerable, as He Launches Global Campaign on Issue, U.N. Press Release SG/SM/11437, 25 February 2008

[125] Stop rape now, UN Action against Sexual Violence in Conflict, "About Un Action", available at: http://www.stoprapenow.org/about/

- increasing recognition of rape as a tactic of war;
- emphasizing national ownership, leadership and responsibility in the fight to put an end to this scourge.[126]

An important instrument to combat conflict-related sexual violence is the Secretary-General's annual report on sexual violence in conflict. Margot Wallström stated that this report, which is based on UN-verified information, is firstly, an instrument at disposal of political leaders to help them track and address sexual violence. Secondly, it does not just highlight stories of violence, but also stories of reactions, like the enforcement of command responsibility. Thirdly, these reports provide a basis for systematic engagement with conflict parties, with the consent and partnership of governments.

The report is also a historical record, this is particularly important since the history of rape has been a *"history of denial"*: rape is still an effective *"secret weapon",*[127] because victims fearing social stigma, often chose not to report.[128]

The report of the Secretary-General on sexual violence in conflict, presented to the Security Council on 14 March 2013, identified 22 conflict areas and included information on parties to conflict credibly suspected of committing or being responsible for acts of rape and other forms of sexual violence. Notably, it affirms that, although women and girls are predominantly affected by sexual violence, men and boys too are victims of such violence. Indeed, sexual violence has been perpetrated also against men and boys as a tactic of war, often in the context of detention.[129]

Moreover, the report underlined the exigency of ensuring that considerations about sexual violence are kept into serious account during peace processes and in peace agreements.

Presenting this report to the Security Council, the Special Representative of the Secretary-General on Sexual Violence in Conflict, Zainab Hawa Bangura, stated that the report highlighted some critical themes, such as:

- *sexual violence as a driver of displacement of civilian populations;*
- *forced marriages, rape and sexual slavery by armed groups;*
- *sexual violence as a tactic in the context of detentions or interrogation;*
- *the plight of children born of wartime rape, about whom there is little or no information available and therefore no meaningful programmatic interventions.*[130]

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[126] Outreach Programme on the Rwandan Genocide and the United Nations, "Background Information on Sexual Violence used as a Tool of War", available at: http://www.un.org/en/preventgenocide/rwanda/about/bgsexualviolence.shtml

[127] Statement by the (previous) Special Representative of the previous Secretary-General on Sexual Violence in Conflict Margot Wallström, "Women, Peace and Security: Conflict-Related Sexual Violence", New York, 23 February 2012, available at: http://www.un.org/sexualviolenceinconflict/statement/the-kenya-elections-must-be-free-of-politically-motivated-rape-and-other-forms-of-sexual-violence/

[128] On this issue, see Chapter 2.4

[129] UN Secretary-General, Sexual violence in conflict: report of the Secretary-General, 14 March 2013, A/67/792 - S/2013/149, available at: http://www.refworld.org/docid/5167bd0f4.html

[130] Statement by Special Representative of the Secretary-General on Sexual Violence in Conflict, Zainab Hawa Bangura, at the Security Council Open Debate on Sexual Violence in Conflict, 17 April 2013, available at: http://www.un.org/sexualviolenceinconflict/statement/statement-by-srsg-zainab-hawa-bangura-to-the-security-council-17-april-2013/

She also emphasized the necessity to begin to effectively transfer the stigma of sexual violence crimes from the survivors, to the perpetrators, especially by means of prosecuting the perpetrators: *"perpetrators must understand that there can be no hiding place; no amnesty; no* safe harbor".[131]

The latest report of the Secretary-General on sexual violence in conflict was presented to the Security Council on 13 March 2014.[132] The report treated various themes, in particular: forced pregnancy and the condition of children born from rapes, access to justice for the victims, the vulnerability of refugee and internally displaced persons' communities, the lack of services for survivors, sexual violence against men and boys, the risk for victims to be forced into marriages or even killed ("honor killings") and the necessity to focus on prevention. The report concerns 20 conflict and post-conflict countries, it lists 34 State and non-State parties credibly suspected to be perpetrators of sexual violence. On April 2014, at the Security Council Open Debate on Sexual Violence in Conflict focused on the issues raised in the Secretary-General's report on conflict-related sexual violence, Ms. Zainab Bangura commented that the principal objective remains bringing to justice perpetrators who commit, command or condone sexual violence crimes, in order to re-direct social stigma from the victims, to the perpetrators.[133]

3.4.3 The UN Security Council Resolutions

In recent years, the United Nations Security Council has done much to try to raise awareness and to focus attention on the problem of sexual violence during conflict. The following UN Security Council resolutions concern the theme of Women, Peace and Security:

Security Council Resolution 1325 (2000)[134] urged member states to promote women's participation in the prevention and resolution of conflicts and in the maintenance and promotion of peace and security. *"The Resolution is historic not only in that it constituted the first time the Council systematically addressed the manner in which conflict affects women and girls differently from men and boys, but also because it acknowledges the crucial link between peace, women's participation in decision-making and the recognition of women's life experiences throughout the conflict cycle"*.[135]

It insisted that the parties involved in armed conflict must respect the international laws protecting the rights of civilian women and girls and, so, define proper policies and procedures to preserve women from gender-based crimes, which are principally sexual violence crimes, including specifically criminal prosecution of the perpetrators.

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[131] Ibid.

[132] UN Secretary-General, Sexual violence in conflict: Report of the Secretary-General , 13 March 2014, S/2014/181, available at: http://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/s_2014_181.pdf

[133] Statement by Special Representative of the Secretary-General on Sexual Violence in Conflict, Zainab Hawa Bangura at the Security Council Open Debate on Sexual Violence in Conflict, 25 April 2014, available at: http://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/s_pv_7160.pdf

[134] S/RES/1325 (2000). All the Resolutions adopted by the Security Council since 1946 are available at: http://www.un.org/en/sc/documents/resolutions/

[135] UN Security Council Resolution 1325 (2000), recognizing Women's Vital Roles in Achieving Peace and Security

Finally, the Resolution also promoted the enforcement of women's rights under national law.

Unfortunately, after the adoption of the Resolution, implementation did not follow.[136]

Security Council Resolution 1820 (2008)[137] recognized explicitly that rape and other forms of sexual violence has been used as a tactic of war and that that can amount to a war crime, a crime against humanity or a constitutive act of genocide. It demanded *"the immediate and complete cessation by all parties to armed conflict of all acts of sexual violence against civilians with immediate effect"* and that all parties in armed conflict *"immediately take appropriate measures to protect civilians, including women and girls, from all forms of sexual violence"*.

International human rights organizations regarded the adoption of this Resolution as an historical moment for women. In fact, after decades of international humanitarian reports showing an escalating incidence of sexual violence during armed conflict, the UN decided to include sexual violence against women as a security issue, belonging to the Security Council.[138]

It can be further considered that UN SC Res. 1820 required the total exclusion of sexual violence crimes from amnesty provisions.[139] Whereas, UN SC Res. 1325 had only asked states to avoid sexual violence crimes, but still had left them the possibility to adopt amnesty provisions relative to such crimes,[140] in fact, it had just *"stressed the need"* to exclude such crimes from amnesty provisions, *"where feasible"*. Indeed, since sexual violence has been a prevalent and long-lasting practice of warfare, states generally "forgave" each other for such crimes, given the fact that both sides usually committed them, but the UN SC Res. 1820 *"stressed the need"* to grant accountability, without exceptions.[141]

Moreover, the UN SC Res. listed some objectives of action: strengthening women's protection from sexual violence in conflict areas, attempting to eliminate conflict-related sexual violence by exposing myths and stereotypes that increase sexual violence, serious prosecutions of perpetrators, promotion of women's participation at local level and integration of women's perspectives into peace operations.[142]

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[136] Rachel Schreck, "Rhetoric Without Results: United Nations Security Council Resolutions Concerning Rape during Armed Conflict," 28 Penn St. Int'l L. Rev. 83, 2009 [hereinafter: Schreck, "Rhetoric Without Results"]

[137] S/RES/1820 (2008)

[138] Schreck, "Rhetoric Without Results", supra at 136; reporting: Maggie Farley, "U.N. Security Council Says Sexual Violence Akin to War Crimes", L.A. Times, 20 June 2008, http:// articles.latimes.com/2008/jun/20/world/fg-violence20.

[139] S/RES/1820 (2008), para 4: "[The Security Council] notes that rape and other forms of sexual violence can constitute a war crime, a crime against humanity or a constitutive act with respect to genocide, **stresses the need for the exclusion of sexual violence crimes from amnesty provisions** in the context of conflict resolution processes and calls upon member states to comply with their obligations for prosecuting persons responsible for such acts, to ensure that all victims of sexual violence, particularly women and girls, have equal protection under the law and equal access to justice, and stresses the importance of ending impunity for such acts as part of a comprehensive approach to seeking sustainable peace, justice, truth, and national reconciliation."

[140] S/RES/1325 (2000), para 11: "[The Security Council] emphasizes the responsibility of all states to put an end to impunity and to prosecute those responsible for genocide, crimes against humanity, and war crimes including those relating to sexual and other violence against women and girls, and in this regard stresses the need to exclude these crimes**, where feasible***,* from amnesty provisions".

[141] Schreck, "Rhetoric Without Results", supra at 136

[142] Melissa Goldenberg Goldstoff, "Security Council Resolution 1820: an imperfect but necessary resolution to protect civilians from rape in war zones", 16 Cardozo J.L. & Gender 491, 2010

One year after the adoption of the Resolution 1820, as required by the Resolution itself, the Secretary General published a report concerning the status of its implementation. Unfortunately, it suggested that adequate implementing mechanisms lacked.[143]

Security Council Resolution 1888 (2009)[144] detailed measures to better protect women and children from sexual violence in conflict situations. In particular, the Secretary-General should intervene to appoint a Special Representative to provide leadership and coordination of UN efforts to address sexual violence, to send a team of experts where situations of particular concern exist and to charge peacekeepers with the protection of women and children. Moreover, this Resolution called for the identification of "women protection advisers" (WPAs) among gender advisers or human rights protection units. These advisers were intended to provide support for the reporting of sexual violence and for the implementation of the Resolution's protection mandate.

With reference to the implementation of UN SC Res. 1888, pursuant to this resolution, the Office of the Special Representative of the Secretary-General on Sexual Violence in Conflict was established. Moreover, the United Nations Mission in South Sudan (UNMISS) was the first peace-keeping mission to deploy, in April 2012, WPAs. From July 2012 to April 2013, six WPAs were appointed within the Human Rights Division and began to monitor, investigate, analyze and report on incidents and patterns of conflict-related sexual violence in South Sudan. [145]

Security Council Resolution 1889 (2009)[146] reaffirmed the Resolution 1325. In fact, it has been already observed that the precedent resolutions having required the involvement of women in peace-building processes lacked implementation, this is demonstrated also by the fact that the Security Council continued to address the issue. In Resolution 1889, the UN Security Council affirmed that it remained *"deeply concerned about the persistent obstacles to women's full involvement in the prevention and resolution of conflicts and participation in post-conflict public life, as a result of violence and intimidation, lack of security and lack of rule of law, cultural discrimination and stigmatization, including the rise of extremist or fanatical views on women and socio-economic factors including the lack of access to education*." In this respect, the Security Council emphasized that the marginalization of women could delay or undermine the achievement of stable peace, security and reconciliation.

Moreover, this Resolution importantly established indicators to monitor its own implementation. Specifically, this Resolution requested the Secretary-General to provide global indicators to measure progresses in implementation of Resolution 1325 and to prepare a report on the participation of women in peace building and required member states and international organizations to grant such a participation by means of contrasting social attitudes that discourage the participation of women.

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[143] Report of the Secretary-General Pursuant to Security Council Resolution 1820, U.N. Doc. S/2009/362, 15 July 2009

[144] S/RES/1888 (2009)

[145] For information concerning the Special Representative of the Secretary-General on Sexual Violence in Conflict, see Chapter 3.4.2.
For information on UNMISS, see UNIMISS Contribution to the Roundtable discussion on SGBV in South Sudan, 8 September, Geneva, available at: http://www.norway-geneva.org/PageFiles/737836/UNMISS%20Contribution%20to%20the%20Roundtable%20discussion%20on%20SGBV%20in%20South%20Sudan%20%20%20%20.pdf

[146] S/RES/1889 (2009)

Finally, this Resolution addressed impunity and called on member states to respect international law and to prosecute those responsible for perpetrating crimes of sexual violence.[147]

Accordingly, on 27 April 2010, the Assistant Secretary-General and Special Adviser on Gender Issues and Advancement of Women, Rachel Mayanja, presented the Secretary General's Report (S/2010/173) on indicators elaborated to track and monitor the implementation of UN SC Res. 1325, on behalf of the Secretary-General. Following the submission of the Secretary General's Report, the Security Council made a Presidential Statement in which it took note of the indicators and recommendations contained in the Secretary General's Report, which listed 26 indicators organized into 4 pillars: prevention, participation, protection and, relief and recovery:

- Prevention: *"Reduction in conflict and all forms of structural and physical violence against women, particularly sexual and gender-based violence"*
- Participation: *"Inclusion of women and women's interests in decision-making processes related to the prevention, management and resolution of conflicts"*
- Protection: *"Women's safety, physical and mental health and economic security are assured and their human rights respected"*
- Relief and Recovery: *"Women's specific needs are met in conflict and post-conflict situations"*[148]

Security Council Resolution 1960 (2010)[149] requested the Secretary-General to list those parties credibly suspected of committing or being responsible for planning tactics of war encompassing the use of sexual violence. It also called for the establishment of monitoring, analysis and reporting arrangements on conflict-related sexual violence.[150]

In order to implement this Resolution, the UN have decided to create, Monitoring, Analysis and Reporting Arrangements on conflict-related sexual violence in situations of armed conflict and post-conflict and other situations of concern (MARA). The implementation of the MARA is intended to help missions to collect objective and reliable information on conflict-related sexual violence, to contribute to improve prevention and response and to develop comprehensive strategies to address this issue, including programmatic responses for survivors at the country-level. In particular, according to the 2014 Inventory of United Nations system activities to prevent and eliminate violence against women, the UN are trying to accelerate the implementation of the Monitoring

[147] UN, "Background Information on Sexual Violence used as a Tool of War", supra at 126

[148] Security Council's Presidential Statement: S/PRST/2010/8 of 27 April 2010. In the Presidential Statement (PRST), the Council took note of the indicators and recommendations contained in the Secretary General's Report (S/2010/173), required by UN SC Res. 1888 (2009): "Implementation of SCR 1325: Indicators on Women, Peace and Security", available at: http://www.peacewomen.org/security_council_monitor/indicators
The indicators were elaborated pursuant to SC/RES/1889 (2009), para 17

[149] S/RES/1960 (2010)

[150] UN, "Background Information on Sexual Violence used as a Tool of War", supra at 126

Analyses and Reporting Arrangements (MARA) in South Sudan,[151] Democratic Republic of Congo, Central African Republic and Cote D'Ivoire.[152]

Security Council Resolution 2106 (2013)[153] was focused on strengthening and monitoring the prevention of sexual violence in conflict.[154]

In particular, this Resolution called for the further deployment of Women Protection Advisors (WPAs), in accordance with UN SC Res. 1888 (2009).

Security Council Resolution 2122 (2013)[155] reaffirmed the importance of women's involvement in conflict prevention, resolution and peace building.[156]

The following box was included in the 2014 report on women and peace and security of the Secretary-General; it describes the actions taken in 2013 by the Security Council to implement SC Res. 1325 (2000) and more generally to protect women from violence.

[151] UNMISS Contribution to the Roundtable discussion on SGBV in South Sudan, 8 September 2014, Geneva, available at: http://www.norway-geneva.org/PageFiles/737836/UNMISS%20Contribution%20to%20the%20Roundtable%20discussion%20on%20SGBV%20in%20South%20Sudan%20%20%20%20.pdf

[152] Inventory of United Nations system activities to prevent and eliminate violence against women, February 2014, available at: http://www.unwomen.org/~/media/headquarters/attachments/sections/what%20we%20do/evaw-inventory.ashx

[153] S/RES/2106 (2013)

[154] UN, "Background Information on Sexual Violence used as a Tool of War", supra at 126

[155] S/RES/2122 (2013)

[156] UN, "Background Information on Sexual Violence used as a Tool of War", supra at 126

Indicator: Number and type of actions taken by the Security Council related to Resolution 1325 (2000) in 2013.[157]

Of the 47 resolutions adopted by the Security Council in 2013, 36 (76.5 per cent) contained references to women and peace and security, an increase from 66 per cent in 2012.

Most pertained to sexual and gender-based violence, followed by other human rights violations and the participation of women. Notably, two of the resolutions - 2106 (2013) and 2122 (2013) - are specifically intended to accelerate the implementation of the women and peace and security agenda.

Of the 20 resolutions that concerned the establishment or renewal of mandates of missions, whether or not led by the United Nations, 14 (70 per cent) contained references to women and peace and security, an increase from 47 per cent in 2012. They included those establishing new missions in Mali and Somalia and authorizing the African-led International Support Mission in the Central African Republic.

Specific requests for data and analysis on the situation of women and gender-specific concerns remain a tool that could be used more frequently by the Security Council. In 2013, such requests were made in relation to the situations in Afghanistan (Resolution 2096 (2013)), the Central African Republic (Resolution 2121 (2013)), the Democratic Republic of the Congo (Resolution 2098 (2013)) and the Sudan/Darfur (Resolutions 2091 (2013) and 2113 (2013)).

With regard to sanctions, the Security Council included sexual and gender-based violence as a designation criterion for targeted sanctions in Somalia (Resolution 2093 (2013)), requested the Panel of Experts on the Sudan to provide information on such violence (Resolution 2091 (2013)) and expressed its intention to consider imposing targeted measures against individuals who acted to undermine peace, stability and security, including through sexual violence, in the Central African Republic (Resolution 2127 (2013)).

[157] This is box 2, concerning a review of the work of the Security Council in 2013, included in the report of the Secretary-General on women and peace and security, S/2014/693, September 2014, submitted to the Security Council pursuant to the presidential statement dated 26 October 2010 (S/PRST/2010/22), in which the Security Council requested to submit annual reports on the implementation of Resolution 1325 (2000) and 2122 (2013), available at: http://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/s_2014_693.pdf

3.5 The process of criminalization at the international level of war crimes, crimes against humanity and genocide

As already argued, nowadays has arisen awareness on the fact that international humanitarian law and international human rights law interact.

International humanitarian law[158] had its roots in ancient times and progressively consolidated during the Middle Ages. Thus, this is one of the oldest areas of public international law.[159]

Instead, human rights law[160] is the product of the theories developed in the Age of Enlightenment and finds its natural expression in domestic constitutional law. It was only in the aftermath of the World War II that, as a reaction to the atrocities committed during the conflict, human rights law became part of the body of public international law.[161]

Once established and in order to be respected, the limits on the method of warfare and the individual human rights required a reaction to their violations, namely the criminalization of their transgression by means of imposing penal sanctions. Therefore, at the end of this process, certain serious violations of international law would encompass not only the classical form of responsibility in international law, which is the responsibility of the state, but also that of the individual perpetrator.

It has been sustained that international criminal rules were first enforced and invoked when, in 1474, a criminal tribunal of twenty-eight judges from different nations was established to try Peter von Hagenbach.[162] He was accused of having instituted a "reign of terror" in the city of Breisach. In particular, the charges against him included the crimes of *"murder, rape, perjury and other crimes in violation of the laws of God and man".* Indeed, he was accused and then found guilty for violations of the laws and the customs of war.[163]

Another important step forward in prosecuting war criminals was the failed attempt to try, at the end of the World War I, the German Kaiser Wilhelm II "*for supreme offence against international morality and the sanctity of treaties*"[164] and the German soldiers accused of war crimes, more specifically of *"acts in violations of the laws and customs of war."*[165] The trial against the Kaiser

[158] For a definition and further details, see Chapter 3.2

[159] Robert Kolb, "The relationship between international humanitarian law and human rights law: A brief history of the 1948 Universal Declaration of Human Rights and the 1949 Geneva Conventions", International Review of the Red Cross No. 324, 30-09-1998, available at: https://www.icrc.org/eng/resources/documents/misc/57jpg2.htm

[160] For a definition and further details, see Chapter 3.3

[161] Ibid.

[162] Peter von Hagenbach, served the Duke of Burgundy, as a governor. After it had been discovered that his troops had raped and killed innocent civilians and pillaged their properties during the occupation of the city of Breisach, in Germany, Hagenbach was tried before a tribunal of twenty-eight judges from the allied states of the Holy Roman Empire, in 1474. He was found guilty of murder, rape and other crimes against the "laws of God and man", thus, stripped of his knighthood and sentenced to death.

[163] First recorded international prosecution for war crimes. Kelly Dawn Askin, "War Crimes Against Women: Prosecution in International War Crimes Tribunals", Martinus Nijhoff Publishers, 1997, p. 28; reporting: M. Cherif Bassiouni, "International Criminal Law, A Draft International Criminal Code", Sitjhoff-Noordhoff Publishers, The Netherlands, 1980, p. 8

[164] Treaty of Versailles (signed on 28 June 1919), Article 227

[165] Treaty of Versailles, Article 228

never occurred and the others against the soldiers, known as the Leipzig Trials, failed their scope, since they were more disciplinary proceedings of the German army than international trials.[166]

The Treaty of Sèvres, which governed the peace with Turkey, also provided for war crimes trials but notably, the suggested prosecutions concerned those considered responsible not only for *"acts committed in violation of the laws and customs of war",* but also for *"crimes against humanity and civilization."*[167] These *"crimes against humanity and civilization"* set a precedent for Articles 6(c) and 5(c) of the Nuremberg and Tokyo Charters, respectively. However, this treaty was never ratified by Turkey. Instead, it was later replaced by the Treaty of Lausanne of 1923, which contained a declaration of amnesty for all the offences committed between 1 August 1914 and 20 November 1922 and, consequently, no international trial took place.

Two noteworthy events that occurred in the mid-twentieth century had a great impact on international criminal law: the trials of the major war criminals held in Nuremberg and Tokyo at the end of the World War II and the adoption of the four Geneva Conventions of 12 August 1949 for the protection of war victims.[168] The Nuremberg and Tokyo trials established the principle of individual criminal responsibility for certain serious violations of the rules of international law applicable in case of armed conflict. Indeed, crimes against peace, war crimes and crimes against humanity received a formal recognition in the Charter of the two Tribunals.[169]

The second event was the adoption of the four Geneva Conventions of 12 August 1949 for the protection of war victims because they explicitly prescribed criminal liability for their "grave breaches".[170]

A most important step in the process of developing rules on individual criminal responsibility under international law was taken by the establishment of the two *ad hoc* Tribunals for the prosecution of the crimes committed, respectively, in the former Yugoslavia (ICTY) and in Rwanda (ICTR).[171] These Tribunals have also provided fundamental advancements in the elaboration of what

[166] William A. Schabas, "An introduction to the international criminal court", 4th edition, Cambridge 2011, pp. 3-4

[167] The Treaty of Sèvres, signed on 10 August 1920, contained, in addition to the provisions dealing with "violations of the laws and customs of war" (Article 226) a further provision, by which *"The Turkish Government undertakes to hand over to the Allied Powers the persons whose surrender may be required by the latter as being responsible for the massacres committed during the continuance of the state of war on territory which formed part of the Turkish Empire on the 1st August, 1914*" (Article 230). Article 230 of the Peace Treaty of Sèvres was intended to cover, in conformity with the Allied declaration of 1915, the offenses committed on Turkish territory against persons of Armenian or Greek race. This declaration, adopted by the Allied Power on 24 May 1915, denounced the massacres of the Armenian population, which occurred at the beginning of the First World War in Turkey, as "crimes against humanity and civilization": "En presence de ces nouveaux crimes de la Turquie contre l'humanité et la civilisation, les Gouvernements allies font savoir publiquement a la Sublime Porte qu'ils tiendront personnellement responsables des dits crimes tous les membres du Gouvernement ottoman ainsi que ceux de ces agents qui se trouveraient impliques dans de pareils massacres."

[168] Thomas Graditzky, "Individual criminal responsibility for violations of international humanitarian law committed in non-international armed conflicts," International Review of the Red Cross No. 322, 31 March 1998, available at: https://www.icrc.org/eng/resources/documents/misc/57jp4l.htm

[169] Ibid.

[170] For further details see supra Chapter 3.2.1

[171] Edoardo Greppi, "The evolution of individual criminal responsibility under international law", International Review of the Red Cross No. 835, 30 September 1999 [hereinafter: Greppi, "The evolution of individual criminal responsibility under international law"]

was becoming a sort of "international criminal code".[172] The UN Security Council Resolutions on the establishment of Tribunals for the prosecution of individuals responsible for acts committed in the former Yugoslavia (ICTY) and in Rwanda (ICTR) contained the provisions determining the *ratione materiae* jurisdiction. In particular, the Tribunals were empowered to prosecute war crimes, crimes against humanity and genocide. [173]

Considering specifically sexual violence crimes, both the ICTY and the ICTR's Statutes enumerated rape among the crimes against humanity, respectively in Article 5(g) of the ICTY Statute and in Article 3(g) of the ICTR Statute. In addition, the ICTR's Statute listed *"rape, enforced prostitution and any other form of indecent assault"* as "outrages upon personal dignity" under Article 4(e), which lists the violations of Article 3 common to the Geneva Conventions and of Additional Protocol II, thus, war crimes.[174]

Since the Statutes of both Tribunals explicitly criminalized rape, they constituted an important improvement, if compared to the Nuremberg and Tokyo Charters, which did not mention gender-based crimes. In fact, only the Control Council Law n. 10, which furnished the legal basis for the trials held before the military tribunals conducted by the occupying regime and for the subsequent prosecutions held by the German courts, meant to prosecute "lower level" accused, included rape within the definition of the crimes against humanity.[175]

The crime of rape was prosecuted by both the ICTY and the ICTR directly, under the crime of rape itself and indirectly, under the provisions relative to other crimes, as a constitutive act thereof.[176]

The Rome Statute of the International Criminal Court (ICC) provides the most comprehensive codification to date of international criminal law.[177] In fact, all the legal heritage of the two *ad hoc*

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[172] Ibid.

[173] Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, adopted 25 May 1993, by UN SC Res. 827 (1993) [hereinafter ICTY Statute]. The ICTY *ratione materiae* jurisdiction:

- Article 2 empowers the Tribunal to prosecute persons "committing or ordering to commit" grave breaches to the 1949 Geneva Conventions.
- Article 3 covers violations of the laws and customs of war.
- Article 4 reproduces Articles 2 and 3 of the 1948 Genocide Convention.
- Article 5 authorizes the Tribunal to prosecute persons responsible for the listed crimes against humanity.

Statute of the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens responsible for genocide and other such violations committed in the territory of neighboring states, between 1 January 1994 and 31 December 1994, adopted on 8 November 1994, by UN SC Res. 955 (1994) [hereinafter ICTR Statute]. The ICTR *ratione materiae* jurisdiction:

- Article 2 reproduces Articles 1 and 2 of the Genocide Convention.
- Article 3 empowers the Tribunal to prosecute the listed crimes against humanity and
- Article 4 to prosecute those "committing or ordering to be committed" serious violations of Article 3 common to the Geneva Conventions of 12 August 1949 for the Protection of War Victims and of Additional Protocol II thereto of 8 June 1977.

[174] ICTR Statute, Art. 4(e): "Outrages upon personal dignity, in particular humiliating and degrading treatment, rape, enforced prostitution and any form of indecent assault"

[175] Control Council Law N. 10, Article 2.1(c)

[176] For further information, see infra Chapter 4

[177] "International Criminal Law: a Discussion Guide", edited by John Cerone and Susana SáCouto, with contributing authors: John Cerone (Chapters I, II and IV), Diane Orentlicher (Chapter VIII), Susana SáCouto (Chapters IV, V and VI), Ewen Allison, Tejal Jesrani, Robert Kahn, Chante Lasco, Cecile Meijer, and Claire Trickler-McNulty; available at: http://www.wcl.american.edu/warcrimes/documents/2004-10_ICL_Discussion_Guide_ET_final.pdf

Tribunals, comprehending the principles expressed in the Statutes and in the jurisprudential developments, has been converged and codified in this Statute, which was adopted by a UN diplomatic conference, on 17 July 1998. The ICC Statute, in Articles 5 to 8, supplemented by the ICC Elements of Crimes, provides the definitions of the crimes under the jurisdiction of the ICC. They are *"the most serious crimes"* and are *"of concern to the international community as a whole"*.[178] Such offences contravene the legal and ethical rules and principles of the international community.[179]

Article 6 of the Rome Statute, as well as Article 4 of the ICTY statute and Article 2 of the ICTR Statute, reproduces Article 2 of the 1948 Genocide Convention. The major evolution regarded Articles 7 and 8, relative to crimes against humanity and war crimes, in fact, it can be noticed that these provisions are more detailed, if compared to the precedent formulations. In particular, Articles 7(1)(g), 8(2)(b)(xxii) and 8(2)(e)(vi) criminalize rape and other forms of sexual violence. In addition, Article 7(1)(h) includes persecution based on gender among the crimes against humanity.

Considering the international law's progress into the field of criminalization in its entirety, crimes against humanity had their roots in war crimes and, later, they differentiated becoming a distinct category of international crimes. Genocide, though originally designed to include crimes against humanity, also evolved into a distinct and separate category of international crimes.[180] Moreover, the contemporary legal scholarship holds the view point that all the "core crimes" categorized by the ICC Statute, i.e war crimes, crimes against humanity and genocide, have reached a *jus cogens* status:[181] "*deriving from multiple legal sources, they overlap relative to their context, content, purpose, scope, application, perpetrators and protected interests"*.[182]

The international Tribunals and Courts have prosecuted sexual violence crimes as war crimes, crimes against humanity and genocide, emphasizing each time different harmful aspects of the various acts of sexual violence.[183] Therefore, it is important to deepen the various elements of these "core crimes"[184] and, in order to better understand such constitutive elements, to consider the historical development of these international crimes.

The Rome Statute of the International Criminal Court is the treaty that established the International Criminal Court. It was adopted at a diplomatic conference in Rome on 17 July 1998 and entered into force on 1 July 2002.

[178] ICC Statute, Art. 5

[179] Greppi, "The evolution of individual criminal responsibility under international law", supra at 171

[180] Bassiouni, "The Normative Framework of International Humanitarian Law", supra at 20

[181] M. Cherif Bassiouni, "International Crimes *Jus Cogens* and *Obligatio Erga Omnes*", 59 Law & Contemp. Probs. 63, 1996; available at: http://www.sos-attentats.org/publications/bassiouni.jus.cogens.pdf [hereinafter: Bassiouni, "International Crimes: *Jus Cogens* and *Obligatio Erga Omnes*"]

"The legal literature discloses that the following international crimes are *jus cogens*: aggression, genocide, crimes against humanity, war crimes, piracy, slavery and slave-related practices and torture."

For further details, see Chapter 3.5.4

[182] Bassiouni, "The Normative Framework of International Humanitarian Law", supra at 20

[183] This issue is widely treated in Chapter 4.1

[184] "Core crimes" are the most serious crimes of concern to the international community as a whole, namely war crimes, crimes against humanity and genocide.

3.5.1 The development of the definition of war crimes

The notion of war crimes developed during the second half of the ninetieth century.

Establishing the individual criminal liability, war crimes constituted the first exception to the concept of "collective responsibility",[185] which was prevalent in the international community. Great impulse to the development of war crimes was given by the codification of the customary law of warfare, in particular in the Hague Conventions (1899-1907) and then, by the adoption of the Geneva Conventions (1949).[186]

Consistently, in the Tadić case, the ICTY Appeals Chamber, clarified that war crimes: (1) must consist of a *"serious infringement"* of rules of international humanitarian law, i.e. it *"must constitute a breach of a rule protecting important values and the breach must involve grave consequences for the victim"*; (2) the rule violated must be part of customary law or of an applicable treaty and (3) *"the violation of the rule must entail, under customary or conventional law, the individual criminal responsibility of the person breaching the rule"*.[187] Therefore, war crimes are *"serious violations of customary or treaty rules belonging to international humanitarian law,"*[188] substantially constituted by the "Law of The Hague" and the "Law of Geneva".[189]

It is important to emphasize that the Hague Conventions are applicable only in case of conflicts between states,[190] whereas the "Law of Geneva" covers two different categories of conflict: conflicts of an international character and conflict of a non-international character. In the first case, violations, which constitute war crimes, are referred to as "grave breaches", applicable only to armed conflicts taking place between states. In the second case, the Geneva provisions are principally applicable to armed conflicts between a state and a belligerent or insurgent group within that state. In fact, the ICTY clarified that the character of the conflict is irrelevant with regard to the application of Common Article 3 because it sets forth a *"minimum mandatory rules"* applicable to

[185] Antonio Cassese, "Cassese's International Criminal Law", Oxford University Press, 31 January 2013, p. 64: Until the 1945 Nuremberg Trials, "states alone could be called to account by other states, plus servicemen (normally law-ranking people) accused of misconduct during international wars".

[186] Antonio Cassese, "Cassese's International Criminal Law", Oxford University Press, 31 January 2013, pp. 63-64.
For further details on The Hague and the Geneva Conventions, see Chapters 3.3 and 3.3.1

[187] Prosecutor v. Duško Tadić, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995, para 94

[188] Antonio Cassese, "Cassese's International Criminal Law", Oxford University Press, 31 January 2013, p. 65

[189] For further information on "The Hague Law" and on the "Law of Geneva", see Chapter 3.2

[190] See supra, Chapter 3.2. Michael N. Schmitt et al., "International Institute of Humanitarian Law: The Manual on the Law of Non-International Armed Conflict with Commentary", 2006, available at: http://www.iihl.org/iihl/Documents/The%20Manual%20on%20the%20Law%20of%20NIAC.pdf "Express treaty law governing non-international armed conflict is rather limited. It includes Common Article 3 of the 1949 Geneva Conventions for the Protection of War Victims; the 1977 Protocol Additional (II) to the Geneva Conventions of August 12, 1949, and Relating to the Protection of Victims of Non-international Armed Conflict; the 1980 Convention on Certain Conventional Weapons, as amended, and its Protocols; the 1998 Statute of the International Criminal Court; the 1997 Ottawa Convention banning anti-personnel land mines; the 1993 Chemical Weapons Convention; and the 1954 Hague Convention for the Protection of Cultural Property and its 1999 Second Protocol".

any armed conflicts.[191] Consequently, the ICTY Appeals Chamber, in the Tadić case, specified that it is not necessary to establish the international or the non-international character of the conflict to exercise jurisdiction under Article 3 of the ICTY Statute.[192]

Therefore, within the Geneva Law, two regimes applicable to war crimes exist:

- the "grave breaches" regime of the four Geneva conventions of 1949 and of the Additional Protocol I;
- the "violations regime" of the Common Article 3 of the four Geneva Conventions of 1949 and of the Additional Protocol II.[193]

Within the first regime, war crimes are not limited to "grave breaches" but include also serious violation of other provisions contained in the Geneva Conventions. Within the second regime, whereas violations of Common Article 3 are interpreted as war crimes,[194] there is hesitancy to interpret all the transgressions of the norms contained in Protocol II as war crimes.[195]

Therefore, the only provisions applicable to non-international armed conflicts are those included in Article 3 common to all four Geneva Conventions of 1949 and in the Protocol II, which develops and supplements Article 3, extending the essential rules of the law of armed conflicts to internal wars.[196] The problem that Common Article 3 and Protocol II are limited in scope and do not have the specificity or detail contained in the articles defining "grave breaches", still remains.[197]

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[191] Prosecutor v. Duško Tadić, "Decision on the Defence Motion for Interlocutory on Jurisdiction", Appeals Chamber, 2 October 1995, para 102: "Court of Justice has confirmed that these rules reflect 'elementary considerations of humanity' applicable under customary international law to any armed conflict, whether it is of an internal or international character (Nicaragua Case, para 218)".

[192] Ibid., para 102: "at least with respect to the minimum rules in common Article 3, the character of the conflict is irrelevant".

[193] See in particular the fundamental guarantees at Art. 4

[194] Bassiouni, "The Normative Framework of International Humanitarian Law", supra at 20: "Common Article 3 of the four Geneva conventions does not categorically establish that "violations" of that provision are war crimes, but scholars (See Theodor Meron, "International Criminalization of Internal Atrocities", 89 AM. J. INT'L L. 554, 1995) have interpreted common Article 3 violations as constituting war crimes".

[195] Bassiouni, "The Normative Framework of International Humanitarian Law", supra at 20

[196] 1977 Additional Protocol II, Art. 1

[197] Bassiouni, "The Normative Framework of International Humanitarian Law", supra at 20. The "grave breaches", contained in Articles 50, 51, 130 and 147 of the 1949 Geneva conventions, embrace nine categories of war crimes:

1. willful killing (I-IV conventions);
2. torture or inhuman treatment, including biological experiments (I-IV conventions);
3. willfully causing great suffering or serious injury to body or health (I-IV conventions);
4. extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly (I, II, and IV conventions);
5. compelling a prisoner of war or a protected person to serve in the forces of the hostile Power (III and IV conventions);
6. willfully depriving a prisoner of war or a protected person of the rights of fair and regular trial prescribed in the Convention (III and IV conventions);
7. unlawful deportation or transfer of a protected person (IV convention);
8. unlawful confinement of a protected person (IV convention); and
9. taking of hostages (IV convention).

In fact, Article 4(2) of Protocol II specifies that it:

- applies only to internal conflicts in which dissident armed groups are under responsible command and exercise control over such a part of the national territory as to carry out sustained and concerted military operations;
- has the effect of excluding many internal conflicts in which dissident armed groups occupy no significant territory but conduct sporadic guerrilla operations over a wide area;
- does not guarantee all the protections of the Conventions for international armed conflicts, e.g., prisoner-of-war treatment for captured combatants;
- does not contain provisions to punish offenders.[198]

Instead, for "grave breaches" are established explicit obligations and rights associated with their enforcement:

- the duties are: (1) to investigate; (2) to prosecute; (3) to extradite and (4) to assist through judicial cooperation of investigations;
- the rights include: (1) the right for any state to rely on universal jurisdiction to investigate, prosecute and punish; (2) the non-applicability in national or international processes of statutes of limitations; (3) the non-applicability of the defense of "obedience to superior orders" and (4) the non-applicability of immunities including that of Head of State.[199]

However, although the same duties and rights are not explicit in the case of the "violations" of Common Article 3, exists a notable tendency to consider the same enforcement consequences applicable also to this legal regime. Indeed, this trend is explainable, in part, because the great majority of post-World War II conflicts causing mass victimization have been of a non-international character.[200] Thus, it is the purpose of these two legal regimes, which is to protect victims from atrocities, that urges to surpass such differences.

Articles 2 and 3 of the ICTY Statute empower the Tribunal to prosecute the "grave breaches of the Geneva Conventions" and the "violations of the laws or customs of war", respectively.[201]

As already emphasized, according to the Appeals Chamber in the Tadić case, it is not necessary to establish the international or non-international character of the conflict for the exercise of jurisdiction under Articles 3 of the Statute,[202] whereas Article 2 ("grave breaches to the Geneva Convention") is applicable only in case of international armed conflict.[203] It has to be considered

[198] Bassiouni, "The Normative Framework of International Humanitarian Law", supra at 20
[199] Bassiouni, "The Normative Framework of International Humanitarian Law", supra at 20
[200] Bassiouni, "The Normative Framework of International Humanitarian Law", supra at 20
[201] Statute of the International Criminal Tribunal for the Former Yugoslavia, Art. 3 is residual in nature. It gives ICTY jurisdiction over any other serious violations of IHL not covered by Arts. 2, 4 or 5 of the ICTY Statute, in addition to the offences expressly listed in Art. 3. The list of crimes in Article 3 is therefore not closed.
[202] Prosecutor v. Duško Tadić, Decision on the Defense Motion for Interlocutory Appeal on Jurisdiction, IT-94-1-AR72, 2 October 1995, para 137: "Under Article 3, the International Tribunal has jurisdiction over the acts alleged in the indictment, regardless of whether they occurred within an internal or an international armed conflict."
[203] Ibid., para 84: "Article 2 of the Statute only applies to offences committed within the context of international armed conflicts"; whereas, Ibid., para 102: "at least with respect to the minimum rules in common Article 3, the character of the conflict is irrelevant". This interpretation was followed in the subsequent judgments: See "War Crimes: Grave

that this interpretation of Article 2 was criticized. In particular, professor Theodor Meron noted that the expansive interpretation of Article 3 ("laws or customs of war") as a general and residual clause that covers all violations of humanitarian law not falling under Articles 2, 4 or 5 of the Statute,[204] does not include the grave breaches to the Geneva Convention, which consequently, remain applicable only in the contest of international armed conflict. Meron was worried that this interpretation could affect the Tribunal's ability to complete its mandate, in fact added: *"The grave breaches are the principal crimes under the Conventions. Thus deprived of the core of international criminal law in cases deemed to be non-international, the Tribunal can only raise the level of actionable violations to crimes against humanity[205] and […] genocide".[206]* However, Meron concluded that the potential chaos was avoided due to the fortunate fact that the Chambers interpreted the conflict in Yugoslavia as international in nature; therefore, the grave breaches provisions were applicable.[207]

Article 4 of the ICTR Statute gives the Tribunal jurisdiction over a non-exhaustive list of crimes based on violations of Common Article 3 and of Additional Protocol II to the Geneva Conventions, reflecting the UN Security Council's determination that the 1994 genocide took place in the context of a non-international armed conflict. According to the ICTR, as well as to the ICTY, the Common Article 3 is customary law,[208] instead, although some provisions of the Additional Protocol II are deemed as customary law, the Protocol in its entirety is not universally recognized as customary international law.[209] In any case, in order to apply the Additional Protocol II, some conditions must be met:

- an armed conflict took place in the territory of a High Contracting Party […] between its armed forces and dissident armed forces or other organized armed groups;
- the dissident armed forces or other organized armed groups were under responsible

Breaches Of The Geneva Conventions Of 1949 (Article 2)", HRW 2004, available at: http://www.hrw.org/reports/2004/ij/icty/2.htm

[204] Article 3 of the ICTY Statute, which is applicable to both international and non-international armed conflict, is interpreted as a residual provision, that covers all the prohibited conducts not included in Art. 2 of the Statute (Prosecutor v. Tadić, Decision on the Defense Motion for Interlocutory Appeal on Jurisdiction, para 20: Article 3 endows "the International Tribunal with the power to prosecute all "serious violations" of international humanitarian law"). Therefore, it has been determined that the serious violations of the Geneva Conventions, different from the grave breaches, could found individual criminal responsibility.

The Chamber specifies the conditions to be fulfilled for Article 3 to become applicable, in Prosecutor v. Tadić, Decision on the Defense Motion for Interlocutory Appeal on Jurisdiction, para 94:

1. the violation must constitute an infringement of a rule of international humanitarian law;
2. the rule must be customary in nature or, if it belongs to treaty law, the required conditions must be met;
3. the violation must be "serious", i. e., it must constitute a breach of a rule protecting important values, and the breach must involve grave consequences for the victim;
4. the violation of the rule must entail, under customary or conventional law, the individual criminal responsibility of the person breaching the rule.

[205] In fact, ICTY Statute, Article 5 (Crimes against humanity): "The International Tribunal shall have the power to prosecute persons responsible for the [enumerated] crimes *when committed in armed conflict, whether international or internal in character*, and directed against any civilian population"

[206] ICTY Statute Article 4 (genocide) does not require any connection to armed conflict

[207] Theodor Meron, Classification of Armed Conflict in the Former Yugoslavia: Nicaragua's Fallout, 92 AM. J. INT'L L. 238, 1998

[208] Prosecutor v. Jean-Paul Akayesu, ICTR-96-4-T, Trial Judgment, 2 September 1998, para 608

[209] Ibid., para 609

command;
- the dissident armed forces or other organized armed groups were able to exercise such control over a part of their territory as to enable them to carry out sustained and concerted military operations; and
- the dissident armed forces or other organized armed groups were able to implement Additional Protocol II.[210]

In the ICC Statute, the distinction between conflicts of an international and non-international character is reflected in the distinction between "grave breaches" and "serious violations of Common Article 3." Moreover, before the ICC, Protocols I and II are neither specifically nor entirely applicable, but their norms are taken selectively and listed in the ICC Statute as war crimes.

The Rome Statute divides a detailed list of conducts into four categories:

- the "grave breaches" established by the Geneva Conventions, which is followed by a list outlining the relevant criminal acts;
- the "other serious violations of the laws and customs applicable in international armed conflict, within the established framework of international law." The list that follows is extremely detailed, comprising 26 types of acts or behaviors, including also sexual crimes;
- the serious violations of Article 3 common to the Geneva Conventions, which regards non-international armed conflicts and covers acts committed against persons taking no active part in the hostilities;
- the "other serious violations of the laws and customs applicable in armed conflicts not of an international character", which include also sexual crimes.

It is specified that these two last categories do not include acts committed in situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence or other acts of similar nature.[211] It is also recognized that the general right of states to maintain or establish law and order or to defend their unity and territorial integrity *"by all legitimate means*".[212] These specifications are included to avoid an excessive limitation of the sovereignty of State parties.

Comparing the list of war crimes contained in Article 8 of the ICC Statute to the one contained in Article 6 of the Nuremberg Charter,[213] it can be said that the more specific codification is the result of a process of elucidation of what conducts may constitute war crimes:

murder; (2) mutilation; (3) cruel treatment and torture; (4) taking of hostages; (5) intentionally directing attacks against the civilian population; (6) intentionally directing attacks against buildings dedicated to religion, education, art, science or charitable purposes, historical monuments or hospitals; (7) pillaging; (8) ***rape, sexual slavery, enforced prostitution, forced***

[210] Ibid., para 623
[211] ICC Statute, Art. 8(2)(f)
[212] ICC Statute, Art. 8(3)
[213] Nuremberg Charter, Art. 6(b) WAR CRIMES: namely, violations of the laws or customs of war. Such violations shall include, but not be limited to, murder, ill-treatment or deportation to slave labor or for any other purpose of civilian population of or in occupied territory, murder or ill-treatment of prisoners of war or persons on the seas, killing of hostages, plunder of public or private property, wanton destruction of cities, towns or villages, or devastation not justified by military necessity.

pregnancy, as defined in article 7, paragraph 2 (f), enforced sterilization, or any other form of sexual violence also constituting a grave breach of the Geneva Conventions (under Article 8(2)(b)(xxii)) / also constituting a serious violation of article 3 common to the four Geneva Conventions (under Article 8(2)(e)(vi)); *(9) conscripting or enlisting children under the age of 15 years into armed forces or groups or using them to participate actively in hostilities.*

The ICC has jurisdiction over the constitutive acts of war crimes only if *"committed as a part of a plan or policy or as part of a large scale commission of such crimes."*[214] However, plan or policy and scale are not elements of war crimes. In fact, this provision suggests that war crimes not committed as part of a plan or policy, *"shall be prosecuted only if they are of such gravity as to indeed be of concern to the international community as a whole".*[215] Therefore, although one single act may constitute a war crime, it is unlikely that a single act would meet the gravity threshold required in Article 17(1)(d) of the ICC Statute.

3.5.1.1 The elements of war crimes

There are elements of crimes common to all war crimes, which distinguish them from ordinary domestic crimes.[216]

With reference to the objective elements, the first element is the characteristic contextual element of war crimes: the existence of an ongoing armed conflict. Indeed, there must have been an armed conflict when and where the alleged crimes were committed. *"An armed conflict exists whenever there is a resort to armed force between states or protracted armed violence between governmental authorities and organized armed groups or between such groups within a State*."[217]

The ICTY specified that international humanitarian law is applicable from the initiation of such armed conflicts and extends beyond the cessation of hostilities until a general conclusion of peace is reached or, in the case of internal conflicts, a peaceful settlement is achieved.[218] Therefore, an international armed conflict has been defined as resort to armed force between states. A non-international armed conflict has been defined as a protracted use of armed violence between governmental authorities and organized armed groups or between non-governmental armed groups within a State.

It has to be further considered that situations involving internal disturbances and tensions, such as riots, isolated and sporadic acts of violence or unrest, do not amount to armed conflict.[219] In

[214] ICC Statute, Art. 8

[215] Payam Akhavan, "Reducing Genocide to Law: Definition, Meaning, and the Ultimate Crime", Cambridge University Press, 2012, p. 72 ; referring to: Andreas Zimmermann, "Article 5, Crimes Within the Jurisdiction of the Court". In Otto Triffterer ed., Commentary on the Rome Statute of the International Criminal Court, 2nd ed. (Oxford, UK: Beck/Hart, 2008) pp. 129-133. See also ICC Statute, Art. 5

[216] The list is found in "International Criminal Law & Practice Training Materials, War Crimes", Part of the OSCE-ODIHR/ICTY/UNICRI Project "Supporting the Transfer of Knowledge and Materials of War Crimes Cases from the ICTY to National Jurisdictions." Developed by International Criminal Law Services

[217] Prosecutor v. Dusko Tadić, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1955, para 70

[218] Ibid.

[219] Rome Statute, Art. 8(2)(f)

situations of internal disturbance, the relevant elements to determine if the internal violence amounts to an armed conflict include the protracted nature of the armed violence, its intensity and the extent of the organization of the parties involved.[220]

The *actus reus* must constitute a violation of customary or treaty international humanitarian law binding on the accused. Moreover, the violation must be serious and involve grave consequences for the victim. The seriousness is fulfilled if the conduct violates a *"rule protecting important values and […] involve grave consequences for the victim."*[221] A victim that must be protected under international humanitarian law. Generally, protected persons are civilians, prisoners of war and combatants no longer able to fight because sick, wounded or shipwrecked, thus, non-combatants.

Furthermore, the violation must entail the individual criminal responsibility of the perpetrator. However, the personal criminal liability needs not to be expressively established in a treaty, as long as customary international law supports it.[222]

For a crime to constitute a war crime there must exist a sufficient nexus between the *actus reus* and the armed conflict. To identify this nexus, the Prosecutor must prove a causal link between the perpetrator's act and the armed conflict or at least prove that the armed conflict *"played a substantial part in the perpetrator's ability to commit it, his decision to commit it, the manner in which it was committed or the purpose for which it was committed".*[223] In particular, in order to establish this link between the act and the armed conflict, the Tribunal may take into account some factors: *"(1) the fact that the perpetrator is a combatant; (2) the fact that the victim is non-combatant; (3) the fact that the victim is a member of the opposing party; (4) the fact that the act may be said to serve the ultimate goal of a military campaign; and (5) the fact that the crime is committed as part of or in the context of the perpetrator's official duties*".[224]

With reference to the subjective elements of war crimes, it is necessary to prove that the accused was aware that an armed conflict existed. In fact, the ICTY required the evidence of the perpetrator's awareness of the existence of the conflict.[225] Moreover, according to the ICC Elements of Crimes, the accused must be aware of the factual circumstances that establishes the existence of an armed conflict.[226] It is also necessary that the perpetrator acts with the intent required for the specific underlying conduct.

[220] Prosecutor v. Zejnil Delalić et al. (Čelebici), IT-96-21-T, Trial Judgment, 16 November 1998 para 184; Prosecutor v. Jean-Paul Akayesu, ICTR-96-4-T, Trial Judgment, 2 September 1998, paras 619-620

[221] Prosecutor v. Duško Tadić, Decision on the Defence Motion for Interlocutory on Jurisdiction, Appeal Chamber, 10 August 1995, para 94

[222] Ibid., para 70: "The individual criminal responsibility of the violator need not be explicitly stated in a convention for its provisions to entail individual criminal liability."

[223] Prosecutor v. D. Kunarac, R. Kovač e Z. Vuković, IT-96-23&IT-96-23/1-A, Appeal Judgment, 12 June 2002, para 58

[224] Ibid., para 59

[225] Prosecutor v. Dario Kordić and Mario Čerkez, IT-95-14/2-A, Appeal Judgment, 17 December 2004, para 311; Prosecutor v. Mladen Naletilić and Vinko Martinović, IT-98-34-A, Appeal Judgment, 3 May 2006, paras 116-120

[226] ICC Elements of Crimes, 8(2)(a)(i)-5; see Prosecutor v. Jean-Pierre Bemba Gombo, ICC-01/05-01/08-424, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute, Pre-Trial Chambers, 15 June 2009, para 238

Conclusively, when all these elements are fulfilled and the prohibited act committed is one of the sexual violence acts listed in Articles 8(2)(b)(xxii) or 8(2)(e)(vi) of the ICC Statute, sexual violence amounts to a war crime.

The following tab summarizes the elements of war crimes as interpreted by the *ad hoc* Tribunals and then cristallized in the ICC Statute.

ELEMENTS OF WAR CRIMES **GRAVE BREACHES OF THE 1949 GENEVA CONVENTIONS** **ICTY Statute Art. 2 and ICC Statute Art. 8(2)(a)** **OTHER SERIOUS VIOLATIONS OF THE LAW AND CUSTOMS APPLICABLE IN INTERNATIONAL ARMED CONFLICT** **ICC Statute Art. 8(2)(b)**	
Actus Reus	1. There must be an armed conflict
	2. The armed conflict must be international
	3. The perpetrator must commit one of the underlying acts
	4. There must be a nexus between the conflict and the act
Mens Rea	5. The perpetrator must have the intent to commit the underlying act
	6. The perpetrator must be aware of the existence of an armed conflict

ELEMENTS OF WAR CRIMES **VIOLATIONS OF THE LAWS OR CUSTOMS OF WAR** **ICTY Statute, Art. 3** **VIOLATIONS OF ARTICLE 3 COMMON TO THE GENEVA CONVENTIONS AND OF THE ADDITIONAL PROTOCOL II** **ICTR Statute Art. 4** **SERIOUS VIOLATIONS OF THE ARTICLE 3 COMMON TO THE 1949 GENEVA CONVETIONS** **ICC Statute, Art. 8(2)(C) AND** **OTHER SERIOUS VIOLATIONS OF THE LAWS AND CUSTOMS APPLICABLE IN ARMED CONFLICT NOT OF AN INTERNATIONAL CHARACTER** **ICC Statute Art. 8(2)(e)**	
Actus reus	1. There must be an armed conflict
	2. For the ICTY: the conflict can be internal or international 3. For the ICTR and the ICC: the conflict must be non-international
	4. The perpetrator must commit one of the underlying acts
	5. There must be a nexus between the armed conflict and alleged offense
Mens rea	6. The perpetrator must have the intent to commit the underlying offence
	7. The perpetrator must be aware of the existence of an armed conflict

3.5.2 The development of the definition of crimes against humanity

Crimes against humanity are serious acts of violence, which harm human beings by striking what is most essential to them: their life, liberty, physical welfare, health and/or dignity. They are inhumane acts that by their extent and gravity go beyond the limits tolerable to the international community, which must perforce demand their punishment. But crimes against humanity also transcend the individual because when the individual is assaulted, humanity comes under attack and is negated. It is therefore the concept of humanity as victim, which essentially characterizes crimes against humanity.[227]

Crimes against humanity originated in the concept of *"crimes against the laws of humanity,"* which is an expression contained in the Preamble to the 1907 Hague Convention and more precisely in the so-called Martens Clause.[228]

After the World War I, in the peace treaty with Turkey, the Treaty of Sèvres, the Allies referred to the *"crimes against the laws of humanity."*[229] The expression was the same they had already used in the 1915 joint declaration by which they had condemned the genocide targeting Armenian and Greek population living in the territory of the Ottoman Empire.[230]

By 1942, the Allies realized that they would have to revisit that crime[231] and in 1945, Article 6(c) of the London Charter provided for a definition of crimes against humanity:

Crimes against humanity: namely, murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian populations, 'before or during the war'; or persecutions on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated.

This definition, which required a "war-connection", implied that the crimes against humanity committed before the initiation of the war, were not prosecutable. Moreover, this requisite established a strong connection, in the Nuremberg Charter, between Article 6(c) and Article 6(a), which defined the "crimes against peace" (planning and waging a war of aggression) and Article 6(b), which defined "war crimes."

The war-connection requirement was later removed by a Report of the International Law Commission (ILC), adopted in 1950 and replaced by the requirement that the crimes against humanity were committed *"in execution of or in connection with"* war crimes or crimes against

[227] Prosecutor v. Drazen Erdemović (Pilica Farm), IT-96-22-T, Trial Judgment, 29 November 1996, para 28
[228] Convention Respecting the Laws and Customs of War on Land (Convention IV), The Hague, 18 October 1907, Preamble, Martens Clause. See supra at 121
[229] Treaty of Sèvres (1919), Art. 230
[230] The joint declaration, issued on 24 May 1915, by the allied powers (England, France and Russia) condemning the Turkish-Kurdish massacres of Armenians as *"crimes of Turkey against humanity and civilization",* for details, see supra at 167
[231] The Punishment Of War Criminals: Recommendations of The London International Assembly (Report of Commission I), 1944

peace.[232] Nevertheless, remained the problem concerning the legal effect of such a report. In fact, a report of the ILC has generally no binding effect, unless it constitutes the codification of customary international law,[233] but it was dubious, at the time, that this modification constituted the expression of a well established custom.

The Security Council reaffirmed the concept of "crimes against humanity" in 1993, when it set up the ICTY and adopted its Statute.[234] Article 5 of the ICTY Statute referred to the definition of crimes against humanity given in the Nuremberg Charter, still requiring the contextual element of "an armed conflict", but adding a specification not present in the Nuremberg Charter: the characterization of the conflict as non-international or international is not relevant.[235]

In fact, Article 5 of the ICTY Statute enumerated a list of conducts that, only *"when committed in armed conflict, whether international or internal in character and directed against any civilian population",*[236] amount to crimes against humanity. Accordingly, the existence of the conflict must be proved, as well as the link between the act or omission charged and the armed conflict.

With reference to this "war-connection" element, the Tribunal concluded that to fulfill it, it is sufficient that the alleged crimes are *"closely related to the hostilities".* Thus, it is not necessary that the acts take place in the heat of a battle.[237]

Moreover, the Tribunal found that, notwithstanding the fact that the ICTY Statute still required this nexus between crimes against humanity and armed conflict, customary international law no longer required it, thus, Article 5 was intended to reintroduce this nexus exclusively for the purposes of limiting the jurisdiction of this Tribunal.[238] In fact, the inclusion of the requirement of an armed

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[232] "Principles of International Law Recognized in the Charter of the Nuremberg Tribunal and in the Judgment of the Tribunal", 1950. Principle VI:
(c) Crimes against humanity:
> "Murder, extermination, enslavement, deportation and other inhuman acts done against any civilian population, or persecutions on political, racial or religious grounds, when such acts are done or such persecutions are carried on *in execution of or in connection* with any crime against peace or any war crime".

[233] Bassiouni, "The Normative Framework of International Humanitarian Law", supra at 20: To establish customary international law, state's practice is an important element to consider, in addition to the element of *opinio juris*, but state practice shew reluctance in prosecuting such crimes.

[234] See the Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of Humanitarian Law Committed in the Territory of the Former Yugoslavia, 25 May 25 1993, UN SC Res. 827 (1993)

[235] However, it can be noted a difference between the war-connection's elements of the London Charter's Article 6(c) and the ICTY's Article 5: the specification, in Article 5, that the conflict can be internal as well as international in character.

[236] ICTY Statute, Art. 5

[237] Prosecutor v. Duško Tadić, IT-94-1-T 7, Trial Judgment, 7 May 1997:
- Para 628: (i) <u>The existence of an armed conflict</u>
  The Appeals Chamber, […] stated that "an armed conflict exists whenever there is resort to armed force between states or protracted armed violence between governmental authorities and organized armed groups or between such groups within a State."
- Para 632: (ii) <u>The nexus between the act or omission and the armed conflict</u>
  "It is sufficient that the alleged crimes were **closely related to the hostilities** occurring in other parts of the territories controlled by the parties to the conflict." Thus, it is not necessary that the acts occur in the heat of battle.

[238] Ibid., para 627: (a) <u>When committed in armed conflict</u>

conflict within the definition of crimes against humanity deviated from the development of the doctrine subsequent to the Nuremberg Charter. More specifically, the Control Council Law No. 10 had no longer linked the concept of crimes against humanity with an armed conflict.[239] Furthermore, prior to the creation of the ICTY, the UN Secretary-General had stated that *"crimes against humanity are aimed at any civilian population and are prohibited regardless of whether they are committed in an armed conflict, international or internal in character."*[240] This interpretation was further supported by Virginia Morris and Michael P. Scharf who sustained, regarding the inclusion of the requirement *"in armed conflict",* that *"this limitation is temporal rather than substantive in character, as indicated by the phrase 'when committed in armed conflict'".*[241]

In fact, in 1994, when the Security Council established the ICTR and adopted its Statute,[242] the element of an armed conflict was omitted. Article 3 of the ICTR Statute defined as crimes against humanity the enumerated acts, which were identical to those enumerated in Article 5 of the ICTY Statute, "*when committed as part of an attack against a civilian population"*.[243] The list covers the following conducts:

(a) murder; (b) extermination; (c) enslavement; (d) deportation; (e) imprisonment; (f) torture; (g) ***rape****; (h) persecutions on political, racial and religious grounds; (i) other inhumane acts.*[244]

Comparing this list of crimes with that contained in Article 6(c) of the Nuremberg Charter, it can be noted that Article 5 of the ICTY Statute and Article 3 of the ICTR Statute added, *inter alia*, the crime against humanity of rape.

Article 5 of the Statute, addressing crimes against humanity, grants the International Tribunal jurisdiction over the enumerated acts (whether international or internal). The requirement of an armed conflict is similar to that of Article 6(c) of the Nürnberg Charter which limited the Nürnberg Tribunal's jurisdiction to crimes against humanity committed "before or during the war", although in the case of the Nürnberg Tribunal jurisdiction was further limited by requiring that crimes against humanity be committed "in execution of or in connection with" war crimes or crimes against peace. Despite this precedent, the inclusion of the requirement of an armed conflict deviates from the development of the doctrine after the Nürnberg Charter, beginning with Control Council Law No. 10, which no longer links the concept of crimes against humanity with an armed conflict. As the Secretary-General stated: "Crimes against humanity are aimed at any civilian population and are prohibited regardless of whether they are committed in an armed conflict, international or internal in character." In the Statute of the International Tribunal for Rwanda the requirement of an armed conflict is omitted, requiring only that the acts be committed as part of an attack against a civilian population. The Appeals Chamber has stated that, by incorporating the requirement of an armed conflict, "the Security Council may have defined the crime in Article 5 more narrowly than necessary under customary international law", having stated earlier that "since customary international law no longer requires any nexus between crimes against humanity and armed conflict […] Article 5 was intended to reintroduce this nexus for the purposes of this Tribunal." Accordingly, its existence must be proved, as well as the link between the act or omission charged and the armed conflict.

[239] Control Council Law n. 10, Art. 2(c)

[240] Report of the Secretary-General pursuant to paragraph 2 of the UN SC Res. 808 (1993), UN Doc. S/25704, para 47

[241] Virginia Morris & Michael P. Scharf, "An Insider's Guide to the International Criminal Tribunal for the Former Yugoslavia: A Documentary History and Analysis", Martinus Nijhof, 1995

[242] S/RES/955 (1994)

[243] ICTR Statute, Article 3. The International Tribunal for Rwanda shall have the power to prosecute persons responsible for the following crimes when committed as part of a widespread or systematic attack against any civilian population on national, political, ethnic, racial or religious grounds.

[244] ICTY Statute Art. 5; ICTR Statute Art. 3

However, the ICTR Statute included a restrictive requirement not present in the ICTY Statute: the acts constituting crimes against humanity must be committed on national, political, ethnic, racial or religious grounds. The Tribunal clarified that this specification, which is peculiar to the ICTR Statute, has to be read as a characterization of the nature of the attack, rather than of the *mens rea* of the perpetrator.[245] Therefore, Article 3 of the ICTR Statute restricts the jurisdiction of the Tribunal to crimes against humanity committed in a specific situation, that is, the *"widespread or systematic attack against any civilian population on discriminatory grounds".*

Article 7 of the ICC Statute, which provides the most comprehensive codification to date of international criminal law,[246] widens the list of conducts of the ICTY and the ICTR:

(a) murder; (b) extermination; (c) enslavement; (d) deportation or forcible transfer of population; (e) imprisonment or other severe deprivation of physical liberty; (f) torture; (g) ***rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity****; (h)* ***persecution*** *against any identifiable group or collectivity* ***on*** *political, racial, national, ethnic, cultural, religious,* ***gender*** *or other* ***grounds*** *that are universally recognized as impermissible under international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the court; (i) enforced disappearance of persons; (j) the crime of apartheid; (k) other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health.* [247]

The general opening clause contained in the Nuremberg Charter *"other inhuman acts committed against any civilian population"*, in the Rome Statute is specified, becoming: *"other inhumane acts of a similar character intentionally causing great suffering or serious injury to body or mental or physical health"*, able to include other acts that can be considered the most serious violation of humanity itself.

3.5.2.1 The elements of crimes against humanity

The conducts enumerated in Article 7 of the ICC Statute can amount to crimes against humanity only if the other requisites, indicated in the *chapeau* of the same article, are fulfilled. Therefore, these elements elevate an ordinary crime or an inhumane conduct to a crime against humanity:[248]

Any of the [enumerated acts] when committed as part of a widespread or systematic attack and directed against any civilian population, with knowledge of the attack.

[245] Prosecutor v. Ignace Bagilishema, ICTR-95-1A-T, Trial Judgment, June 7, 2001, para 81

[246] "International Criminal Law: a Discussion Guide", edited by John Cerone and Susana SáCouto. With contributing authors: John Cerone (Chapters I, II and IV), Diane Orentlicher (Chapter VIII), Susana SáCouto (Chapters IV, V and VI), Ewen Allison, Tejal Jesrani, Robert Kahn, Chante Lasco, Cecile Meijer, and Claire Trickler-McNulty. Available at: http://www.wcl.american.edu/warcrimes/documents/2004-10_ICL_Discussion_Guide_ET_final.pdf

[247] Greppi "The evolution of individual criminal responsibility under international law", supra at 171

[248] Commentary of The Rome Statute, available at: http://www.casematrixnetwork.org/case-m/klamberg-commentary/rome-statute/#c1171

Crimes against humanity require the commission of one of the enumerated acts as part of an overarching attack, of which the perpetrator is aware. The *chapeau* does not require any discriminatory grounds or a nexus to an armed conflict, which are instead required, respectively by the ICTR and the ICTY Statutes.[249]

The ICTR and ICTY case law clarified that crimes against humanity consist of individual acts that fall under, are connected with or exist during a larger attack.[250] An "attack" is generally defined as an unlawful act, event or series of events.[251] It does not necessarily require the use of armed force, but it could involve all the forms of ill treatment of the civilian population. The attack can precede, outlast or continue during the armed conflict, but it need not be part of it.[252]

In particular, the ICTR jurisprudence has specified that the act does not need to be committed at the same time or place as the attack, or share the same features, but it must, on some essential level, form part of the attack.[253] For example, it must share some relation, temporal or geographical, with the attack.

To be precise, only the ICTR and the ICC's Statutes explicitly mention the requisite of the "attack". Nevertheless, the ICTY jurisprudence established that the commission of the prohibited acts amounts to crimes against humanity, only if it consists of an attack.

More precisely, the ICTY clarified that for the acts of an accused to amount to a crime against humanity the following elements must be present:

- there must be an attack
- the acts of the perpetrator must be part of that attack;
- the attack must be directed against any civilian population;
- the attack must be widespread or systematic;
- the attack on any civilian population may be part of an armed conflict;
- the perpetrator must know that his acts constitute part of a pattern of widespread or systematic crimes directed against a civilian population and know that his acts fit into such a pattern.[254]

[249] Compare: ICC Statute Art. 7; ICTY Statute Art. 5; ICTR Statute Art. 3

[250] Each act enumerated has its own requirements, but each must be part of the greater attack required by the *chapeau*. The enumerated acts which may rise to the level of crimes against humanity are the same in the ICTR (Art. 3) and ICTY (Art. 5) Statutes. The ICC Statute (Art. 7) amplified the list.

[251] Prosecutor v. Laurent Semanza, ICTR-97-20-T, Trial Judgment, 15 May 2003, para 327

[252] Ibid. See also Prosecutor v. Milomir Stakić, IT-97-24, Trial Judgment, July 31, 2003 para 623: "an attack can precede, outlast, or continue during the armed conflict, but it need not be part of it and is not limited to the use of armed force; it encompasses any mistreatment of the civilian population."

[253] Prosecutor v. Semanza, Trial Judgment, para 329: "Although the act need not be committed at the same time and place as the attack or share all of the features of the attack, it must, by its characteristics, aims, nature, or consequence objectively form part of the discriminatory attack."

[254] Prosecutor v. Dragoljub Kunarac, Radomir Kovač and Zoran Vuković, IT-96-23&IT-96-23/1-A, Appeal Judgment, 12 June 2002, paras 85-86. See also Prosecutor v. Milomir Stakić, IT-97-24-T, 31 July 2003, para 621

The ICTR also listed four essential elements common to the crimes against humanity:

- the act must be inhumane in nature and character, causing great suffering, or serious injury to body or to mental or physical health;
- the act must be committed as part of a wide spread or systematic attack
- the act must be committed against members of the civilian population;
- the act must be committed on one or more discriminatory grounds, namely, national, political, ethnic, racial or religious grounds.[255]

Confronting the elements of the crime common to all the crimes against humanity identified by the ICTY to those identified by the ICTR, the differences regard essentially the ICTR's discriminatory ground and the ICTY's requirement that the attack must be part of the armed conflict.

All the Statutes under examination require for crimes against humanity the element of an attack that has to be widespread or systematic, but none of them defines the two concepts. Therefore, the two concepts of "widespread" and "systematic" have to be interpreted following the ICTY and the ICTR jurisprudence. According to these case laws, "widespread" includes both a large number of acts spread across time or geography, as well as a single or limited number of acts committed on a large scale[256] and "systematic" generally refers to the organized or planned nature of the attack.[257]

The attack must be committed against *"any civilian population".*[258] According to the interpretation given by the jurisprudence, it is sufficient that the targeted population remains predominantly civilian in nature; in fact, the presence of certain non-civilians does not change the population's civilian character.[259] Further, according to ICTR and ICTY jurisprudence, it is the situation of the victim at the time of the attack and not the victim's status to be relevant.[260]

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[255] Prosecutor v. Jean-Paul Akayesu, ICTR-96-4-T, Trial Judgment, 2 September 1998, para 578

[256] Ibid., para 580: "The concept of "widespread" may be defined as massive, frequent, large scale action, carried out collectively with considerable seriousness and directed against a multiplicity of victims. The concept of "systematic" may be defined as thoroughly organized and following a regular pattern on the basis of a common policy involving substantial public or private resources". See also Prosecutor v. Dusko Tadić, IT-94-1-T, 7 May 1997, Trial Judgment, para 648

[257] Prosecutor v. Jean-Paul Akayesu, ICTR-96-4-T, Trial Judgment, 2 September 1998, para 580. See also Prosecutor v. Tihomir Blaskić, IT-95-14, Judgment, para 203 (Trial Chamber I, March 2, 2000). In this case, the ICTY has identified the relevant factors of "sistematicity":

- the existence of a political objective, a plan pursuant to which the attack is perpetrated or an ideology, in the broad sense of the word, that is, to destroy, persecute or weaken a community;
- the perpetration of a criminal act on a very large scale against a group of civilians or the repeated and continuous commission of inhumane acts linked to one another;
- the preparation and use of significant public or private resources, whether military or other;
- the implication of high-level political and/or military authorities in the definition and establishment of the methodical plan.

[258] ICC Statute, Art. 7; ICTY Statute, Art. 5; ICTR Statute, Art. 3

[259] Prosecutor v. Duško Tadić, IT-94-1-T, 7 May 1997, Trial Judgment, para 638

[260] See Prosecutor v. Ignace Bagilishema, ICTR-95-1A-T, Trial Judgment, 7 June 2001, para 79 (citing Blaskic Trial Judgment, para 214: "the specific situation of the victim at the moment of the crimes committed, rather than his status, must be taken into account in determining his standing as a civilian").

The "population requirement" refers to the fact that enough people is targeted, this concept is opposed to limited and randomly selected individuals.[261] However, the jurisprudence clarified that to fulfill the concept it is not necessary that the entire population of a state, city or town is involved.[262]

Coherently with this jurisprudential development, the ICC Elements of Crimes states that the *"attack directed against any civilian population"*, which is not necessarily military in nature, means *"a course of conduct involving the multiple commission"* of the prohibited acts enumerated in Article 7, paragraph 1, of the Statute. This conduct must be *"pursuant to or in furtherance"* of a *"policy to commit such attack."* This policy requires that the State or an organization actively promote or encourage such an attack against a civilian population, although, in some cases, it is sufficient a *"deliberate failure to take action, which is consciously aimed at encouraging such attack"*, by the State or the organization concerned.[263]

The requisite *mens rea* for crimes against humanity under the ICC Statute, which follows the ICTY and ICTR jurisprudence, appears to be comprised by: the intent to commit the underlying offence combined with the knowledge of the broader context in which that offence occurs.[264] Therefore, to satisfy the *mens rea* element of crimes against humanity, the perpetrator must be aware that that there is an attack against the civilian population and that "*his acts comprise part of that attack, or at least that he took the risk that his acts were part of the attack"*.[265]

According to the ICTY, the perpetrator need not know the details of the attack.[266] Similarly, the ICC Elements of Crimes clarifies that knowledge of the attack does not imply a complete knowledge of the detailed character of the attack or the plan or policy behind it.[267] Further, it is not relevant whether the accused intended to direct his act against the targeted population or just the particular

[261] See Prosecutor v. Stakić IT-97-24, Trial Judgment, 31 July 2003, para 624. See also Situation in the Central African Republic in the Case of the Prosecutor v. Jean-Pierre Bemba Gombo, ICC-01/05-01/08, 15 June 2009, para 77: "therefore, the Chamber is of the view that the Prosecutor must demonstrate that the attack was such that it cannot be characterized as having been directed against only a limited and randomly selected group of individuals. However, the Prosecutor need not prove that the entire population of the geographical area, when the attack is taking place, was being targeted."

[262] Prosecutor v. Duško Tadić, IT-94-1-T, 7 May 1997, Trial Judgment, para 644

[263] ICC Elements of Crimes, Article 7, Crimes against humanity, Introduction: "since *attack directed against a civilian population* in these context elements is understood to mean a course of conduct involving the multiple commission of acts referred to in Article 7, paragraph 1, of the Statute against any civilian population, pursuant to or in furtherance of a State or organizational policy to commit such attack. The acts need not constitute a military attack. It is understood that *policy to commit such attack* requires that the State or organization actively promote or encourage such an attack against a civilian population." Footnote 6: "A policy which has a civilian population as the object of the attack would be implemented by State or organizational action. Such a policy may, in exceptional circumstances, be implemented by a deliberate failure to take action, which is consciously aimed at encouraging such attack. The existence of such a policy cannot be inferred solely from the absence of governmental or organizational action."

[264] Prosecutor v. Zoran Kupreškić et al., IT-95-16-T, Trial Chamber Judegment, 14 January 2000, para 556

[265] Prosecutor v. Dragoljub Kunarac, Radomir Kovač and Zoran Vuković, IT-96-23&IT-96-23/1-A, Appeal Judgment, 12 12 June 2002, para 102

[266] Ibid., para 104

[267]ICC Elements of Crime, Crimes against humanity, Introduction Art. 7.2

victim.[268]

Moreover, since the *chapeau* of Article 7 of the ICC Statute does not include any "discrimination requirement," reflecting the ICTY jurisprudence, discriminatory intent is not an element of crimes against humanity, except for the specific crime of persecution.[269]

M. Cherif Bassiouni, commenting on the evolution of crimes against humanity, approached a complex problem, relative to the element of a "state policy" for crimes against humanity. He noted that the formulation of Article 6(c) of the Nuremberg Charter was ambiguous regarding persecution: it was difficult to establish if it constituted a required policy element of the crime or another of the forbidden conducts listed in the Article or it was both a prohibited act as well as a policy element. This problem concerned the definition of crimes against humanity: if they were a category of mass victimization, crimes that required state action or state policy or a residual category comprehending mass crimes even if committed by non-state actors.[270] Bassiouni sustained that crimes against humanity, as described in Article 6(c), constituted a category of international crimes, differentiable from other forms of mass crimes by the element of a "state action or policy".[271] In fact, he continued, Article 3 of the ICTR Statute further developed Article 6(c)'s policy of persecution by the addition of the element of the "widespread or systematic attack"[272] and persecution itself became a prohibited act.[273] The use of the disjunctive "or" seemed to emphasize an advancement: if the mass victimization could be only widespread and not necessarily systematic, then theoretically, it could be inferred that these crimes were not necessarily the result of state action or policy.[274] However, the jurisprudence of the *ad hoc* Tribunals was confused and conflicting on the matter. In fact, the policy seemed to be included in the definition of "systematicity",[275] consequently it should be considered an element of crime, although alternative to "widespreadness".[276] On the contrary, subsequently, the Tribunals affirmed that the existence of a policy or plan may be evidentially relevant, but it is not a legal element of the crime.[277]

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[268] Prosecutor v. Kunarac, Appeal Judgment, para 103

[269] Prosecutor v. Dusko Tadić, IT-94-1-A, Appeal Judgment, 15 July 1999, para 249. See also: Prosecutor v. Jean-Paul Akayesu, ICTR-96-4-A, Appeal Judgment, 1 June 2001, para 464

[270] Bassiouni, "The Normative Framework of International Humanitarian Law", supra at 20

[271] Ibid.

[272] Nuremberg Charter, Article 6(c): "[…] or persecutions on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated" compared to ICTR Statute, Article 3: "The International Tribunal for Rwanda shall have the power to prosecute persons responsible for the following crimes when committed as part of a widespread or systematic attack against any civilian population on national, political, ethnic, racial or religious grounds".

[273] ICTR Statute, Art. 3(h): persecution on political, racial and religious grounds

[274] ICTR Statute, Article 3, *chapeau*

[275] See inter alia, Akayesu, ICTR-96-4-T, Trial Judgment, 2 September 1998, para 580: "The concept of *systematic* may be defined as thoroughly organized and following a regular pattern on the basis of a common policy involving substantial public or private resources. […] There must however be some kind of preconceived plan or policy."

[276] Prosecutor v. Tihomir Blaskić, IT-95-14-T, Trial Judgment, 3 March 2000, para 207: "the conditions of scale and systematicity are not necessarily cumulative."

[277] See Prosecutor v. Kunarac et al., IT-96-23&IT-96-23/1-A, Appeal Judgment, 12 June 2002, para 98: "neither the attack nor the acts of the accused needs to be supported by any form of policy or plan […] the existence of a policy or plan may be evidentially relevant, but it is not a legal element of the crime." This interpretation was followed by the ICTR: see Prosecutor v. Laurent Semanza, ICTR-97-20-T, Trial Judgment, 15 May 2003, para 329.

Anyway, the ICC Elements of Crimes explicitly requires that a policy is implemented by State or organization's action or failure to take action.[278]

As already emphasized the ICC Statute, defining crimes against humanity, followed the ICTR's contextual element of "widespread or systematic attack"[279] and lists persecution among the prohibited conducts.[280] According to M. Cherif Bassiouni, *"the persecution of a group of persons is by its very nature possible only as a consequence of state action or policy carried out by state actors or non-state actors, or the product of policy carried out by non-state actors".*[281] Moreover, he added that the major part of the crimes listed within the meaning of crimes against humanity's definition can take place only as a result of state action or policy carried out by state actors or non-state actors:

(b) extermination; (c) enslavement; (d) deportation or forcible transfer of population; […] (j) the crime of Apartheid.

However, he continued, although the other listed crimes can be committed by individuals without the existence of state action or policy, being directed against a "civilian population", they are necessarily the product of a state action or policy carried out by state actors or the product of a policy of non-state actors. These specific crimes are:

(a)murder; […] (e) imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law; (f) torture; (g) ***rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity****; […] (i) enforced disappearance of persons; […] (k) other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health.*[282]

Therefore, the element of policy is a fundamental element for crimes against humanity, not only because the ICC Elements of Crimes explicitly requires it but, in this perspective, also because, given the contextual framework of the "attack against a civilian population", all the conducts enumerated imply the furtherance of a policy. It can be even sustained that this policy element is the "*international jurisdictional element that distinguishes between large scale crimes which, even though committed by State agents, remain part of domestic criminal jurisdiction and the category of an international crime called crimes against humanity".*[283]

[278] ICC Elements of Crimes, Article 7, Crimes against humanity, Introduction, requires "that the State or organization actively promote or encourage such an attack against a civilian population". In the footnote, it is added that "a policy may, in exceptional circumstances, be implemented by a deliberate failure to take action, which is consciously aimed at encouraging such attack".

[279] ICC Statute, Article 7: "for the purpose of this statute, crimes against humanity means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population with knowledge of the attack".

[280] ICC Statute, Article 7(h)

[281] Bassiouni, "The Normative Framework of International Humanitarian Law", supra at 20

[282] Bassiouni, "The Normative Framework of International Humanitarian Law", supra at 20

[283] M. Cherif Bassiouni, "The Normative Framework of International Humanitarian Law: Overlaps, Gaps and Ambiguities", International Law Studies-Volume 75, International Law Across the Spectrum of Conflict, Essay in Honour

In fact, the ICC Pre-Trial Chamber in the Prosecutor v. Katanga and Ngudjolo, contrary to the ICTY and the ICTR Chambers, correctly linked this policy element also to the elements of "widespread" and not only of "systematic": *"in the context of a widespread attack, the requirement of an organizational policy […] ensures that the attack, […] must still be thoroughly organized and follow a regular pattern."*[284]

The ICC Pre-Trial Chamber in the Gbagbo case added that the concept of "policy" and that of the "systematic nature of the attack" refer to a certain level of planning of the attack thereof, but the two concepts are not synonyms, serving different purposes and implying different thresholds under Articles 7(1) and 7(2)(a) of the ICC Statute.[285]

In conclusion, the ICC listed the elements of crimes against humanity as: (1) an attack directed against any civilian population, (2) a State or organizational policy, (3) the widespread or systematic nature of the attack, (4) a nexus between the individual act and the attack and (5) knowledge of the attack.[286] Therefore, when all these elements are fulfilled and the prohibited act committed is one of the sexual violence acts enumerated in Articles 7(1)(g) or 7(1)(h) of the ICC Statute, sexual violence amounts to a crime against humanity.

The following tab summarizes the elements of crimes against humanity as interpreted by the *ad hoc* Tribunals and then cristallized in the ICC statute.

of Professor L. C. Green on the Occasion of his eightieth birthday, Michael N. Schmitt Editor, p. 23, available at: file:///C:/Users/MartinaRoberta/Downloads/vol-75_I_bassiouni_the_normative_framework.pdf

[284] Prosecutor v. Katanga and Ngudjolo, ICC PT. Ch. I, ICC-01/04-01/07-717, Decision on the confirmation of charges, 30 September 2008, para 396

[285] Prosecutor v. Laurent Gbagbo, ICC-02/11-01/11-656-Red, ICC PT. Ch. I, Decision on the Confirmation of Charges, 12 June 2014, para 216

[286] Situation in the Republic of Kenya, ICC PT. Ch. II, ICC-01/09-19, Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya, 31 March 2010, para 79; Situation in the Republic of Côte d'Ivoire, ICC PT. Ch. III, ICC-02/11-14, Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Côte d'Ivoire, 3 October 2011, para 29

ELEMENTS OF CRIMES AGAINST HUMANITY **ICTY Statute Art. 5, ICTR Statute Art. 3 and ICC Statute Art. 7**	
Actus Reus	1. Only for the ICTY: there must be an armed conflict
	2. There must be an attack
	3. The perpetrator must commit at least one of the underlying acts
	4. The acts of the perpetrator must be part of the attack (nexus between the act and the attack)
	5. The attack must be directed against any civilian population
	6. The attack must be widespread or systematic
	7. Only for the ICC: State or organizational policy to commit such attack (for ICTY and ICTR plan or policy are not a legal elements)
	8. Only for ICTR: the attack must be on national, political, ethnic, racial or religious grounds (discriminatory grounds)
Mens Rea	9. The perpetrator must know of the wider context in which his acts occur and know that his acts are part of the attack
	10. The perpetrator must have the intent to commit the acts, discriminatory intent only required for persecution

3.5.3 The development of the definition of the crime of genocide

In the early 1940s, the jurist Raphael Lemkin conceived the term "genocide"[287] to delineate the intentional destruction of certain groups. He wrote:

By "genocide" we mean the destruction of a nation or of an ethnic group. This new word, coined by the author to denote an old practice in its modern development, is made from the ancient Greek word "genos" (race, tribe) and the Latin "cide" (killing) […].
Generally speaking, genocide does not necessarily mean the immediate destruction of a nation, except when accomplished by mass killings of all members of a nation. It is intended rather to signify a coordinated plan of different actions aiming at the destruction of essential foundations of the life of national groups, with the aim of annihilating the groups themselves […].
Genocide is directed against the national group as an entity, and the actions involved are directed against individuals, not in their individual capacity, but as members of the national group.[288]

However, despite the Holocaust, this crime was not included in the Nuremberg Charter.[289] The criminalization of this conduct occurred in 1948, with the adoption of the Genocide Convention.

3.5.3.1 The elements of the crime of genocide

Article 2 of the Convention defined this crime as:

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.[290]

The definition encompasses both a mental element, which is the necessary intent to destroy

[287] Holocaust Encyclopedia, available at: http://www.ushmm.org/wlc/en/article.php?ModuleId=10007050
Raphael Lemkin, as early as 1933, was working to introduce legal safeguards for ethnic, religious, and social groups at international forums. The concept of the crime, which later evolved into the idea of genocide, was based on the Armenian experience at the hands of the Ottoman Turks then later the experience of Assyrians massacred in Iraq during the 1933 Simele massacre.
[288] Raphael Lemkin, "Axis Rule in Occupied Europe: Laws of Occupation - Analysis of Government - Proposals for Redress", 1944, The Lawbook Exchange, Ltd., reprinted in 2008, p. 79
[289] Holocaust Encyclopedia, supra at 287: Raphael Lemkin worked and succeeded in including the word "genocide" in the indictment against Nazi leadership during Nuremberg trials. However, "genocide" was not a legal crime at the time, because it was not included in the Charter of the tribunal and the verdict at Nuremberg did not cover peacetime attacks against groups, only crimes committed in conjunction with an aggressive war.
[290] Convention on the Prevention And Punishment of the Crime Of Genocide, adopted by the General Assembly of the United Nations on 9 December 1948 [hereinafter Genocide Convention], Article 2

the group as such and a physical element, which is the commission of, at least, one of the enumerated acts. Therefore, the perpetrator must commit one of the enumerated acts with the required intent. This specific *"intent to destroy",* in whole or in part, a group as such (or *dolus specialis*) is the distinguishing element of this crime under international law.[291] A majority of the Chambers of the *ad hoc* Tribunals found that intent implies a "*volitional standard"*: the perpetrator *"seeks to achieve"* the destruction of the group.[292] Consequently, the prohibited act must be committed against the individual because of his membership in a particular group and as a step toward the realization of the goal of the material destruction of the group, which is the ultimate target of this kind of massive criminal conduct.

Moreover, the *travaux préparatoires* explained that the definition of genocide arranged in the Convention was not conceived to cover "cultural genocide",[293] nor it was intended to provide protection for political groups.[294]

It can be noted that, although both genocide and crimes against humanity can be committed during peacetime, these two crimes differs from one another. Indeed, the ICTY Trial Chamber stated that genocide, from the viewpoint of *mens rea*, is an "*extreme and most inhumane form"* of the crime against humanity of persecution. In fact, its *mens rea* needs the proof of the intent not only to discriminate, but also to destroy, in whole or in part, the group to which the victims of the genocide belong.[295]

The Statutes of the ICTY and of the ICTR adopted the same definition contained in Article 2 of the Genocide Convention, but the jurisprudence of both Tribunals interpreted it in an extensive way.

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[291] ILC, Draft Code of Crimes against the Peace and Security of Mankind with commentaries 1996. Text adopted by the International Law Commission at its forty-eighth session, in 1996, available at: http://www.legal-tools.org/uploads/tx_ltpdb/7_4_1996_01.pdf
In fact, general intent is sufficient for crimes against humanity, moreover, war crimes do not necessarily require specific intent. Most war crimes require knowledge as the requisite mental element, while, in some cases, recklessness might suffice. (Bassiouni, "The Normative Framework of International Humanitarian Law: Overlaps, Gaps and Ambiguities", p. 23, supra at 283)

[292] Prosecutor v. Goran Jelisić, IT-95-10-A, Appeal Judgment, 5 July 2001, paras 45-46

[293] "Convention on the Prevention and Punishment of the Crime of Genocide, Paris, 9 December 1948", Introductory note, by William A. Schabas, available at: http://legal.un.org/avl/ha/cppcg/cppcg.html
"The Sixth Committee voted to exclude cultural genocide from the scope of the Convention, although it subsequently agreed to an exception to this general rule, allowing "forcible transfer of children from one group to another" as a punishable act. The drafters also voted down, by a very substantial margin, an amendment that sought to add a sixth punishable act to Article 2. It would have enabled prosecution for imposing "measures intended to oblige members of a group to abandon their homes in order to escape the threat of subsequent ill-treatment". References to these debates have bolstered judicial decisions that essentially exclude "ethnic cleansing" from the scope of the definition".

[294] Bassiouni, "The Normative Framework of International Humanitarian Law", supra at 20, sustained that: at the time the Convention was elaborated (1948), the USSR did not want political and social groups included in those being given protection, because Stalin and his regime had already begun their purges which targeted these very groups.
Moreover, see ILC, Draft Code of Crimes against the Peace and Security of Mankind with commentaries 1996, supra at 291: it is argued that political group are not sufficiently stable.

[295] Prosecutor v. Zoran Kupreškić et al., IT-95-16, Trial Judgment, 14 January 2000, para 636: in fact the chamber sustained that "when persecution escalates to the extreme form of willful and deliberate acts designed to destroy a group or part of a group, it can be held that such persecution amounts to genocide".

Considering the nature of the groups listed, the ICTY found that it is the perpetrator's perspective to be determinant in the evaluation of the victim's membership to a national, ethnic, religious or racial group.[296] Accordingly, two approaches exist: following a positive approach, the group is identified by the characteristics that the perpetrator attributes to it and following a negative approach the perpetrator identifies individuals as not being part of the ethnic, racial, religious or national group to which he himself believe to belong.[297]

Therefore, in addition to the *mens rea* required for the underlying crime, genocide requires proof of a *dolus specialis*, i.e. the specific intent to commit genocide, which is difficult to prove.

Recognizing this difficulty, the ICTR noted that, in the absence of a confession from the accused, his intent can be inferred from *"a certain number of presumptions of fact"*.[298] Therefore, the Tribunal concluded that it was possible to deduce the genocidal intent of a particular act from: (1) the general context of the perpetration of other culpable acts systematically directed against that same group, no matter if these acts were committed by the same offender or by others; (2) the scale of atrocities committed, their general nature, in a region or a country and (3) the deliberate and systematic targeting of victims on account of their membership of a particular group, while excluding the members of other groups.[299]

The ICTY found that the requisite intent may be inferred from the commission of acts that violate or that the perpetrator believes to violate the "*very foundation of the group"*, acts that even though not specifically enumerated in the list of Article 4(2), are committed as "*part of the same pattern of conduct."*[300] The ICTY further found that this intent may be inferred from the *"combined effect of speeches or projects laying the groundwork for and justifying the acts,"* from the *"massive scale of their destructive effect"* and from *"their specific nature,* aimed at undermining *the foundation of the group."*[301]

With respect to the "in whole or in part" aspect of the intended destruction, the ICTY specified that it is not necessary to aim at the complete annihilation of the group,[302] in particular

[296] Prosecutor v. Goran Jelisić, IT-95-10-T, Trial Judgment, 14 December 1999, para 70

[297] Ibid., para 71

[298] Prosecutor v. Jean-Paul Akayesu,ICTR-96-4-T, Trial Judgment, 2 September 1998, para 523

[299] Ibid., para 523

[300] Ibid., para 524, citing: International Criminal Tribunal for the former Yugoslavia, Decision of Trial Chamber 1, Radovan Karadzić, Ratko Mladić case (Cases N. IT-95-5-R61 and IT-95-18-R61), Consideration of the Indictment within the framework of Rule 61 of the Rules of Procedure and Evidence, para 94

[301] Akayesu Trial Judgment, para 524, citing: International Criminal Tribunal for the former Yugoslavia, Decision of Trial Chamber 1, Radovan Karadzić, Ratko Mladić case (Cases N. IT-95-5-R61 and IT-95-18-R61), Consideration of the Indictment within the framework of Rule 61 of the Rules of Procedure and Evidence, para 95. See also: Prosecutor v. Clement Kayishemaet al, ICTR-95-1, Trial Judgment, 21 May 1999, para 93, which provided additional examples of factors that can be used to infer genocidal intent. The court referred to a "pattern of purposeful action", which might include: (1) the physical targeting of the group or their property; (2) the use of derogatory language toward members of the targeted group; (3) the weapons employed and the extent of bodily injury; and (4) the methodical way of planning, the systematic manner of killing.

[302] Prosecutor v. Goran Jelisić, IT-95-10, Trial Judgment, 14 December 1999, para 80, citing the ILC Draft Articles, p. 89: The ILC also states that "it is not necessary to intend to achieve the complete annihilation of a group from every corner of the globe".

the ICTY sustained that the intent to destroy could concern only the part of the group living in a limited geographical area.[303] However, the Chamber clarified that, considering that the purpose of the Convention is to deal with mass crimes, it was widely acknowledged that the intention to destroy has to target at least a *"substantial part"* of the group.[304] The ICTY, citing Raphaël Lemkin, explained that the intent to destroy "in part" had to be interpreted as a will of destruction, which *"must be of a substantial nature […] so as to affect the entirety."*[305] Moreover, the targeted part of a group would be classed as substantial either because the intent is that to harm a large majority or the most representative members of a targeted community. The character of the attack on the leadership must be evaluated in the context of what happened or what is going to happen to the rest of the group.[306]

It can be observed that, generally, the international tribunals have first determined whether genocide occurred in an area and then proceeded to determine if the specific accused has shared the genocidal intent.

The *ad hoc* Tribunals dealt with the various acts that constitute genocide whether committed with the requisite intent, in particular the ICTR in Akayesu case, which was the first genocide case prosecuted before an international criminal tribunal.

- Killing members of the group

According to the ICTR, killing means murder. It is a specific intent crime, which requires the specific intent to murder the victim: *"it is accepted that there is murder when death has been caused with the intention to do so".*[307] However, this only means that "killing", for the purpose of Article 2 of the ICTR Statute, requires both the intent to destroy the group and the intent to kill the victim. In fact, killing can amount to genocide only if also the intent to destroy is fulfilled. In other words, the intent distinguishes the crime of genocide from homicide, because genocide is the *"denial of the right of existence of entire human groups"* and homicide as the *"denial of the right to live of individual human beings".*[308]

- Causing serious bodily or mental harm to members of the group

This crime does not necessarily mean that the harm is permanent and irremediable.[309] The Tribunal

[303] Ibid., para 83: "The Trial Chamber notes that it is accepted that genocide may be perpetrated in a limited geographic zone".
[304] Ibid., para 82
[305] Ibid., para 82; citing: Raphaël Lemkin in Executive Session of the Senate Foreign Relations Committee, Historical Series, 1976, p. 370
[306] Ibid., para 82
[307] Prosecutor v. Jean-Paul Akayesu, ICTR-96-4-T, Trial Judgment, 2 September 1998, paras 500-501. See also: Prosecutor v. Milomir Stakić, IT-97-24-T, Trial Judgment, 31 July 2003, para 515 (killing" is an "intentional but not necessarily premeditated act.")
[308] ILC, Draft Code of Crimes against the Peace and Security of Mankind with commentaries 1996, supra at 291
[309] Prosecutor v. Akayesu, Trial Judgment, para 502. See also para 503, the Tribunal cited the Eichmann case: "serious bodily or mental harm of members of the group can be caused 'by the enslavement, starvation, deportation and persecution [...] and by their detention in ghettos, transit camps and concentration camps in conditions which were designed to cause their degradation, deprivation of their rights as human beings, and to suppress them and cause them inhumane suffering and torture."

affirmed that the concept of "serious bodily or mental harm" may include, though it is not necessarily limited to acts of torture, inhumane or degrading treatment, persecution[310] and even sexual violence acts. In particular, the Court stated that *"rape and sexual violence certainly constitute infliction of serious bodily and mental harm on the victims and are even, according to the Chamber, one of the worst ways of inflicting harm on the victim."*

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

The ICTR stated that the means of deliberately inflicting on the group conditions of life calculated to bring about its physical destruction, in whole or part, include *inter alia* the subjection of the group to a *"subsistence diet",* its *"systematic expulsion"* from a territory and the reduction *"of essential medical services below minimum requirement."*[311] Similarly, the ICC Elements of Crimes clarifies that the concept *forcibly* is not limited to physical force, but may include "*threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power, against such person or persons or another person, or by taking advantage of a coercive environment"*.[312]

- Imposing measures intended to prevent births within the group

Within this category of genocidal acts, the ICTR included sexual mutilation, the practice of forced sterilization, forced birth control, separation of men and women and prohibition of marriages.[313] Furthermore, the Tribunal noted that in patriarchal societies, where membership of a group is determined by the identity of the father, other measures used for these purpose encompasses the forced pregnancy by rapists belonging to a group different from that of the victim.[314]

In addition, the Tribunal found that these typology of measures, are not only physical, but also mental: *"rape can be a measure intended to prevent births when the person raped refuses subsequently to procreate, in the same way that members of a group can be led, through threats or trauma, not to procreate."*[315]

- Forcibly transferring children of the group to another group

The Akayesu Trial Chamber found that this conduct is not only referred to forcible physical transfer, but also to *"acts of threats or trauma, which would lead to the forcible transfer of children from one group to another."*[316]

Although the definitions of genocide within ICTY and the ICTR Statutes are identical to the one provided in the Rome Statute,[317] because all of them reproduce the definition given in the

[310] Ibid., para 504
[311] Ibid., para 506
[312] ICC Elements of Crimes, Article 6(e), Genocide by forcibly transferring children, Footnote 5
[313] Prosecutor v. Jean-Paul Akayesu, ICTR-96-4-T, Trial Judgment, 2 September 1998, para 507
[314] Ibid., para 507
[315] Ibid., para 508. For further details, see Chapter 4.1.3
[316] Ibid., para 509
[317] ICTY Statute, Art. 4, ICTR Statute, Art. 2 and ICC Statute, Art. 6: reproduce the definition of genocide contained in Art. 2 of the Genocide Convention

Genocide convention, the ICC Elements of Crimes, for each of the enumerated acts of genocide, includes a common element not required by the jurisprudence of the *ad hoc* Tribunals, namely that the conduct must take place *"in the context of a manifest pattern of similar conduct directed against that group or was conduct that could itself effect such destruction*."[318] The requirement, normally referred to as the "contextual element" of genocide, is disjunctive: the conduct that satisfies the *actus reus* of the crime must either be committed as part of a genocidal policy or plan or anyway be capable of directly effecting the total or partial destruction of a protected group.

In the Al Bashir case, the ICC followed a specific logical pattern to clarify its position on the controversial[319] contextual element of genocide. The Court observed:

- the definition of the crime of genocide in Article 2 of the Convention on the Prevention and Punishment of the Crime of Genocide of 1948 does not expressly require any contextual element;[320]
- Article 4 of the ICTY Statute and Article 2 of the ICTR Statute have adopted the same definition of Genocide as the one provided for in Article 2 of the 1948 Genocide Convention.[321] Consequently, the case law of the ICTY and the ICTR has interpreted this definition as excluding any type of contextual element;[322]
- the definition of the crime of genocide provided for in Article 6 of the ICC Statute is the same as that included in Article 2 of the 1948 Genocide Convention;
- the ICC Elements of Crimes elaborates on the definition of the Genocide Convention, identifying a contextual element.[323] According to this contextual element the conduct must have taken place in the context of a manifest pattern of similar conduct directed against the targeted group or must have had such a nature so as to itself effect, the total or partial destruction of the targeted group;[324]
- this "contextual element" is interpreted as requiring an actual threat to the targeted group or a part thereof;
- this interpretation: (i) is not per se contrary to Article 6 of the Statute; (ii) fully respects the requirements of Article 22(2) of the Statute that the definition of the crimes "*shall be strictly construed and shall not be extended by analogy"* and *"in case of ambiguity, the definition*

[318] ICC Elements of Crimes, Art. 6(a) element 4; Art. 6(b) element 4; Art. 6(c) element 5; Art. 6(d) element 5; Art. 6(e) element 7

[319] The debate in ICC scholarship: whether the genocidal plan or policy element is a formal element of the crime or is simply a jurisdictional prerequisite to the Court's exercise of jurisdiction. This qualification has important consequences: if it is a formal element, the prosecution will have to prove that the defendant either intended his conduct to be part of the larger genocidal plan or policy or at least knew that his conduct was part of that plan or policy. By contrast, if it is simply a jurisdictional prerequisite, the prosecution will only have to prove the existence of the genocidal plan or policy; it will not have to prove the nexus between the plan or policy and the defendant's act.

[320] Prosecutor v. Al Bashir, ICC-02/05-01/09, Decision on the Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir, 4 March 2009, para 117

[321] Ibid., para 118

[322] Ibid., para 119

[323] Ibid., para 121

[324] Ibid., para 123

shall be interpreted in favour of the person being investigated, prosecuted or convicted"; and (iii) is fully consistent with the traditional consideration of the crime of genocide as the "crime of the crimes".[325]

Therefore, in the Court's view, the crime of genocide requires that the relevant conduct is a *"concrete [and real] threat"* to the existence of the targeted group, or a part thereof, as opposed to just being *"latent or hypothetical"*.[326] In other words, the isolated act of the perpetrator must be linked to a broader widespread or systematic attack against a civilian population. On the contrary, the ICTY held that genocide does not require the participation of the perpetrator to an attack.[327] Moreover, the Tribunal found that neither a plan nor a policy were legal elements of genocide.[328] In fact, the drafter of the Genocide Convention did not require the existence of an organization or a system aimed at the destruction of a group, thus according to the court, if a single individual tries to destroy a group, that is genocide.[329] Conclusively, in this respect, it can be argued that the ICC Elements of Crimes *"amends and restricts the scope of genocide"* as identified in the Genocide Convention.[330]

The following tab summarizes the elements of the crime of genocide as interpreted by the *ad hoc* Tribunals and then cristallized in the ICC statute.

ELEMENTS OF THE CRIME OF GENOCIDE **Genocide Convention, Art. 2; Statutes: ICTY Art. 4, ICTR Art. 2, ICC Art. 6**	
Mes rea	1. specific intent to destroy the group
	2. intent to commit the *actus reus*
Actus reus	3. Commission of one of the listed acts
	4. For the ICC only: The conduct must took place in the context of a manifest pattern of similar conduct directed against that group or was conduct that could itself effect such destruction

[325] Ibid., para 133
[326] Ibid., para 124
[327] Prosecutor v. Krstić, Appeal Judgment, 19 April 2004, para 223
[328] Ibid, 19 April 2004, para 225
[329] Prosecutor v. Jelisić, Trial Judgment, 14 December 1999, para 200
[330] Payam Akhavan, "Reducing Genocide to Law: Definition, Meaning, and the Ultimate Crime". Cambridge University Press, 26 January 2012, p. 46

3.5.4 War crimes, crimes against humanity, genocide and sexual violence crimes specifically, as *jus cogens* crimes

Some scholars sustain that several crimes, in particular, war crimes, crimes against humanity, genocide and even sexual violence crimes specifically, have currently achieved a *jus cogens* status.[331]

Jus cogens norms are *"peremptory norms of general international law from which no derogation is permissible."*[332] Peremptory norms are rules *"so fundamental to the international community of states as a whole that the rule constitutes a basis for the community's legal system. […It] is a sort of international law that, once ensconced, cannot be displaced by states, either in their treaties or in their practice".*[333]

Jus cogens norms have their roots in states' exigency to maintain an international public order. In the Siderman case, Judge Fletcher noted that *"the fundamental and universal norms constituting jus cogens transcend such consent [of states]".*[334]

The recognition of certain international crimes as *jus cogens* carries with it the duty to prosecute or extradite, the non-applicability of statutes of limitation for such crimes and universality of jurisdiction.[335] In fact, *jus cogens* crimes are justiciable by any state, even if the criminal acts do not violate the law of the state where they are committed and even if the prosecuting state should not have jurisdiction on the basis of the traditional criteria that require a connection between the state that proceeds and the crime, the offender or the victim.[336]

In general, the legal literature agrees that some international crimes are *jus cogens*, namely, aggression, genocide, crimes against humanity, war crimes, piracy, torture, slavery and slave-related practices.[337] Focusing specifically on sexual violence crimes, Askin is of the opinion that at present sexual violence crimes have reached a *jus cogens* status for themselves[338] and not only when they

[331] Askin, "Prosecuting wartime rape", supra at 1

[332] See Michelle Seyler, "Rape in Conflict: Battling the Impunity That Stifles Its Recognition as a *Jus Cogens* Human Right", 15 Gonz. J. Int'l L. 1, 2011-2012 [hereinafter: Seyler, "Rape in conflict"], citing: Melina Milazzo, "Military Commissions Act of 2006: A Regressive Step Back from the International Legal Standards of Rape and Sexual Violence", 35 Fla. St. U. L. Rev. 527, 2007-2008, p. 536. The terms "*jus cogens"* and "peremptory norm" can be used interchangeably. In fact, Article 53 of the of the Vienna Convention on the Law of Treaties (Vienna, 23 May 1969), named "Treaties conflicting with a peremptory norm of general international law (*jus cogens*)" clarifies that: "a peremptory norm of general international law is a norm accepted and recognized by the international community of states as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character".

[333] Askin, "Prosecuting wartime rape", supra at 1, citing: Mark W. Janis, "An Introduction to International Law", 2d ed. 1993, p. 64

[334] Askin, "Prosecuting Wartime Rape", supra at 1, citing: Siderman de Blake v. Republic of Argentina, 965 F.2d 699, 9th Cir. 1992

[335] Bassiouni, "International Crimes: *Jus Cogens* and *Obligatio Erga Omnes*", supra at 181

[336] Askin, "Prosecuting wartime rape", supra at 1, referring to: Hilary Charlesworth & Christine Chinkin, "The Gender of *Jus Cogens*", 15 Hum. Rts. Q. 63, 1993; Jonathan I. Charney, Universal International Law, 87 Am. J. Int'l L. 529, 1993, p. 541; Lauri Hannikainen, "Implementation of International Humanitarian Law in Finnish Law"; Jalil Kasto, "*Jus Cogens* and Humanitarian Law", 1994

[337] Bassiouni, "International Crimes*: Jus Cogens* and *Obligatio Erga Omnes*", supra at 181

[338] Seyler, "Rape in Conflict", supra at 332

are prosecutable as war crimes, crimes against humanity or as constitutive acts of genocide, meeting the constituent elements of these crimes.[339]

On this issue, it is interesting to recall the legal basis to found the conclusion that a crime is part of *jus cogens,* identified by Bassiouni: (1) international pronouncements, or what can be called international *opinio juris*, reflecting the recognition that these crimes are deemed part of general customary law; (2) language in preambles or other provisions of treaties applicable to these crimes which indicates these crimes' higher status in international law; (3) the large number of states which have ratified treaties related to these crimes; and (4) the *ad hoc* international investigations and prosecutions of perpetrators of these crimes.[340]

Consistently, Askin emphasized that:

The landmark jurisprudence of the Yugoslav and Rwanda Tribunals recognizing [and prosecuting] sexual violence as war crimes, crimes against humanity and instruments of genocide [and torture], the inclusion of various forms of sexual violence in the ICC Statute (including crimes that had never before been formally articulated in an international instrument);
the increasing attention given to gender violence in international treaties, U.N. documents and statements by the Secretary-General [and high-level jurists], the new efforts to redress sexual violence in internationalized/hybrid courts and by truth and reconciliation commissions, the recent recognition of gender crimes by regional human rights bodies and the increasingly successful claims brought in domestic courts to adjudicate gender crimes […] provide compelling evidence that crimes of sexual violence are now considered amongst the most serious international crimes.[341]

On this basis, she sustained that *"sexual violence, at the very least rape and sexual slavery, has risen to the level of a jus cogens norm"*.[342]

More specifically, rape is encompassed *"as a constituent element of every accepted peremptory norm":*[343] indeed, many sexual violence acts are forms or tools of genocide, slavery, torture, war crimes and crimes against humanity.[344]

[339] Askin, "Prosecuting Wartime Rape", supra at 1
[340] Bassiouni, "International Crimes: *Jus Cogens* and *Obligatio Erga Omnes*", supra at 181. See also David S. Mitchell, "The Prohibition of Rape in International Humanitarian Law as a Norm of *Jus Cogens*: Clarifying the Doctrine", 15 Duke Journal Of Comparative & International Law 219, 2005, pp. 233-234: "during the drafting of the Vienna Convention some members of the International Law Commission (ILC) suggested that a peremptory norm could be identified by the following objective indicia: (1) whether the norm is incorporated into norm-creating multilateral agreements and is prohibited from derogation in those instruments; (2) whether a large number of nations have perceived the norm to be essential to the international public order, whereby the norm is reflected in general custom and is perceived and acted upon as an obligatory rule of higher international standing; and (3) whether the norm has been recognized and applied by international tribunals, such that when violations occur, the norm is treated in practice as a jus cogens rule with appropriate consequences ensuing"
[341] Askin, "Prosecuting Wartime Rape", supra at 1
[342] Askin, "Prosecuting Wartime Rape", supra at 1
[343] David S. Mitchell, "The Prohibition of Rape in International Humanitarian Law as a Norm of *Jus Cogens*: Clarifying the Doctrine", 15 Duke Journal of Comparative & International Law 219, 2005
[344] Askin, "Prosecuting Wartime Rape", supra at 1

In particular, rape has been considered a tool of genocide.[345] Although enforcement remains a problem, the prohibition of genocide is indisputably considered as part of customary international law. On the issue, Cassese commented that the substance of the Genocide Convention nowadays is part of *jus cogens* and cannot be derogated by international agreements.[346]

Moreover, rape has been prosecuted as a war crime, including torture[347] and as a crime against humanity, including torture and sexual slavery.[348] The Rome Statute, which codified the achievements of the international jurisprudence, defined *"rape, sexual slavery, enforced prostitution, forced pregnancy*, *enforced sterilization* and *any other forms of sexual violence of comparable gravity"* as crimes against humanity[349] and war crimes.[350] Therefore, since war crimes and crimes against humanity are widely recognized as *jus cogens*, these are important acknowledgements that support the argument that, nowadays, protection from rape is a *jus cogens* human right.

Recognizing this evolution, the United Nations General Assembly clearly declared, by resolution, that "*rape in the conduct of armed conflict constitutes a war crime and that under certain circumstances it constitutes a crime against humanity and an act of genocide."*[351]

Similarly, the Security Council, urged the prosecution of rape as a crime against humanity, war crime and genocide: *"[Security Council] emphasizes the responsibility of all States to put an end to impunity and to prosecute those responsible for genocide, crimes against humanity, war crimes including those relating to sexual violence against women and girls".*[352]

Consequently, sexual violence crimes can be qualified and prosecuted as *jus cogens* when they fulfill the requisite elements of torture, slavery, genocide, crimes against humanity and war crimes.[353] However, despite these progresses, there are important reasons, that Michelle Seyler has enumerated, to identify rape as a separate *jus cogens* human rights' violation.

First, including rape under the crime of genocide, war crimes or crimes against humanity risks to challenge the fact that rape is a crime on its own.[354]

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[345] For further considerations, see Chapter 4.1.3.
In particular, see Prosecutor v. Jean-Paul Akayesu, ICTR-96-4-T, Trial Judgment, 2 September 1998, in general paras 492-524. His was the first conviction ever for genocide and it was the first time that an international tribunal ruled that rape and other forms of sexual violence could constitute genocide.

[346] Antonio Cassese, International Law 143, Oxford University Press 2005

[347] See the historic precedents in Prosecutor v. Mucić et al. (Čelebići Camp), IT-96-21 and Prosecutor v. Furundžija, IT-95-17/1. These judgments recognized rape as a violation of the Laws and Customs of War and as a basis of torture under the Geneva Conventions.
For further considerations, see Chapter 4.1.1

[348] See Prosecutor v. Jean-Paul Akayesu, ICTR-96-4-T, Trial Judgment, 2 September 1998, in general paras 578-598 (first conviction of an individual for rape as a crime against humanity) and para 507 (the Chamber sustained that rape could constitute torture, as a crime against humanity). See Prosecutor v. Kunarac et al., IT-96-23-T&IT-96-23/1-T, Trial Judgment, 22 February 2001, *inter alia* paras 728-745 (sexual violence as slavery)
For further considerations, see Chapter 4.1.1

[349] Rome Statute Art. 7(1)(g)

[350] Rome Statute Art. 8(2)(b)(xxii)

[351] A/RES/51/115 (1997)

[352] S/RES/1325 (2000), Art. 11

[353] Askin, "Prosecuting Wartime Rape", supra at 1

[354] Seyler, "Rape in Conflict", supra at 332

Second, rape and these other crimes are different: rape is identifiable as a form of gender-based violence, thus, it has its roots in discrimination. Indeed, *"violence against women does not originate with war and conflicts; it emerges from prior social, economic and cultural discrimination that fuel sexual violence when a conflict erupts."*[355] The point is that rape is mostly perpetrated against women, because they are women. On this subject, MacKinnon wrote that the problem is that *"men do in war what they do in peace, only more so, so when it comes to women, the complacency that surrounds peacetime extends to wartime, no matter what the law says."* [356]

Third, the prohibition against rape must become a *jus cogens* right itself because not always an act of rape can fulfill the characterizing elements of the other *jus cogens* crimes. In fact, war crimes require the existence of an armed conflict, genocide a specific intent to destroy in whole or in part the targeted group and crimes against humanity the contextual element of the attack against any civilian population.[357]

Furthermore, sexual slavery can be said to be a *jus cogens* crime in itself because it is a particular form of slavery, whose prohibition is a recognized peremptory norm.

Conclusively, the recognition of sexual violence crimes or at least rape and sexual slavery as *jus cogens* crimes in themselves, is important because it represents the acknowledgement that such crimes are among the most serious crimes of international concern and it can facilitate prosecution of perpetrators considering, in particular, the duty *out dedere aut judicare* that *jus cogens* crimes encompass.

[355] Seyler, "Rape in Conflict", supra at 332; reporting: Gaelle Brenton-Le Goff, "Ending Sexual Violence in the Democratic Republic of Congo", 34 WTR Fletcher F. World. Aff. 13, 2010, p. 17

[356] Seyler, "Rape in Conflict", supra at 332, reporting: Catherine A. MacKinnon, "Rape, Genocide, and Women's Human Rights", 17 Harv. Women's L.J. 5, 1994, p. 12

[357] Rome Statute of the International Criminal Court, Articles: 6 (genocide), 7 (crimes against humanity) and 8 (war crimes)

4. INTERNATIONAL JURISPRUDENCE ON SEXUAL VIOLENCE CRIMES

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4.1 The prosecution of sexual violence crimes at the international level

The crimes of sexual violence committed in the context of mass atrocities or of armed conflicts have been prosecuted in many ways: as war crimes of rape, torture, outrages upon personal dignity and inhuman treatment; as crimes against humanity of rape, torture, enslavement, persecution and inhumane acts; as constituent acts of genocide.

The relevant legal framework for the international courts and tribunals is composed as follows:

- <u>war crimes</u>
    - ICTY Statute: torture or inhuman treatment under Article 2(b); willfully causing great suffering or serious injury to body or health under Article 2(c)
    - ICTR Statute: outrages upon personal dignity, in particular humiliating and degrading treatment, rape, enforced prostitution and any other form of indecent assault under Article 4(e); torture under Article 4(a)
    - SCSL Statute: outrages upon personal dignity, in particular humiliating and degrading treatment, rape, enforced prostitution and any form of indecent assault under Article 3(e); acts of terrorism under Article 3(d)

- crimes against humanity
    - ICTY Statute: rape under Article 5(g); torture under Article 5(f); enslavement under Article 5(c); other inhumane acts under Article 5(i); persecution under Article 5(h)
    - ICTR Statute: rape under Article 3(g); torture under Article under Article 3(f); other inhumane acts under Article 3(i)
    - SCSL Statute: rape, sexual slavery, enforced prostitution, forced pregnancy and any other form of sexual violence under Article 2(g); other inhumane acts under Article 2(i)
    - ECCC Law: rape and other inhumane acts under Article 5
- genocide
    - ICTY Statute: Article 4
    - ICTR Statute: Article 2

The conceptualization of sexual violence as a war crime is possible if the sexual offence takes place in the context of an armed conflict. The conceptualization of sexual violence as a war crime *"places the primary focus on the violation of a victim's individual human right to be free from invasions of her bodily and sexual integrity"*[1] because a pattern of systematic attacks linked to the offence, is not an element of the war crime legal framework.

On the contrary, the conceptualization of sexual violence as a crime against humanity or as an act of genocide requires a connection between the sexual offence and a widespread or systematic attack against civilians or a campaign to destroy a particular group, respectively. The conceptualization of sexual violence as a crime against humanity or as a form of genocide focuses *"on the wider context of violence against a group and addresses the complex range of functions that wartime sexual violence serves".*[2]

In this Chapter, I analyze how sexual violence crimes have been prosecuted at the international level and, more specifically, by the international and internationalized criminal tribunals and courts established so far.[3]

As already observed, the International Criminal Tribunals for the Former Yugoslavia and Rwanda were established by United Nations Security Council Resolutions, in 1993 and in 1994, to prosecute war crimes, crimes against humanity and genocide committed during the armed conflicts that occurred in these territories in the 1990s. Several judgments of the two Tribunals concerned the individual criminal liability for sexual violence crimes, i. e. for conducts consisting of rape, sexual enslavement, sexual torture, gender persecution, forced nudity, sexual mutilations and other forms of sexual violence. The Statutes of both the ICTY and ICTR explicitly include rape as a crime against humanity. Additionally, the ICTR Statute includes rape, enforced prostitution and any other form of indecent assault as "outrages upon personal dignity" that violate the Common Article 3 of the Geneva Conventions.

[1] Kimberly E. Carson, "Reconsidering the Theoretical Accuracy and Prosecutorial Effectiveness of International Tribunals' *ad hoc* Approaches to Conceptualizing Crimes of Sexual Violence as War Crimes, Crimes Against Humanity and Acts of Genocide", 39 Fordham Urb. L.J. 1249, 2012

[2] Ibid.

[3] See Chapter 5 for information about the ICC

The ICTY and ICTR jurisprudence has been fundamental in defining the crimes of sexual violence in international law and in establishing the status of such offences as war crimes, crimes against humanity and acts of genocide.[4]

Furthermore, also the hybrid or internationalized courts[5] in Sierra Leone and Cambodia, according to their Statute, are empowered to prosecute sexual violence crimes.

In the aftermath of the brutal civil war that occurred in Sierra Leone from approximately 1991 and 2002, the Government of Sierra Leone negotiated an agreement with the Security Council of the United Nations to establish a war crimes tribunal to try those responsible for the crimes committed during the conflict, which was characterized by crimes of widespread sexual violence.

Negotiations between the United Nations and the Government of Sierra Leone on the structure of the court and its mandate, produced the world's first treaty-based hybrid international criminal tribunal, mandated to try solely those bearing the greatest responsibility for crimes committed in Sierra Leone between 30 November 1996, the date of the failed Abidjan Peace Accord and 18 January 2002.[6] The Special Court for Sierra Leone (SCSL) sat in Freetown and was the first international tribunal to hold trials where the alleged crimes were committed.

Article 2(g) of the SCSL Statute of the SCSL empowers the Court to prosecute substantially the same crimes against humanity included in the ICC Statute.[7] In fact, although enforced sterilization is not expressly enumerated, it is prosecutable along with the *"other forms of sexual violence"*, under a residual category that is slightly different from the one included in the ICC Statute, which instead specifies the requirement of *"comparable gravity."*[8] In addition, the SCSL has jurisdiction over outrages upon personal dignity, in particular humiliating and degrading treatment, rape, enforced prostitution and any form of indecent assault under Article 3(e) that lists war crimes. Notably, the case law of the SCSL analyzed the phenomenon of the "bush wives", developing the concepts of "forced marriage" and "conjugal slavery" to describe it.[9]

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[4] Note that sexual violence crimes were prosecuted by the ICTY and the ICTR as rape, but also indirectly, under the provisions relative to other crimes (Anne-Marie de Brouwer, "Supranational Criminal Prosecution of Sexual Violence: The ICC and the Practice of the ICTY and the ICTR", Intersentia, 2005):

- enslavement, torture, persecution and other inhumane acts as crimes against humanity (both the ICTY and the ICTR);
- causing serious bodily and mental harm to members of the group as genocide (both the ICTY and the ICTR);
- torture and inhumane treatment, willfully causing great suffering or serious injury to body or health as grave breaches (ICTY only);
- cruel treatment, torture, outrages upon personal dignity, in particular humiliating and degrading treatment, rape as an independent crime, as a violation of the laws and customs of war (ICTY only);

violence to life, health and physical and mental being of persons, in particular cruel treatment such as torture, mutilation or any of corporal punishment as violations of the Common Article 3 to the Geneva Conventions and Additional Protocol II (ICTR only).

[5] The hybrid or internationalized tribunals are composed of both local and international judges, prosecutor and defence attorneys

[6] Information on the Special Court for Sierra Leone are available at: http://www.rscsl.org/

[7] SCSL Statute, Art. 2(g): "rape, sexual slavery, enforced prostitution, forced pregnancy and any other form of sexual violence"

[8] Rome Statute of the International Criminal Court, UN Doc A/CONF.183/9, 17 July 1998, Art. 7(1)(g), Art. 8(2)(b)(xxii), and Art. 8(2)(e)(vi)

[9] The "bush wives" phenomenon is analyzed in Chapter 4.4.4

The Extraordinary Chambers in the Courts of Cambodia (ECCC) was established pursuant to an Agreement between the United Nations and the Royal Kingdom of Cambodia concluded in 2003.[10] More specifically, this agreement regulated the cooperation between the United Nations and the Royal Government of Cambodia in bringing to trial the senior leaders of the Democratic Kampuchea and those who were most responsible for the crimes committed during the period from 17 April 1975 to 6 January 1979, which constituted serious violations of Cambodian penal law, international humanitarian law and custom and international conventions recognized by Cambodia.[11] The court has jurisdiction over the international crimes of genocide, war crimes and crimes against humanity. More specifically, it has jurisdiction on rape as a crime against humanity, under Article 5 of the ECCC Law.[12] Notably, this Court is currently prosecuting forced marriage.[13]

The crimes of forced pregnancy, forced abortion and sexual mutilation were identified by the ICTY, in the Kvočka trial judgment, as crimes involving serious sexual violence,[14] thus, they can be prosecuted as named, in each of these Courts.[15]

Sexual slavery and enforced prostitution cover similar conducts; the main difference is that, from the victim's perspective, prostitution is "an offensive label", since in many cultures a great stigma attaches to women lured or forced into prostitution. However, forced prostitution was specifically included in the Rome Statute because this term was historically used, precisely, in the 1919 War Crimes Commission report and in the 1977 Additional Protocols to the 1949 Geneva Conventions.

Moreover, sexual violence crimes could be prosecuted as acts of persecution, of terror or of torture.

Nowadays, in the contest of armed conflicts and mass violence, sexual violence is widespread and systematic because it is employed as a weapon of war. Ensuring accountability of the perpetrators is a fundamental step to put an end to such a terrible use of violence.

[10] Agreement between the United Nations and the Royal Government of Cambodia, concerning the prosecution under Cambodian Law of Crimes committed during the period of Democratic Kampuchea [hereinafter ECCC Agreement], 6 June 2003, available at : www.refworld.org/docid/48441e412.html

[11] ECCC Agreement, Article 1

[12] Law on the Establishment of the Extraordinary Chambers, with inclusion of amendments as promulgated on 27 October 2004 (NS/RKM/1004/006), Art. 5, available at: http://www.eccc.gov.kh/sites/default/files/legal-documents/KR_Law_as_amended_27_Oct_2004_Eng.pdf

[13] For details, see Chapter 4.4.5

[14] Prosecutor v. Miroslav Kvočka et al., IT-98-30/1-T, Trial Judgment, 2 November 2001, para 180, note 343: "Sexual violence would also include such crimes as sexual mutilation, forced marriage and forced abortion as well as the gender related crimes explicitly listed in the ICC Statute as war crimes and crimes against humanity, namely rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization and other similar forms of violence".

[15] "Listening to the Silences: Women and War", edited by Helen Durham, Tracey Gurd, Martinus Nijhoff Publishers, 2005, Chapter 12: Kelly D. Askin, "The jurisprudence of International War Crimes Tribunals: Securing Gender Justice for Some Survivors", pp. 128-129

4.1.1 Sexual violence crimes as war crimes

Under the legal framework of war crimes, sexual violence has been prosecuted by the ICTY and the ICTR as a violation of the laws and customs of war and as a grave breach of the Geneva Conventions, more specifically, as the war crimes of torture, inhumane treatment, outrages upon personal dignity and willfully causing great suffering or serious injury to body or health.

Moreover, sexual violence acts have been prosecuted by the SCSL as violations of Article 3 common to the Geneva Conventions and of Additional Protocol II, more specifically as the war crimes of outrages upon personal dignity and of committing acts of terror, carried out by, *inter alia*, sexual violence.

As already observed, for a sexual offence to constitute a war crime, the alleged act must be *"closely related"* to an armed conflict.[16] It means that a war crime is *"shaped by or dependent upon"* the armed conflict, in which it is committed. The armed conflict needs not have been causal to the commission of the war crime, but the existence of an armed conflict must at least *"have played a substantial part in the perpetrator's ability to commit it, his decision to commit it, the manner in which it was committed or the purpose for which it was committed"*. Therefore, it is sufficient to prove that *"the perpetrator acted in furtherance of [causal link] or under the guise of the armed conflict [the armed conflict influenced the perpetrator's decision, ability and way to act]"*.[17]

In the case of the Prosecutor v. Furundžija, the ICTY established that rape may constitute a violation of the laws or customs of war under Article 3 of the ICTY Statute, in particular, outrages upon personal dignity and torture, if the requisite elements are met.[18] Therefore, the Chamber clarified that rape has always been a crime in itself, under customary international law.

More specifically, the accused was convicted of aiding and abetting outrages upon personal dignity, including rape,[19] because it was proved that he continued to interrogate a woman while she was sexually assaulted and raped by another officer. Such a conduct was interpreted as encouraging the "direct perpetrator" in the raping. Moreover, the Chamber, considering that the sexual assault was committed publicly, was satisfied that the victim suffered severe physical and mental pain, along with public humiliation, that amounted to outrages upon her personal dignity and sexual integrity.[20]

Furthermore, the accused was convicted as a co-perpetrator of the crime of torture, because the interrogation he carried on, during the sexual assault, was an integral part of the torture: the intention of the accused was to obtain information from the victim by causing her severe physical and mental suffering by means of rape.[21] On the issue, the Chamber noted that rape, either by the

[16] Prosecutor v. Tadić, IT-94-1-I, "Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction", para 70

[17] Prosecutor V. D. Kunarac, R. Kovač and Z. Vuković, IT-96-23&IT-96-23/1-A, Appeal Judgment, 12 June 2002, para 58. For further details, see Chapter 3.5.1.1

[18] Prosecutor v. Anto Furundžija, IT-95-17/1-T, Trial Judgment, 10 December 1998, para 172

[19] Ibid., para 274

[20] Ibid., para 272

[21] Ibid., para 267. See the elements of torture at para 162: (1) torture consists of the infliction, by act or omission, of severe pain or suffering, whether physical or mental; (2) this act or omission must be intentional; (3) it must aim at obtaining information or a confession, or at punishing, intimidating, humiliating or coercing the victim or a third person, or at discriminating, on any ground, against the victim or a third person; (4) it must be linked to an armed conflict; (5) at least one of the persons involved in the torture process must be a public official or must at any rate act in a non-private capacity.

interrogator himself or by other persons associated with the interrogation of a detainee, resorted to a means of punishing, intimidating, coercing or humiliating the victim, or obtaining information or a confession, from the victim or a third person. In such situations, the rape may amount to torture.[22] The Tribunal explained that rape can also constitute a grave breach of the Geneva Conventions in the form of torture but the grave breach charges, in that case, were dropped.[23]

The ICTY case law includes numerous conviction for sexual violence rising to cruel treatment under Article 3 of the ICTY Statute, among the others, in the Čelebići, Blaškić and Tadić cases. The relevant conducts included forced fellatio, rape, sexual mutilation and genital violence, committed against male detainees.[24]

The Appeals Chamber in Čelebići decided that, if the same conduct is charged both as "willfully causing great suffering or serious injury to body or health" under Article 2 of the ICTY Statute (grave breaches of the Geneva Conventions of 1949) and as "cruel treatment" under Article 3 of the ICTY Statute (violations of the laws and customs of war), the charges under Article 3 should be dismissed.[25] In fact, Article 3 of the ICTY Statute is residual with respect to Articles 2, 4 and 5 of the ICTY Statute. Consequently, Mucić was convicted for sexual violence crimes only as the grave breaches of inhumane treatment and willfully causing great suffering. Similarly, Blaškić was convicted for rape as the grave breach of inhuman treatment. On the contrary, Tadić, whose trial was concluded prior to the Čelebići's one, was cumulatively convicted of cruel treatment (violation of the laws and customs of war), inhumane acts (crime against humanity), inhumane treatment and willfully causing great suffering or serious injury to the body or health (grave breaches of the 1949 Geneva conventions),[26] with reference to the incidence of forcing two prisoner to perform fellatio on one another and forcing one prisoner to bite of the testicles of the other.[27]

Moreover, in Čelebići, the ICTY reaffirmed its statement on rape as a grave breach, convicting the defendant Delić of torture as a grave breach of the 1949 Geneva Conventions, based on his multiple rapes of two women at the Čelebići prison camp. In particular, the Chamber established that Hazim Delić acted for the purpose of obtaining information and of punishing the victims for their inability to provide it, of coercing and intimidating them into providing such information. In addition, the Chamber found that the violence suffered by the two victims of rape was inflicted upon them because they were women and thus, it represents a form of discrimination that constitutes a prohibited purpose for the offence of torture.[28] Moreover, the Chamber explained that *"the fact that these acts were committed in a prison-camp, by an armed official […] evidences Mr. Delić's*

[22] Ibid., para 163
[23] Ibid., para 172
[24] See also Chapter 2.6.2
[25] Prosecutor v. Zejnil Delalić et al. (Čelebići case), T-96-21-A, Appeal Judgment, 20 February 200, para 424. In fact, in Statute of the International Criminal Tribunal for the Former Yugoslavia, Art. 3 is residual in nature. It gives ICTY jurisdiction over any other serious violations of IHL not covered by Arts. 2, 4 or 5 of the ICTY Statute, in addition to the offences expressly listed in Art. 3. The list of crimes in Article 3 is therefore not closed.
[26] ICTY, Landmark Cases on sexual violence, available at: http://www.icty.org/sid/10314
[27] Prosecutor v. Dusko Tadić, IT-94-1-T, Trial Judgment, 7 May 1997, para 206
[28] Prosecutor v. Zejnil Delalić et al. (Čelebići case), T-96-21-T, 16 November 1998, paras 941 (Ms. Ćećez) and 963 (Ms. Antić)

purpose of seeking to intimidate not only the victim but also other inmates, by creating an atmosphere of fear and powerlessness."[29]

The idea that rape is committed against women because they are women can be supported by the facts verified by the ICTY Trial Chamber in the Furundžija case. In order to obtain information by two prisoners, a man and a woman, Furundžija and the other accused, accused b, tortured them, but the methods of torture were different: the men was brutally beaten, only the woman was repeatedly raped. In particular, accused B had warned another soldier, *"not to hit her as he had 'other methods' for women",*[30] methods specifically "dedicated" to women that encompassed sexual abuses.

In the Foča case, the ICTY convicted Kunarac and Vucović of rape and torture, by means of rape, both as violations of the laws and customs of war, punishable under Article 3 of the ICTY Statute. Kovać was convicted of rape and outrages upon personal dignity, both as violations of the laws and customs of war, under Article 3 of the ICTY Statute.[31]

The ICTR found Nyiramasuhuko guilty of outrages upon personal dignity as a serious violation of Article 3 common to the 1949 Geneva Conventions and of the Additional Protocol II,[32] based on her ordering the Interahamwe, which was the Hutu militia, to rape Tutsis at the Butare préfecture office.[33]

Moreover, the SCSL convicted the RUF and the AFRC accused and Charles Taylor of the war crime of committing acts of terrorism, perpetrated also by means of sexual violence. In fact, the Prosecutor proved that the underlying sexual crimes were committed with the intent to spread fear among civilians.

More specifically, the indictment charged the RUF[34] and AFRC[35] accused with acts of terrorism as a serious violation of Common Article 3 and of Additional Protocol II pursuant to Article 3(d) of the SCSL Statute. The RUF indictment specified that, as part of the campaign of terror and punishment, the AFRC and the RUF routinely captured and raped women and girls, many of them were abducted and used as sex slaves and as forced laborers, some of them even for years.

In the RUF case, the Trial Chamber analyzed the role of sexual and gender-based violence in the RUF's military and political strategy and found that: *"the manner in which the rebels ravaged through villages targeting the female population effectively disempowered the civilian population and had a direct effect of instilling fear on entire communities."* Indeed, *"these acts were not intended merely for personal satisfaction or a means of sexual gratification for the fighter",* but rather *"these acts were committed with the specific intent of spreading fear amongst the civilian*

[29] Ibid., para 941. See also paras 955-965
[30] Prosecutor v. Anto Furundžija, IT-95-17/1-T, Trial Judgment, 10 December 1998, para 87
[31] Prosecutor v. Dragoljub Kunarac, Radomir Kovać And Zoran Vuković (Foča case), IT-96-23-T& IT-96-23/1-T,Trial Judgment, 22 February 2001, paras 862 (Kunarac), 872 (Kovać), 878 (Vuković)
[32] Prosecutor v. Pauline Nyiramasuhuko et al., ICTR-98-42-T, Trial Judgment, 24 June 2011, paras 6182 and 6183
[33] Ibid., paras 6182
[34] Prosecutor v. Issa Hassan Sesay, Morris Kallon and Augustine Gbao (RUF accused), SCSL-2004-15-PT Corrected Amended Consolidated Indictment, para 43
[35] Prosecutor v. Alex Tamba Brima, Brima Bazzi Kamara and Santiage Borbor Kanu (AFRC accused), SCSL-2004-16-PT, Corrected Amended Consolidated Indictment, para 41

population as a whole, in order to break the will of the population and ensure their submission to AFRC/RUF control".[36]

All these findings support our view that sexual violence is currently employed as a weapon of war,[37] as a means to alienate victims and split apart communities, thus inflicting physical and psychological injury not only on the individual victim, but also on the community as a whole:

the physical and psychological pain and fear inflicted on the women not only abused, debased and isolated the individual victim, [which is ostracized by the family and the community at large] but deliberately destroyed the existing family nucleus, thus undermining the cultural values and relationships which held the societies together. [38]

More specifically, the atmosphere of terror and helplessness that the rebel forces created by systematically engaging in sexual violence was aimed at demonstrating that the communities were unable to protect their own women, in this way the AFRC and RUF extended their power and dominance over the population.[39]

In the Taylor case, the Trial Chamber took a similar approach, finding that rape, sexual slavery, forced marriages and outrages on personal dignity, when committed against a civilian population with the specific intent to terrorise, amount to acts of terror.[40]

Moreover, the RUF and AFRC accused and Taylor were also convicted of "outrages upon personal dignity", a violation of Common Article 3 and of Additional Protocol II punishable under Article 3(e) of the Statute. This crime referred to incidents in which civilian women and girls were forced to undress in public, raped and subjected to other acts of sexual abuse, sometimes in full view of the public and of the family members.[41]

4.1.2 Sexual violence crimes as crimes against humanity

Under the legal framework of crimes against humanity, sexual violence has been prosecuted by the ICTY and ICTR as rape, enslavement, torture, persecution and inhumane acts.

As already observed, an offense constitutes a crime against humanity if committed as part of a widespread or systematic attack against a civilian population.

The ICTR, in the Akayesu case, was the first international tribunal to find that rape constitutes a crime against humanity. Akayesu had served as *bourgmestre* of the Taba commune. He was prosecuted for his participation in widespread violence against Tutsi, including systematic rape, sexual mutilation and forced nudity,[42] which occurred often in front of a large number of people.[43]

[36] Ibid., para 1348
[37] On the issue of sexual violence as a gendered weapon of war, see Chapters 2.1 and 2.6.1
[38] Ibid., para 1349
[39] Ibid., para 1350
[40] Prosecutor v. Charles Ghankay Taylor, SCSL-03-01-T, Trial Judgment, 18 May 2012, para 2035
[41] Prosecutor v. Charles Ghankay Taylor (Judgment Summary), SCSL-03-1-T, 26 April 2012, para 29, available at: http://www.refworld.org/docid/4f9a4c762.html
[42] Prosecutor v. Jean-Paul Akayesu, ICTR-96-4-T, 2 September 1998, para 692
[43] Ibid., para 449

The Trial Chamber judged the accused criminally responsible for rape under Article 3(g) of the ICTR Statute for the numerous incidents of rape[44] he *"supervised"*[45] and for "other inhumane acts" under Article 3(i) of the ICTR Statute[46] for the numerous episodes of "*forced undressing"*.

The Akayesu Trial Chamber found that sexual violence may fall within the scope of the crimes against humanity of rape, torture, other inhumane acts, outrages upon personal dignity and infliction of serious bodily or mental harm. In particular, the Chamber noted that rape can amount to the crime against humanity of torture:

> *Like torture, rape is used for such purposes as intimidation, degradation, humiliation, discrimination, punishment, control or destruction of a person.*
> *Like torture, rape is a violation of personal dignity, and rape in fact constitutes torture when inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity*.[47]

The ICTR found also that Nyiramasuhuko, having ordered Interahamwe to rape Tutsis at the Butare préfecture office, was guilty of rape as a crime against humanity, pursuant to Article 3 (g) of the ICTR Statute.[48]

In the Foča case, the ICTY Trial Chamber found Kunarac, Vuković and Kovać guilty for rape not only as a violation of the laws or customs of war under Article 3 of the ICTY Statute, but also as a crime against humanity under Article 5 of the Statute.[49]

The ICTR found Semanza guilty of rape as a crime against humanity.[50]

Moreover, Kunarac and Vuković, but also Semanza[51] among the others, have been prosecuted for rapes as acts of torture as a crime against humanity and then convicted thereof.

It is interesting to notice that, contrary to its previous decisions, in the Kunarac case, the ICTY did not include among the elements of torture the official capacity of the perpetrator: *"the characteristic trait of the offence in this context is to be found in the nature of the act committed rather than in the status of the person who committed it."*[52] The Trial Chamber concluded that the definition of torture under international humanitarian law does not comprise the same elements as the definition of torture generally applied under human rights law. In particular, the participation of a state official or of any other authority-wielding person at the torture process is not necessary for the offence to be regarded as torture under international humanitarian law.[53]

Furthermore, the Chamber found that Kunarac and Kovać were guilty of enslavement as a crime against humanity. This crime was undoubtedly sexual in nature, considering the numerous

[44] Ibid., para 696
[45] Ibid., para 422
[46] Ibid., para 697
[47] Ibid., para 597
[48] Prosecutor v. Pauline Nyiramasuhuko et al., Trial Judgment, para 6093
[49] Prosecutor v. Dragoljub Kunarac, Radomir Kovać And Zoran Vuković, IT-96-23-T& IT-96-23/1-T,Trial Judgment, 22 February 2001, para 436
[50] Prosecutor v. Laurent Semanza, ICTR-97-20-A, Appeals Judgment, 20 May 2005, para 280
[51] Ibid., para 280
[52] Prosecutor v. Dragoljub Kunarac et al., Trial Judgment, para 495
[53] Ibid., para 496

rapes the victims were subjected to, while detained by the accused in houses and apartments used as brothels.[54] In fact, the Prosecutor affirmed: *"the main characteristic of the enslavement exercised by the accused Kunarac and Kovać was the sexual exploitation of the girls and women. All the controls exerted served that purpose. Repeated violations of the victim's sexual integrity, through rape and other sexual violence, were some of the most obvious exercises of the powers of ownership by the accused."*[55]

The ICTY Trial Chamber found Miroslav Kvočka, Mlađo Radić, Zoran Žigić and Dragoljub Prcać guilty, *inter alia*, of co-perpetrating persecution as a crime against humanity under Article 5(h) of the ICTY Statute, for sexual assault and rape of Bosnian Muslims, Bosnian Croats and other non-Serbs detained in the Omarska camp.[56]

In order to reach this conclusion, the Chamber reasoned that:

- the contextual element of all the crimes charged under Article 5 of the ICTY Statute is that the criminal acts form part of a widespread or systematic attack directed against any civilian population;[57]
- the crime of persecution is characterized by the discriminatory intent on political, racial, or religious grounds, which is an element of the crime.[58] This specific intent to discriminate, is thus additional to the intent to commit the underlying act (rape, etc.) and to the *mens rea* required for crimes against humanity (knowledge of act committed within the context of a widespread or systematic attack directed against a civilian population);[59]
- the Trial Chamber noted that the required elements that there must be an attack, that the attack must be directed against any civilian population and that the attack be widespread or systematic have been satisfied.[60] Moreover, the Chamber verified that the attacks specifically targeted the non-Serb population of Prijedor;[61]
- the evidence established that female detainees in Omarska camp were subjected to acts of sexual nature committed under coercive or abusive circumstances;[62]
- the Chamber concluded that rapes constitute persecutory acts if committed on discriminatory ground.[63]

However, the Appeals Chamber allowed, in part, Kvočka's fourth ground of appeal. More specifically, Kvočka contended that the Trial Chamber erred in finding him guilty of persecutions because, *inter alia*, the Prosecution had not proved beyond reasonable doubt that the alleged rapes and sexual assaults happened in the period he was at the camp. In fact, reviewing the trial judgment, the Appeals Chamber noted that the witnesses had not provided a date or an approximate date for the acts of sexual violence endured and thus, the Trial Chamber could not properly rely on this

[54] Ibid., paras 554 and 742
[55] Ibid., para 554, reporting: Prosecutor's Final Trial Brief, para 801
[56] Prosecutor v. Miroslav Kvoćka et al., IT-98-30/1-T, Trial Judgment, 2 November 2001, paras 119, 419, 470, 504, 578 and 691
[57] Ibid., para 128
[58] Ibid., para 181
[59] Ibid., para 200
[60] Ibid., para 129
[61] Ibid., para 198
[62] Ibid., para 182
[63] Ibid., para 189

witness' testimony to conclude that these crimes were committed during the time that Kvočka was employed in the camp. Consequently, the Appeals Chamber reversed his conviction pursuant to Article 7(1) of the ICTY Statute under count 1 (persecution, a crime against humanity) as far as this conviction related to rape and sexual assault and affirmed his remaining conviction pursuant to Article 7(1) of the ICTY Statute under count 1. Substantially, the Trial Chamber erred in concluding that the rapes and the sexual assaults were committed in Omarska during the time that the accused was employed there and, consequently, erred in convicting Kvočka of "persecution for sexual assault and rape."[64] Therefore, the Appeals Chamber did not criticize the reasoning of the Trial Chamber according to which sexual violence can be a constitutive act of persecution but found only that, regarding Kvočka, it was not proved that the sexual crimes occurred under his responsibility.

Furthermore, also in Krstić, the Trial Chamber concluded that acts of sexual violence could constitute persecution when committed with the required discriminatory intent based on race, religion or political grounds.[65]

Moreover, it is interesting to recall that the ICTR Trial Chamber recognized that the creation of stereotypes may be used as a way to inflame persecution. Indeed, *"the portrayal of the Tutsi woman as a femme fatale and the message that Tutsi women were seductive agents of the enemy"* was conveyed repeatedly by the media, in this way, it was created a framework that made the *"sexual attack of Tutsi women a foreseeable consequence of the role attributed to them"*.[66]

Therefore, although, neither the ICTY nor the ICTR Statutes contains a definition of persecution, the jurisprudence developed the concept,[67] so that, as we will see, the ICC's definition largely reflected the approach of these two Tribunals.[68] It can be further noted that both the ICTY and ICTR Statutes include the crime against humanity of persecutions solely on political, racial and religious grounds,[69] not mentioning specifically the "gender-based ground" that instead is included in the ICC Statute. However, it can be observed that, even though the two *ad hoc* Tribunals did not

[64] Prosecutor v. Miroslav Kvoćka et al., IT-98-30/1-A , Appeal Judgment, 28 February 2005 paras 333 and 334

[65] Prosecutor v. Krstić, IT-98-33-T, Trial Judgment, 2 August 2001, para 150: "the Bosnian Muslim […] were subjected to a terror campaign comprised of threats, insults, looting and burning of nearby houses, beatings, rapes and murders". See also para 533: General Krstić is accused of persecutions, a crime against humanity, on the basis of his alleged participation in: […] the terrorising of Bosnian Muslim civilians." See also paras 617 and 618

[66] Prosecutor v. Ferdinand Nahimana, Jean-Bosco Barayagwiza, Hassan Ngeze, ICTR-99-52-T, Trial Judgment, 3 December 2003, para 1079

[67] See: Prosecutor v. Miroslad Krnojelac, IT-97-25-A, Appeal Judgment, 17 September 2003, para 185 (the Appeals Chamber noting that the Trial Chamber correctly defined the crime of persecution as it appears in paragraph 431 of the Judgment): persecution is "an act or omission which discriminates in fact and which: denies or infringes upon a fundamental right laid down in international customary or treaty law (the actus reus) and was carried out deliberately with the intention to discriminate on one of the listed grounds , specifically race religion or politics (mens rea)".

[68] "Sexual Violence as an international crime", Anne-Marie de Brouwer, Charlotte Ku, Renée Römkens and Larissa van den Herik (eds.), 2012, Chapter III (Valerie Oosterveld), p. 61 et ss. See ICC Statute, Art. 7(2)(g)
For further information, see infra Chapter 5.6

[69] ICTY Statute, Art. 5(h) and ICTR Statute Art. 3(h). The ICTR Statute contains the same act set forth in the ICTY Satute, but adds a persecutory element, requiring that the crimes against humanity be committed not only "as part of a widespread or systematic attack against any civilian population," but also as an attack be based on "national, political, ethnic, racial or religious grounds."

specifically analyze the persecution's specific ground of gender, they clearly addressed the "intersections" between gender and racial, religious and political identities.[70]

The SCSL also prosecuted sexual violence crimes as crimes against humanity in tree of the four cases it decided: those of the RUF and AFRC accused, in particular, rape, sexual slavery and outrages upon personal dignity (forced marriage) and that of Charles Taylor, in particular rape and sexual slavery.[71]

Moreover, in the case 002/02, the ECCC is currently prosecuting sexual crimes as crimes against humanity, in particular as "other inhumane acts in the form of sexual violence" through rape, which was committed also in the context of forced marriage.[72]

4.1.3 Sexual violence crimes as acts of genocide

Genocidal rape […] is ethnic rape as an official policy of war in a genocidal campaign for political control. That means […] not only a policy to defile, torture, humiliate, degrade, and demoralize the other side, which happens all the time in war […]. It is specifically rape under orders. This is not rape out of control. It is rape under control. It is also rape unto death, rape as massacre, rape to kill and to make the victims wish they were dead. It is rape as an instrument of forced exile, rape to make you leave your home and never want to go back. It is rape to be seen and heard and watched and told to others; rape as spectacle. It is rape to drive a wedge through a community, to shatter a society, to destroy a people. It is rape as genocide.[73]

In the context of ethnical conflicts, sexual violence and in particular rape, can be a constituent act of genocide, even though it is not expressly indicated in the definition of the Genocide Convention, which is included in the ICTY, ICTR and ICC Statutes.[74]

It is important to acknowledge the particular as well as the generic aspects of the crime of genocidal rape. MacKinnon affirmed that, in this case, women are targeted for rape generally, because they are women and specifically, for their ethnicity. Rape is previously a form of violence against women but also a violence against the entire group. Therefore, MacKinnon identified the fundamental character of genocidal rape in the *"intersectionality between ethnicity and gender"*.[75]

In September 1998, the Rwandan Tribunal concluded the case of Jean-Paul Akayesu. It gave an historic judgment concerning the issue of genocidal rape, becoming the first international

[70] Valerie Oosterveld, "Gender, Persecution and The International Criminal Court: Refugee Law's Relevance to the Crime Against Humanity of Gender-Based Persecution", 17 Duke Journal Of Comparative & International Law 49, 2006.
See also Chapter 4.1.3

[71] For an analysis of these cases, see Chapters 4.2.6 (rape) and 4.4.4 (sexual slavery/forced marriage)

[72] Case 002/19-09-2007-ECCC-OCIJ, Closing Order, 15 September 2010, paras 1426-1429, 1430-1433. On this issue, see Chapter 4.4.5

[73] Sherrie L. Russell-Brown, "Rape as an Act of Genocide", 21 Berkeley J. Int'l Law. 350, 2003, p. 350, citing: Catharine A. MacKinnon, Rape, Genocide, and Women's Human Rights, 17 HARV. WOMEN'S L. J. 5, 1994, p. 11-12. See also, Catharine A. MacKinnon, "Are Women Human?", Harvard University Press, 2007, p. 38

[74] ICTY Statute Art. 4, ICTR Statute Art. 2, ICC Statute Art. 6

[75] Russell-Brown, "Rape as an Act of Genocide", supra at 73, reporting Catharine A. MacKinnon, "Crimes of War, Crimes of Peace", 4 UCLA WoMEN's L. J. 59,1993, pp. 64-65

criminal tribunal to recognize rape to be an act of genocide and to condemn an accused for genocide on the basis, *inter alia*, of acts of sexual violence.

First, the Rwandan Tribunal recognized the "intersectionality" between ethnicity and gender as a peculiar characteristic of the crime of genocidal rape. In fact, during the Rwandan genocide, rape was directed against certain women because of their ethnicity, more specifically against Tutsi women or Hutu women married to Tutsi men.[76] The Tribunal also found that Tutsi women were targeted also because they were presented as sexual objects by the propaganda campaign to mobilizing the Hutu against the Tutsi.[77] This *"sexualized representation of ethnic identity"* graphically illustrates that Tutsi women were subjected to sexual violence because they were Tutsi. Indeed, "s*exual violence was a step in the process of destruction of the Tutsi group, destruction of the spirit, of the will to live and of life itself"*.[78]

Second, through its wide definition of rape and its finding that rape can be an *actus reus* of genocide, the Rwandan Tribunal emphasized and acknowledged how *"sex worked to destroy a people"*.[79]

Lastly, referring to the happenings in Rwanda, the Chamber specifically considered the sexual conducts that may amount to genocide:

- causing serious bodily or mental harm to members of the group;
- imposing measures intended to prevent births within the group.[80]

The *"measures intended to prevent births within the group"*, should be construed as sexual mutilation, the practice of sterilization, forced birth control, separation of the sexes and prohibition of marriages.[81] Moreover, since in patriarchal societies the membership of a group is determined by the identity of the father, rape aimed at the impregnation of the woman, by a man of another group, is a measure used to prevent births within a specific group.[82] Furthermore, the measures intended to prevent births within the group may be physical, but also mental. Indeed, rape for its traumatic consequences, is used for the purpose to prevent births within a group.[83]

The Chamber found also that sexual violence certainly constitutes an *"infliction of serious bodily and mental harm"*[84] on the victims and is even one of the worst ways to inflict harm on the victims, as it causes both bodily and mental harm.[85]

Moreover, since killing[86] can be a constitutive act of genocide, it can be further considered that violent rapes and other forms of sexual violence can cause the victim's death. Indeed, during

[76] Prosecutor v. Jean-Paul Akayesu, ICTR-96-4-T, Trial Judgment, 2 September 1998, para 449: "All of [sexual violence] was directed against Tutsi women"
[77] Ibid., para 732
[78] Ibid.
[79] Russell-Brown, "Rape as an Act of Genocide", supra at 73; citing: Katherine M. Franke, Putting Sex to Work, 75 DENv. U. L. REV. 1139, 1998
[80] See ICTR Statute, Articles 2(2)(d) and 2(2)(b)
[81] Prosecutor v. Jean-Paul Akayesu, Trial Judgment, para 507
[82] Ibid.
[83] Ibid., para 508
[84] See ICTR Statute, Article 2(2)(b)
[85] Prosecutor v. Jean-Paul Akayesu, Trial Judgment, para 731
[86] See ICTR Statute, Article 2(2)(a)

the Rwandan genocide, acts of sexual violence were inflicted in order to cause the victims' death. Women were gang raped, raped repeatedly with objects, infected with HIV and subjected to outrageous brutality, some of which involved the mutilation of their sexual organs. Many victims died in the course of or consequently to a sexual assault. In such cases, sexual violence was a part of the killing.[87] In particular, it is reported that seventy percent of women raped during the Rwandan genocide contracted HIV because of the rapes.[88]

It is necessary to remember that for these conducts to constitute genocide, they must be accompanied by the *"specific intent to destroy in whole or in part the group"* to fulfill the requisite subjective element of the crime. The act must have been committed against one or several individuals because such individual or individuals were members of a specific group and, specifically, because they belonged to this group. Therefore, the victim has to be chosen because of his/her membership to the specific group, racial, religious, ethnical or national. Consequently, the victim of the crime of genocide is also the group itself and not only the individual.

Subsequent judgments followed this landmark case and contributed to advance the understanding of rape as a genocidal act.

On 10 August 1999, the Prosecution was allowed to amend the indictment accusing Pauline Nyiramasuhuko, who was the former Minister of Family and Women's Development, in Rwanda. The amended indictment finally included charges of genocide, conspiracy to commit genocide, complicity in genocide, direct and public incitement to commit genocide, crimes against humanity and serious violations of Article 3 common to the 1949 Geneva Conventions and Additional Protocol II, relative to the crimes she had allegedly committed during the 1994 Rwandan genocide.

Nyiramasuhuko was the first woman to be indicted before an international criminal tribunal, thus, the first woman to be charged with rape as a war crime and as a crime against humanity and the first woman to be charged with genocide. In particular, allegations of rape, sexual assault and other crimes of sexual nature were at the factual bases of the charge against Nyiramasuhuko for genocide.[89]

The Prosecution presented evidence that, during the attacks, Nyiramasuhuko ordered the Interahamwe to rape Tutsi women and girls,[90] among the others:

- Nyiramasuhuko told the Interahamwe and soldiers to *"start from one side and take the young girls and women and go and rape them because they refused to marry you."* After Nyiramasuhuko spoke, the Interahamwe and soldiers raped Tutsi women.[91]
- Nyiramasuhuko gave orders to the *Interahamwe* to *"rape the women and the girls and kill the rest."*[92]

[87] Women's Caucus For Gender Justice In The International Criminal Court, "Recommendations and Commentary For December 1997 PrepCom On The Establishment of An International Criminal Court", United Nations Headquarters December 1-12, 1997, WC.5.6-1

[88] Peter Landesman, "A Woman's Work", N.Y. TIMES, 15 September 2002, p. 6, available at: http://www.nytimes.com/2002/09/15/magazine/a-woman-s-work.html?pagewanted=6

[89] Russell-Brown, "Rape as an Act of Genocide", supra at 73

[90] Prosecutor v. Pauline Nyiramasuhuko et al., ICTR-98-42-T, Trial Judgment, 24 June 2011, para 2605

[91] Ibid., par 2688

[92] Ibid., para 2693

In general, during Rwandan genocide, the rapes were committed *"by many men in succession,[93] were frequently accompanied by other forms of physical torture and often staged as public performances to multiply the terror and degradation."*[94]

Genocidal rapes were committed also during the 1990s civil war in the territory of the Former Yugoslavia. They were principally designed to have the effect of impregnating the victim so that she would have a child belonging to the rapist's Serb ethnicity.[95] The other intent was to provoke the ostracization of raped women, taking advantage of the shame attached to rape. In this way, women excluded from their communities, could not be any longer possible procreator for their own ethnic group.[96] Therefore, rape as an act of genocide resulted, *inter alia*, in the prevention of births within the particular ethnic group of the victim: *"women were substantially viewed as the object through which and by which, the destruction of the group could be achieved".*[97]

Notably, in the Furundžija case, the ICTY confirmed that rape may also amount to an act of genocide.[98]

Moreover, the ICTY Trial Chamber found Krstić responsible for the crimes committed in Potočari, including the rapes and sexual assaults,[99] which were deemed as *"natural and foreseeable consequences of the ethnic cleansing campaign"*.[100] The Judges observed that, although ethnic cleansing was not a legal term, it had been used in various legal analyses and that there were *"obvious similarities between a genocidal policy and the policy of ethnic cleansing".*[101] In fact, the expression "ethnic cleansing" was used by the Commission of Experts, which had to investigate the crimes committed in the former Yugoslavia, to describe the scope of rendering an area ethnically homogenous by using force or intimidation to remove persons of given groups from the area.[102] The events in Potočari were a prelude to the subsequent genocide. Anyway, the rapes in Potočari were not at the basis of Krstić's conviction for aiding and abetting genocide because they were not specifically charged in the indictment.[103] However, the Chamber observed that in the decision on the review of the indictment against Karadžić and Mladić, the ICTY had stated that rape could constitute serious bodily or mental harm targeting the members of a group under a count of genocide and agreed with this interpretation.[104]

[93] Ibid., para 2631
[94] Peter Landesman, "A Woman's Work", supra at 88
[95] See, *inter alia*, Prosecutor v. Dragoljub Kunarac et al., Trial Judgment, 22 February 2001, para 654
[96] Russell-Brown, "Rape as an Act of Genocide", supra at 73; reporting Rhonda Copelon, "Gendered War Crimes: Reconceptualizing Rape in Time of War", in Women's Rights, Human Rights: International Feminist Perspectives, Julie Peters & Andrea Wolper, eds., 1995, pp. 205-206
[97] Russell-Brown, "Rape as an Act of Genocide", supra at 73
[98] Prosecutor v. Anto Furundžija, IT-95-17/1-T, Trial Judgment, 10 December 1998, para 172
[99] Prosecutor v. Radislav Krstić, IT-98-33-T, Trial Judgment, 02 August 2001, para 617
[100] Prosecutor v. Radislav Krstić, Trial Judgment, para 616
[101] Ibid., para 562
[102] "Final Report Of The Commission Of Experts Established Pursuant To Security Council Resolution 780 (1992)", para 129, available at: http://www.icty.org/x/file/About/OTP/un_commission_of_experts_report1994_en.pdf
[103] Prosecutor v. Radislav Krstić, IT-98-33, Amended Indictment, 27 October 1999
[104] Prosecutor v. Radislav Krstić, Trial Judgment, paras 509 and 513

Conclusively, it is important to recognize that genocidal rape is a crime that encompasses both gender and ethnicity: *"certain men",* for specific ethnical reasons, rape *"certain women"*.[105]

4.2 Rape

4.2.1 The case of the Prosecutor v. Jean-Paul Akayesu before the ICTR

The International Criminal Tribunal for Rwanda was the first international tribunal to identify the elements of the crime of rape, in the case of the Prosecutor v. Akayesu. In this case, the accused was convicted of rape as a crime against humanity and genocide with rape as a predicate crime.[106]

With respect to the genocidal aspect of sexual violence, the Chamber, referring to the events in Rwanda, found that the rapes were an integral part of the process of destruction, specifically targeting Tutsi women and, through them, specifically contributing to the destruction of the Tutsi group as a whole. Rape of Tutsi women targeted the individual victim and through her, the entire community. Indeed, these rapes were accompanied by the specific intent to destroy the Tutsi group.[107]

The Chamber added that rape constitutes a crime against humanity pursuant to Article 3(g) when it is committed as part of a widespread or systematic attack against a civilian population on the catalogued discriminatory grounds.

Moreover, the Tribunal found that sexual violence falls within the scope of "other inhumane acts", set forth Article 3(i) of the ICTR Statute, of "outrages upon personal dignity," set forth in Article 4(e) of the ICTR Statute and of "serious bodily or mental harm," set forth in Article 2(2)(b) of the ICTR Statute.[108]

The Chamber found also that the acts of rape could amount to the crime against humanity of torture, if the elements of this crime are satisfied.[109]

The allegations of sexual violence against Akayesu were set forth in paragraphs 12A and 12B of the Indictment:

> 12A. While seeking refuge at the bureau communal, Tutsi female displaced civilians were regularly taken by armed local militia and/or communal police and subjected to sexual violence, many women were forced to endure multiple acts of sexual violence which were at times committed by more than one assailant. These acts of sexual violence were generally accompanied by explicit threats of death or bodily harm. Because of the violence they were subjected to, these women lived in constant fear and their physical and psychological health deteriorated as a result of the sexual violence, of the beatings and of the killings.

[105] Russell-Brown, "Rape as an Act of Genocide", supra at 73, reporting Catharine A. MacKinnon, "Crimes of War, Crimes of Peace", 4 UCLA WoMEN's L. J. 59,1993, pp. 64-65
[106] Prosecutor v. Jean-Paul Akayesu, ICTR-96-4-T, Trial Judgment, 2 September 1998, para 696 (rape as a crime against humanity), 731 (rape as genocide)
[107] Ibid., para 731
[108] Ibid., para 688
[109] Ibid., para 687

> 12B. Jean Paul Akayesu knew that the acts of sexual violence were being committed, sometimes even at his presence. Therefore, he facilitated the commission of the sexual violence by allowing the sexual violence to occur: indeed, his presence during the commission of the sexual violence and his failure to prevent their commission encouraged these activities.[110]

In the light of the factual findings relative to these allegations of sexual violence, the Tribunal found the accused individually criminally responsible for crimes against humanity, in particular rape, punishable by Article 3(g) of the Statute[111] and genocide, punishable under Art 2(2) of the Statute.[112] In fact, the rapes of Tutsi women were systematic and evidently perpetrated against Tutsi women because they were Tutsi.[113] Many of them were subjected to public humiliations, mutilated and raped several times, often in public and often by more assailants.[114] The rapes resulted in physical and psychological destruction of Tutsi women, their families and their communities. Sexual violence was an *"integral part of the process of destruction"*, specifically targeting Tutsi women and specifically contributing to their destruction and to the destruction of the Tutsi group as a whole.[115]

Giving this judgment, the Chamber noted that, at the time, there was no commonly accepted definition of the crime of rape in international law,[116] so the Trial Chamber needed to establish it.

The Tribunal was not satisfied with the definition that historically had defined rape in national jurisdictions as *"non-consensual sexual intercourse"*.[117] In fact, variations on the form of rape may encompass acts that involve the insertion of objects and/or the use of bodily orifices not considered to be intrinsically sexual, under the traditional definition of this offence.[118] For instance, in the view of the Chamber, an act such as the insertion of a piece of wood into the sexual organs of a woman constituted rape.[119]

The Tribunal considered that rape is a complex form of aggression, thus, a mechanical description of objects and body parts was not able to capture all the elements of this crime.[120] Therefore, the Chamber defined rape as a *"physical invasion of a sexual nature"*, committed on a person *"under coercive circumstances"*.[121] By adopting this broad definition, *"a physical invasion of a sexual nature",* the Trial Chamber rejected the traditional definition of rape as *"coercive sexual intercourse"*, which, evidently, was limited not only in terms of the sex of the perpetrator and victim, but also in terms of the prohibited acts.

[110] Prosecutor v. Jean-Paul Akayesu, ICTR-96-4, Amended Indictment, 1998
[111] Prosecutor v. Jean-Paul Akayesu, Trial Judgment, para 685
[112] Ibid., para 731
[113] Ibid., para 732
[114] Ibid., para 731
[115] Ibid., para 731
[116] Ibid., para 686
[117] Ibid., para 686
[118] Ibid., para 686
[119] Ibid., para 686
[120] Ibid., para 687
[121] Ibid., para 688

More precisely, the Chamber's definition was innovative in these two aspects:

1. it included forced oral or anal sex, as well as the insertion of body parts or objects into the vagina or the anus, whereas under the traditional law approach, those acts were classified as various sexual offenses, including sodomy;[122]
2. it is gender neutral, thus, a male could be a victim and a female could be a perpetrator. This aspect diverges from the traditional law understanding of rape as a crime that only a male could commit upon a female.[123]

Another important aspect of this definition of rape is that it only required the acts be committed under coercive circumstances, without further restrictive specifications, granting significant freedom in determining what could constitute coercion.[124] The Tribunal itself noted that, in the context of the Rwandan genocide, coercive circumstances were not limited to physical force. Threats, intimidation, extortion and other forms of duress that take advantage of fear and desperation, may constitute coercion.[125] Therefore, to create a coercive context could be sufficient the military presence of Interahamwe among refugee Tutsi women.

Moreover, the Tribunal specified that it considered sexual violence, which includes rape, as *"any act of a sexual nature whether committed on a person under coercive circumstances".*[126] Accordingly, sexual violence is not limited to the physical invasion of the human body and may include acts that do not involve penetration or even physical contact. For example, a witness told that the accused ordered the Interahamwe to undress a student and force her to do gymnastics naked in the public courtyard of the bureau communal, in front of a crowd. This conduct constituted sexual violence, in the opinion of the Chamber.[127]

The appeal in Akayesu did not raise any issue relating to the elements of the crime of rape.[128]

The Appeals Chamber observed that the Akayesu definition of rape was endorsed by the ICTR Trial Chamber in Musema and Niyitegeka and by ICTY Trial Chamber in Čelebići and that no appeal was taken concerning this issue in any of these cases.[129]

4.2.2 The case of the Prosecutor v. Anto Furundžija before the ICTY

Three months after the ICTR had given its decision on the Akayesu case, the International Criminal Tribunal for the Former Yugoslavia concluded the trial against Anto Furundžija, who was a local commander of the "Jokers", a unit of the Croatian Defence Council (HVO), in the Vitez municipality in central Bosnia and Herzegovina. The Trial Chamber found the accused guilty of

[122] Phillip Weiner, "The Evolving Jurisprudence of the Crime of Rape in International Criminal Law", 54 B.C.L. Rev. 1207, 2013 [hereinafter: Weiner, "The Evolving Jurisprudence of the Crime of Rape"], referring to: Joshua Dressler, "Understanding Criminal Law", 6th ed., 2012, para 33.01, p. 567 n.2

[123] Weiner, "The Evolving Jurisprudence of the Crime of Rape", supra at 122, referring to: Wayne R. La Fave, Substantive Criminal Law. 2d ed., 2003, para 17.2(a), pp. 610–11

[124] Weiner, "The Evolving Jurisprudence of the Crime of Rape", supra at 122

[125] Prosecutor v. Jean-Paul Akayesu, Trial Judgment, para 688

[126] Ibid., para 688

[127] Ibid., para 688

[128] See Prosecutor v. Akayesu, ICTR-96-4-A, Appeal Judgment, 1 June 2001, para 10

[129] Prosecutor v. Mikaeli Muhimana, ICTR- 95-1B-T, Trial Judgment, 28 April 2005, para 540

violations of the laws or customs of war, under Article 3 of the ICTY Statute. More specifically, this judgment qualified rape as an "outrage upon personal dignity"[130] and as torture[131].

The guilty plea was based on a incidence that had happened during an interrogation at which the accused participated. The Trial Chamber found that the victim was interrogated by the Furundžija, who made the questions, in state of nudity, under the threatening of the other accused, accused B, to cut out her private parts.[132] The Trial Chamber also found that the accused was still present when the second phase of the interrogation of the witness occurred: accused B sexually assaulted the witness, in front of an audience of soldiers, while the accused was still interrogating her.[133] The intention of the accused was to obtain information from the victim by causing her severe physical and mental suffering, also by means of rape. Considering the evidence, the Trial Chamber found that the elements of torture were met. Therefore, the accused was condemned as a co-perpetrator for torture, because his interrogation of the victim was as an integral part of the torture.[134]

Moreover, although the Chamber found that the accused had not personally raped the witness, nor could he be considered, under the circumstances of that case, to be a co-perpetrator, his presence and continued interrogation of the victim, encouraged accused B in the raping and substantially contributed to the commission of his criminal acts.[135] The Chamber also considered that the victim suffered severe physical and mental pain along with public humiliation, at the hands of the two defendants, in what amounted to *"outrages upon her personal dignity and sexual integrity"*.[136] Consequently, the Trial Chamber held that the presence of the accused and his continued interrogation aided and abetted the crimes committed by accused B, thus, he was individually responsible for outrages upon personal dignity, including rape, as a violation of the laws or customs of war under Article 3 of the Statute.[137]

In this case, the Trial Camber concluded that the elements of rape were met when accused B penetrated the victim's mouth, vagina and anus under coercive circustances due to the fact that she was in captivity.[138] The Tribunal adopted a strict definition of rape, different from that adopted by the ICTR in the Akayesu case. In fact, the Chamber, noting that no definition of rape could be found in international law,[139] surveyed national legislation and concluded that most legal systems in the common and civil law areas consider rape to be the *"forcible sexual penetration of the human body by the penis* or *the forcible insertion of any other object into either the vagina or the anus".*[140]

The Chamber noticed that the major discrepancy in domestic law was relative to the criminalization of forced oral penetration, because some states regard it only as sexual assault and

[130] ICTY Statute, Art. 3, Violation of the laws or customs of war, outrages upon personal dignity
[131] Prosecutor v. Anto Furundžija, IT-95-17/1-T, Trial Judgment, 10 December 1998, para 267 (rape as torture)
[132] Ibid., para 24
[133] Ibid., para 266
[134] Ibid., para 267
[135] Ibid., para 273
[136] Ibid., para 272
[137] Ibid., para 274
[138] Ibid., para 271
[139] Ibid., para 175
[140] Ibid., para 181

others as rape[141] However, since a greater stigma attaches to being a convicted rapist rather than a convicted sexual assailant,[142] it classified forced oral penetration as rape.[143] It considered that the effect of forced oral sex can be as humiliating and traumatic for a victim as vaginal or anal penetration,[144] thus, it constitutes a *"most humiliating and degrading attack upon human dignity"*, which international law is intended to protect.[145]

Accordingly, the Trial Chamber established its own definition of rape as the *"sexual penetration*, *however slight, of the vagina or anus of the victim by the penis of the perpetrator or any other object used by the perpetrator or of the mouth of the victim by the penis of the perpetrator, by coercion or force or threat of force against the victim or a third person".*[146]

The Chamber emphasized that the circumstances surrounding captivity, such as prison camps or detention facilities, preclude consent.[147]

The Appeals Chamber in Furundžija confirmed the Trial Chamber's definition of the crime of rape.[148]

4.2.3 The case of the Prosecutor Prosecutor v. Dragoljubk Kunarac, Radomir Kovač and Zoran Vuković (Foča case) before the ICTY

In 2001, just over two years after Furundžija, the ICTY gave its judgment in the case of the Prosecutor v. Kunarac, Kovač and Voković. In this case, the defendants were charged with rape as a crime against humanity under Article 5(g) of the ICTY Statute and as a violation of the laws or customs of war under Article 3 of the ICTY Statute.[149] In fact, the Statute refers explicitly to rape as a crime against humanity within the Tribunal's jurisdiction, in Article 5(g) of the ICTY Statute. Moreover, in the concept of the violations of the laws or customs of war, pursuant to Article 3 of the Statute, is included the transgressions to the common Article 3 to the 1949 Geneva Conventions, which undoubtedly covers rape as an outrage against personal dignity.[150]

During the conflict in the territory of the former Yugoslavia, many Muslim women and girls[151] were kept in various houses, apartments, gymnasiums or schools, which had become detention centers where, constantly, soldiers and policemen subjected them to physical abuses and rape, sometimes several times a day.[152] Witnesses told that the guards working at Foča High School

[141] Ibid., para 182
[142] Ibid., para 184
[143] Ibid., para 183
[144] Ibid., para 184
[145] Ibid., para 183
[146] Ibid., para 185
[147] Ibid., para 271
[148] Prosecutor v. Anto Furundžija, IT-95-17/1-A, Appeal Judgment, 21 July 2000, para 207
[149] Prosecutor v. Dragoljub Kunarac, Radomir Kovač and Zoran Vuković, Trial Judgment, IT-96-23-T&IT-96-23/1-T, 22 February 2001, paras 4, 9, 10
[150] Ibid., para 436
[151] Ibid., para 42: a girl of twelve was raped by the soldiers
[152] Ibid., para 28

prevented the detainees from escaping, but they did not prevent soldiers from entering the facilities.[153] A witness reported that some soldiers told her that they were ordered to rape.[154]

The Chamber noted that the specific elements of the crime of rape were set out neither in the Statute nor in international humanitarian law or human rights instruments. Therefore, the Trial Chamber decided to refer to the elements of the crime of rape identified in the Furundžija case,[155] which were elaborated on the basis of the definitions of rape adopted in the national legal systems.[156]

However, in the particular circumstances of the case, the Trial Chamber found necessary a clarification of its understanding of the elements of the Furundžija definition. In fact, the Trial Chamber considered that the Furundžija definition, although appropriate in that case, was narrower than it was required by international law.[157] In the view of the Chamber, force, threat of force or coercion were certainly relevant elements, but the national provisions referred to in that judgment, suggest that the true *"common denominator"* which unifies the various national legal systems, may be a *"wider or more basic principle of penalizing violations of sexual autonomy"*. In particular, sexual penetration would constitute rape if it were *"not truly voluntary or consensual on the part of the victim"*. Therefore, according to the Chamber, *"sexual autonomy is violated wherever the person subjected to the act has not freely agreed to it or is otherwise not a voluntary participant".*[158] The absence of genuine and freely given consent or voluntary participation may be evidenced by various factors such as force, threats of force, or taking advantage of a person who is unable to resist.[159]

According to the Chamber, the relevance not only of force, threat of force and coercion, but also of absence of consent or voluntary participation was suggested in the Furundžija trial judgment itself:

> *[…] all jurisdictions surveyed by the Trial Chamber require an element of force, coercion, threat, or acting without the consent of the victim: force is given a broad interpretation and includes rendering the victim helpless.*[160]

The Kunarac et al. interpretation is focused on a conception of rape as a *"serious violations of sexual autonomy".*[161]

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[153] Ibid., paras 32-35

[154] Ibid., para 39

[155] Ibid., para 437 (referring to Furundžija Trial Judgment, para 185):
"The Trial Chamber found that, based on its review of the national legislation of a number of states, the *actus reus* of the crime of rape is:
1. the sexual penetration, however slight:
   - of the vagina or anus of the victim by the penis of the perpetrator or any other object used by the perpetrator; or
   - of the mouth of the victim by the penis of the perpetrator;
2. by coercion or force or threat of force against the victim or a third person

[156] Ibid., para 439

[157] Ibid., para 438

[158] Ibid., para 457

[159] Ibid., para 458

[160] Ibid., para 440 (referring to Furundžija Trial Judgment, para 80)

[161] Ibid., para 441

Following these considerations, the Chamber modified the second part of the Furundžija definition and concluded that the *actus reus* of the crime of rape in international law is constituted by:

1. the sexual penetration, however slight:
   - of the vagina or anus of the victim by the penis of the perpetrator or any other object used by the perpetrator; or
   - of the mouth of the victim by the penis of the perpetrator;
2. where such sexual penetration occurs without the consent of the victim.[162]

Consent, for this purpose, must be consent given voluntarily, because of the victim's free will, assessed in the context of the surrounding circumstances. Therefore, the *mens rea* is *"the intention to achieve this sexual penetration with the knowledge that it occurs without the consent of the victim".*[163]

In this judgment, the issue of consent was particularly important because the accused sustained that he was unaware that another soldier had threatened to kill the victim if she did not "*satisfy the desires of his commander,"* so he believed that the victim voluntarily consented to sexual relations with him.[164] However, the Trial Chamber rejected this position, finding instead that the accused had knowledge of circumstances that nullified the victim's consent. In fact, he was aware that the victim was a detainee, that she and other women were being raped, that she was in fear for her life.[165] As a result, the accused could not reasonably believe that the victim was voluntarily consenting to sexual activity.[166]

The Trial Chamber explained that lack of consent cannot be presumed.[167] However, the decision is quite unclear on the issue. More specifically, the Kunarac Trial Chamber explained that the Rule 96 of procedure and evidence[168] establishes that, in general, consent cannot be a defense if a victim has been subjected to coercive circumstances or if the victim reasonably believes that submitting to a perpetrator's demands will prevent subjecting a third party to similar threats. Therefore, Rule 96 lists some circumstances that negate consent by presumption.[169] Nevertheless, then the Chamber added that the reference to the factors listed in Rule 96, *"serves to reinforce the requirement that consent will be considered to be absent in those circumstances unless freely given."*[170] Therefore, the Chamber initially stated that in the cases listed in Rule 96 consent would not be possible because its

[162] Ibid., para 460
[163] Ibid., para 460
[164] Ibid., para 645
[165] Ibid., para 646
[166] Ibid., para 647
[167] Prosecutor v. Kunarac et al., IT-96-23-T & IT-96-23/1-T, Appeal Judgment, paras 130–131
[168] Rule 96 of the ICTY's Rules of Procedure and Evidence sets parameters for the Tribunal's consideration of consent. Similar rules were adopted for courts and tribunals in Rwanda and Sierra Leone.
Rules Of Procedure And Evidence, Rule 96 (Evidence in Cases of Sexual Assault):
In cases of sexual assault: (i) no corroboration of the victim's testimony shall be required; (ii) consent shall not be allowed as a defence if the victim (a) has been subjected to or threatened with or has had reason to fear violence, duress, detention or psychological oppression, or (b) reasonably believed that if the victim did not submit, another might be so subjected, threatened or put in fear; (iii) before evidence of the victim's consent is admitted, the accused shall satisfy the Trial Chamber in camera that the evidence is relevant and credible; (iv) prior sexual conduct of the victim shall not be admitted in evidence.
[169] Prosecutor v. Kunarac, IT-96-23-T & IT-96-23/1-T, Trial Judgment, para 464
[170] Ibid.

absence would be presumed and then, implied that voluntary consent would still be possible, thus its absence should be proved. In this failed attempt to balance the rights of the victim and those of the accused, the Chamber was not only contradictory, but departed from the previous sentences and from the meaning of the Rule. Moreover, considering the wider contest of war or mass atrocities in which international crimes are committed, it is extremely unlikely that such a defence could be accepted.[171] As we will see, the Appeals Chamber bypassed the contradictory statements, simply agreeing with the Trial Chamber's finding that captivity is a coercive circumstance that makes consent to sexual activities, impossible.

It can be observed that the Kunarac definition, maintaining the definition of the *actus reus* given in Furundžija, adopted a formulation of rape[172] narrower than the one adopted by the ICTR in the Akayesu case. Moreover, it removed the element of coercion or force or threat of force from the Furundžija definition and replaced it with the lack of consent.

The *mens rea* requirement of the perpetrator's knowledge of the victim's lack of consent was meant to further protect the rights of the accused.

With reference to the guilty plea relative to sexual violence crimes, the three accused were all found guilty, *inter alia*, for rape as a crime against humanity and as a violation of the laws or customs of war. Indeed, according to the Trial Chamber, the evidence shew that the members of the Bosnian Serb armed forces used the rapes of women of another ethnicity as an instrument of terror. The Serb forces set up and maintain a detention centre for Muslim women in Foča, from which women and young girls were taken away on a regular basis to other locations to be raped.[173] The sum of the evidence demonstrated that:

- the actions of the three accused were part of a systematic attack against Muslim civilians;
- they knew of the military conflict in the Foča region, because they participated in it as soldiers;
- they knew that one of the main purposes of that campaign was force Muslims out of the Region, terrorizing them so they never come back;
- they also knew of the general pattern of crimes, especially of detaining women and girls in detention centers or in apartments, where they would be raped;
- many times, they personally raped these women and girls, one was a child of only 12 years at the time;[174]

On appeal, the appellants challenged the Trial Chamber's definition of rape: they proposed a different definition requiring, in addition to penetration, two additional elements: *"force or threat of force and coercion"* and the victim's *"continuous* or *genuine resistance".*[175] They argued that the

[171] Ibid., para 464: where the victim is "subjected to or threatened with or has reason to fear violence, duress, detention or psychological oppression" or "reasonably believed that if [he or she] did not submit, another might be so subjected, threatened or put in fear", any apparent consent which might be expressed by the victim is not freely given".
[172] Weiner, "The Evolving Jurisprudence of the Crime of Rape", supra at 122, referring to La Fave, "Substantive Criminal Law", 2d ed., 2003, para 17.2, p. 609.
[173] Prosecutor v. Dragoljub Kunarac et al., Trial Judgment: Judgment Summary, available at: http://www.icty.org/x/cases/kunarac/tjug/en/010222_Kunarac_Kovac_Vukovic_summary_en.pdf
[174] Ibid.
[175] Prosecutor v. Dragoljub Kunarac, Radomir Kovač and Zoran Vuković, IT-96-23& IT-96-23/1-A, Appeal Judgment, 12 June 2002, para 125

use of coercion or force, as opposed to *lack of consent,* was a basic element of the crime of rape.[176] The respondent noted instead that force, threats of force or coercion nullifies true consent.[177]

Although the Appeals Chamber agreed with the Trial Chamber's definition of rape, it believed that it was necessary to clarify two aspects. First, it rejected the Appellants' continuous resistance requirement, because it has no basis in customary international law, it is wrong on the law and absurd on the facts.[178]

Second, in the view of the Appeals Chamber, the Trial Chamber had not adopted a new definition of rape, but simply followed the Tribunal's previous jurisprudence, trying to explain the relationship between force and consent. In particular, the Trial Chamber wished to explain that there are factors other than force, which would render an act of sexual penetration non-consensual or non-voluntary on the victim' side. Therefore, force or threat of force are only evidence of non-consent, but *"not elements per se of rape."* Consequently, a *"narrow focus on force or threat of force"* would be not appropriate and a way for perpetrators to avoid liability, in case of sexual activity to which the other party had not consented, if coercive circumstances are different from physical force.[179]

As already noted, the Appeals Chamber concurred with the Trial Chamber's finding that the fact that women were held in *de facto* military headquarters, detention centers and apartments maintained as soldiers' residences, constituted coercive circumstances that made consent to the sexual acts, impossible.[180]

However, although the Appeals Chamber argued that the Trial's Chamber definition of rape followed the previous jurisprudence of the Tribunal, merely explaining the relationship between force and consent, a closer review of the decision shows that the definition of the Trial Chamber distanced from the earlier Tribunal's case law, approaching more to a domestic view of the crime. Indeed, force and consent have traditionally deemed as separate and distinct elements, *"each of which must independently be satisfied."*[181] Force, threats and coercion regard the accused's conduct, whereas voluntary consent relates to the mental state of the victim.[182]

[176] Ibid., para 125
[177] Ibid., para 126
[178] Ibid., para 128
[179] Ibid., para 129
[180] Ibid., paras 132-133
[181] Weiner, "The Evolving Jurisprudence of the Crime of Rape", supra at 122, referring to: Wayne R. La Fave, Substantive Criminal Law, 2d ed., 2003, para 17.4, pp. 637-38.
[182] Compare Furundžija, IT-95-17/1-T, Trial Judgment, para 185 (defining rape as "sexual penetration […] by coercion or force or threat of force"), with Kunarac, IT-96-23-T & IT-96-23/1-T, Trial Judgment, para 460 (defining rape as "sexual penetration […] without the consent of the victim").

4.2.4 The case of the Prosecutor v. Mikaeli Muhimana before the ICTR

In 2005, almost three years after the Kunarac judgment, Muhimana was found guilty of rape as a crime against humanity.

In this case, the Chamber reconsidered the definitions of rape given so far by the two *ad hoc* Tribunals.[183] The Chamber noted that both the Defence and the Prosecution endorsed the Akayesu definition of rape.[184] In fact, the Prosecution considered that the disembowelment of Pascasie Mukaremera, effected by using a machete to cut her from her breasts to her genitals, constituted rape and the Akayesu definition was able to cover also this kind of conducts. However, considering the peculiar factual circumstances of this case, the Chamber believed that it was necessary to recall the evolution of the definition of rape in international criminal law:[185]

- The Akayesu judgment provided a broad definition of rape, which included *"any physical invasion of a sexual nature in coercive circumstances"*. Indeed, the Akayesu Trial Chamber rejected as too mechanical and not sufficiently wide the traditional definition of rape as a *"non-consensual sexual intercourse."*[186]
- The Kunarac Trial Chamber considered that it was necessary to clarify its understanding of the mental element included in paragraph (ii) of the Furundžija definition. In the view of the Kunarac Chamber, in stating that the relevant act of *"sexual penetration"* would constitute rape only if accompanied *"by coercion or force or threat of force"* against the victim or a third person, the Furundžija definition had been excessively narrow. In fact, it did not referred to the other factors that could render an act of sexual penetration non-consensual or non-voluntary on the part of the victim. Therefore, the Kunarac Trial Chamber identified the elements of the crime of rape as the *"sexual penetration, however slight, of the vagina or anus of the victim by the penis of the perpetrator or any other object used by the perpetrator; or of the mouth of the victim by the penis of the perpetrator, whether such sexual penetration occurs without the consent of the victim"*. Consent, for this purpose, must be consent given voluntarily, as the result of the victim's free will, evaluated with reference to the contextual circumstances. The *mens rea* is the intention to perpetrate this sexual penetration accompanied by the knowledge that it occurs without the consent of the victim.[187] Evidently, any form of captivity makes consent impossible. The Appeals Chamber in Kunarac opined that the Trial Chamber solely apparently departed from the Tribunal's prior definitions of rape. In fact, the Trial Chamber wanted to explain the relationship between force and consent.[188]
- The Muhimana Trial Chamber concurred with the fact that coercion is an element that excludes consent, so it is an evidentiary factor in the crime of rape.[189]
- The Chamber noted that the Akayesu's definition of rape was not adopted in all subsequent jurisprudence of the *ad hoc* Tribunals: the ICTR Trial Chambers in Semanza,

[183] Prosecutor v. Mikaeli Muhimana, ICTR- 95-1B-T, Trial Judgment, 28 April 2005, para 6
[184] Ibid., para 535
[185] Ibid., para 536
[186] Ibid., paras 537-538, reporting Akayesu Trial Judgment, paras 598 and 688, 686
[187] Ibid., para 541, reporting Kunarac Trial Judgment, paras 437-438
[188] Ibid., para 544
[189] Ibid., para 546

Kajelijeli and Kamuhanda, *inter alia*, relied on the physical elements of rape set out in Kunarac, refusing the Akayesu definition.[190] More precisely, the ICTR Trial Chamber in Semanza stated that the Akayesu judgment enunciated a broad definition of the material element of rape, as a sexual invasion, whereas the ICTY affirmed a narrower interpretation of this element, limited to sexual penetration.

At the end of its reasoning, the Muhimana Chamber decided to adopt the definition of rape approved by the Kunarac Appeals Chamber. In doing so, the Chamber emphasized that acts of sexual violence different from penetration are prosecutable as other crimes against humanity, such as torture, persecution, enslavement or other inhumane acts.[191] However, it considered that the Furundžija and the Kunarac definitions of rape, which sometimes have been construed as departing from the Akayesu one, as in Semanza, actually are substantially conform to this definition but more detailed. In fact, the Chamber believed that the Akayesu definition and the Kunarac elements were not incompatible or substantially different, in their application. Akayesu referred broadly to a *"physical invasion of a sexual nature"*, whereas Kunarac identified precisely what would constitute a physical invasion of a sexual nature amounting to rape.[192]

With reference to the issue of consent, the Chamber observed that most cases charged under international criminal law, including genocide, crimes against humanity and war crimes, almost universally involve coercive circumstances.[193]

Therefore, it can be said that the Muhimana Trial Chamber adopted the conceptual definition of rape established in Akayesu, which encompasses the elements set out in Kunarac.

Consequently, the Chamber found that the accused bears no criminal responsibility for the rape of Pascasie Mukaremera. In the Chamber's opinion, though the conduct of the accused involved sexual organs, it does not constitute a physical invasion of a sexual nature, thus, it was deemed murder, not rape.[194]

However, the accused was convicted of rape with reference to other incidents. In fact, the Chamber found that the accused personally committed multiple acts of rape, among the others:

- the accused took two women into his house and raped them. Thereafter, he drove them out of his house naked and invited Interahamwe and other civilians to see what naked Tutsi girls looked like;
- in the basement of Mugonero Hospital, at Mugonero Complex, the accused raped a young Hutu girl, whom he mistook for a Tutsi. When he was informed that she was not a Tutsi, apologized to her for the rape.[195]

[190] Ibid., para 547
[191] Ibid., para 548
[192] Ibid., paras 549-551
[193] Ibid., para 546
[194] Ibid., para 557
[195] Ibid., para 552

The Chamber found that the accused also abetted in the commission of rapes by others, *inter alia*:

- at the same time and in the same area where the accused raped a witness in the basement of Mugonero Hospital, two soldiers, in his presence, raped two other women. The presence of the accused during the rapes, added to his own action of raping, encouraged the two soldiers to rape. Consequently, Muhimana's encouragement contributed substantially to the commission of these rapes. Other similar episodes took place.[196]

The Chamber, basing its judgment on these and similar facts, concluded that the accused participated in attacks against Tutsi and that in doing so, he intended to destroy the Tutsi ethnic group. The accused not only knew that all of these rapes were part of a discriminatory, widespread and systematic attack against Tutsi civilians, but he also raped his victims, because he believed that they were Tutsi. Accordingly, the Chamber found the accused Mikaeli Muhimana criminally liable for committing and abetting the rapes charged, as part of a widespread and systematic attack against a civilian population on discriminatory ground, consequently he was guilty of rape as a crime against humanity.

4.2.5 The case of the Prosecutor v. Sylvestre Gacumbitsi before the ICTR

In 2006, in the case of the Prosecutor v. Gacumbitsi, the ICTR Appeals Chamber, which is common to the ICTY and the ICTR, finally determined the proper definition of rape within the jurisdiction of the two *ad hoc* Tribunals. In this case, Gacumbitsi was convicted of rape as a crime against humanity.

The Trial Chamber found that the accused publicly instigated the rape of Tutsi girls, specifying that sticks should be inserted into their genitals, if they tried to resist. The Chamber found that the rapes and other acts of sexual violence committed were part of a widespread and systematic attack against Tutsi civilians. Women and girls were all raped because of their Tutsi ethnic origin or because of their relationship with a person of the Tutsi ethnic group.[197] The Chamber assessed that the accused knew or had reason to know that such rapes were being committed because he instigated the attack against Tutsi civilians.[198]

The Chamber found the accused criminally liable, pursuant to Article 6(1) of the Statute, for instigating others to commit rape, a crime against humanity.[199]

The Trial Chamber did not hesitate on the definition of rape, but simply stated that any penetration of the victim's vagina by the rapist with his genitals or with any object constitutes rape, however recognizing that the definition of rape under Article 3(g) of the Statute is not restricted to such acts.

[196] Ibid., para 553
[197] Prosecutor v. Sylvestre Gacumbitsi, ICTR-2001-64-T, Trial Judgment, 17 June 2004, paras 322-323
[198] Ibid., paras 224-225
[199] Ibid., paras 332-333

The Prosecution did not allege any error in the definition of rape invalidating the verdict, but required a clarification of its elements, in particular, arguing that the victim's non-consent and the perpetrator's knowledge thereof should not be considered elements of the crime.[200] In fact, first, the Prosecution argued that the Tribunal's jurisdiction covers the acts of rape only when they occur in the context of genocide, armed conflict or a widespread or systematic attack against a civilian population, circumstances that *per se* exclude a genuine consent.[201] Second, the Prosecution sustained that rape should be treated as any other violation of international criminal law, such as torture or enslavement, which do not require the evidence of the absence of consent.[202]

The Gacumbitsi Appeals Chamber finally reconciled the two divergent definitions of rape adopted by the ICTY and ICTR, recalling the Kunarac[203] definition of rape and establishing that, according to this definition, non-consent and knowledge thereof are elements of rape, thus, the Prosecution has to prove them beyond reasonable doubt.[204]

It further explained that the Prosecution could provide evidence of non-consent by proving the existence of *"coercive circumstances under which meaningful consent is not possible"*. The Chamber would be free to deduce non-consent from the contextual circumstances, such as an ongoing genocide campaign or the detention of the victim.[205] The existence of circumstances of detention could suffice for proving, beyond a reasonable doubt, lack of consent.[206] However, the Appeals Chamber specified that, although under certain circumstances the accused would be allowed to introduce evidence that establish the victim's consent, such evidence was inadmissible if the victim:

- has been subjected to or threatened with or has had reason to fear violence, duress, detention or psychological oppression; or
- reasonably believed that if the victim did not submit, another might be so subjected, threatened or put in fear.[207]

Obviously, even if the Chamber admits such evidence, it is free to evaluate it and eventually disregard it, if it concluded that under the circumstances the consent given was not genuinely voluntary.

As to the element of the accused's knowledge of the absence of consent of the victim, similarly, it is the context to be relevant.

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[200] Ibid., paras 147, 150
[201] Prosecutor v. Sylvestre Gacumbitsi, ICTR-2001-64-A, Appeal Judgment, 7 July 2006, para 148
[202] Ibid., para 149
[203] Kunarac Appeals Chamber defined rape as follows:
"the *actus reus* of the crime of rape in international law is constituted by: 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) the mouth of the victim by the penis of the perpetrator; where such sexual penetration occurs without the consent of the victim. Consent for this purpose must be consent given voluntarily, as a result of the victim's free will, assessed in the context of the surrounding circumstances. The *mens rea* is the intention to effect this sexual penetration, and the knowledge that it occurs without the consent of the victim".
[204] Prosecutor v. Sylvestre Gacumbitsi, Appeal Judgment, para 153
[205] Ibid., para 155
[206] Ibid., para 155
[207] Ibid., para 156

Consequently, the elements of the crime of rape are, according to these jurisprudential developments:

1. the sexual penetration, however slight:
   - of the vagina or anus of the victim by the penis of the perpetrator or any other object used by the perpetrator;
   - or the mouth of the victim by the penis of the perpetrator; where such sexual penetration occurs without the consent of the victim;
2. the sexual activity must:
   - occur without the consent of the victim, which may be inferred by the presence of coercive circumstances, including the use of force or treat of force to the victim or to a third person
3. the perpetrator acts:
   - with the intent to commit the material act
   - knowing the non-consent of the victim

Conclusively, the more traditional definition of rape, as opposed to the more comprehensive definition in Akayesu, prevailed in both the ICTY and ICTR.

4.2.6 The cases of the Prosecutor v. Alex Tamba Brima, Brima Bazzy Kamara and Santigie Borbor Kanu (AFRC case) and of the Prosecutor v. Issa Hassan, Sesay Morris Kallon and Augustine Gbao (RUF case) before the SCSL

The conflict in Sierra Leone began in 1991, when the Armed Forces Revolutionary Council (AFRC), a group of soldiers from the Sierra Leonean Army allied with the Revolutionary United Front (RUF), a rebel group that invaded Sierra Leone from Liberia with the support from Charles McArthur Ghankay Taylor, who, at the time of the RUF invasion, was the leader of a Liberian armed faction known as the National Patriotic Front of Liberia (NPFL). In 1997, the two groups overthrew the Government of Sierra Leone. A third Sierra Leonean armed faction, the Civil Defense Forces (CDF), was a group of pro-government paramilitary forces that fought against the combined forces of the AFRC and the RUF.

All of these armed groups committed mass atrocities, including massive sexual violence. The SCSL was in fact set up to prosecute the crimes committed during the war. The Court started to work in 2003 and ten years later, in 2013, became the first Court to complete its mandate and transition to a residual mechanism. Although charged individually, the cases held before the Court consolidated into four trials: the three trials against the leaders of the RUF, the AFRC and the CDF and the trial against Charles Taylor,[208] who as leader of the NPFL and later as President of Liberia provided arms and ammunition, military personnel, operational support, moral support and ongoing guidance to

[208] On 30 May 2012, the Trial Chamber issued a sentencing decision imposing a prison term of 50 years.
On 26 September 2013, a five-judge panel of the Appeals Chamber of the SCSL upheld the conviction and the sentence of 50 years imprisonment.

the AFRC/RUF alliance and Liberian fighters for military operations during the relevant period.[209] Therefore, he was found guilty, pursuant to Article 6.1 of the SCSL Statute, for (*inter alia*) aiding and abetting the planning, preparation or execution of the crimes committed by the military organizations he supported.[210]

The Special Court of Sierra Leone (SCSL) faced the issue of defining the crime of rape. In fact, in its 2007 case of the Prosecutor v. Brima, Kamara and Kanu, the defendants were charged with rape and other forms of sexual violence as crimes against humanity,[211] punishable under Article 2(g) of the Statute. In particular, the Court found that *"reliable documentary evidence from several sources estimates that thousands [civilians] were raped."*[212]

In order to prosecute the crime of rape, the Court specifies that, in addition to the *chapeau* requirements of crimes against humanity pursuant to Article 2 of the Statute, the following elements of the crime of rape should be met:

1. The non-consensual penetration, however slight, of the vagina or anus of the victim by the penis of the perpetrator or by any other object used by the perpetrator, or of the mouth of the victim by the penis of the perpetrator; and knowledge that it occurs without the consent of the victim.
2. The intent to effect this sexual penetration and the knowledge that it occurs without the consent of the victim.[213]

This definition is similar to the one adopted by the ICTY Trial Chamber in the Kunarac case. First, as in Kunarac, the Brima Trial Chamber explained that *"force or threat of force"* were factors establishing *"lack of consent,"* but not elements of the crime.[214] Second, the *mens rea* requirements are identical to those identified by the Kunarac Trial Chamber.[215]

More specifically, the Court, referring to the case law of the ICTY and ICTR, specified that, if the victim had not consent voluntarily, as the result of his/her free will, evaluated considering the surrounding circumstances, the sexual penetration amounts to rape. Force or threat of force provide clear evidence of non-consent, but force is not an element per se of rape and there are factors other than force which would render an act of sexual penetration non-consensual or non-voluntary on the victim's side. Neither the "continuous resistance" by the victim is required to establish coercion. The coercion has to be necessarily assessed from the context. However, in situations of armed conflict or detention, coercion is almost universal and the eventual consent of children below the age of 14 is not valid.[216]

[209] Prosecutor v. Charles Ghankay Taylor (Judgment Summary), SCSL-03-1-T, Special Court for Sierra Leone, 26 April 2012, para 149, available at: http://www.refworld.org/docid/4f9a4c762.html
[210] Ibid., para 145
[211] Prosecutor vs. Alex Tamba Brima, Brima Bazzy Kamara and Santigie Borbor Kanu (AFRC accused), SCSL-04-16-T, Trial Judgment, 20 June 2007, para 210
[212] Ibid., para 236
[213] Ibid., para 693
[214] See Prosecutor v. Kunarac et al., IT-96-23-T & IT-96-23/1-T, Trial Judgment, para 460
[215] See Ibid., paras 458-460
[216] Prosecutor v. Alex Tamba Brima et al., Trial Judgment, para 694

Two years later, in the 2009 case of the Prosecutor v. Sesay, Kallon and Gbao, the Trial Chamber of the SCSL adopted a different definition of the crime of rape. In that case, the accused were charged with rape and other forms of sexual violence as crimes against humanity.[217]

Numerous witnesses testified before the court and gave personal accounts of having suffered brutal rapes, also with objects[218] and gang rapes,[219] often in front of the family or of having personally witnessed the commission of these crimes.[220]

The Chamber found all the accused guilty, *inter alia*, of rape, identifying the following elements of rape:

1. The accused 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 accused 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.
3. The accused intended to effect the sexual penetration or acted in the reasonable knowledge that this was likely to occur.
4. The accused knew or had reason to know that the victim did not consent.[221]

The first two paragraphs develop from the ICC's definition of rape, provided in the ICC Elements of Crimes, which, as we will see, reconciles the Akayesu concept of "invasion" with the Kunarac concept of "penetration" as the Appeals Camber in Gacumbitsi tried to do.

The third and fourth paragraphs refer to the Kunarac trial judgment and are not included in the ICC Elements of Crimes.

The Chamber explained its definition. The first element of the *actus reus* defines the type of invasion encompassed by the concept of rape, in particular, two types of penetration, however slight. The first part of the provision refers to the penetration of any part of the body, of either the victim or the accused, with a sexual organ. The "any part of the body" in this part includes genital, anal or oral penetration. The second part of the provision refers to the penetration of the genital or anal opening of the victim with any object or any other part of the body. This definition of invasion is broad enough to be gender neutral, given the fact that both men and women can be victims of rape.[222]

The second element of the *actus reus* of rape refers to the circumstances that would render the sexual act, a criminal act. The relevant circumstances are those in which the person could not be said to have voluntarily and genuinely consented to the act. Indeed, the use or threat of force

[217] Prosecutor v. Issa Hassan Sesay, Morris Kallon and Augustine Gbao, (RUF accused), SCSL-04-15-T, Trial judgment, 2 March 2009, para 143 (rape as a crime against humanity under Article 2 of the Statute)
[218] Ibid., see for example paras 1185 and 1208
[219] Ibid., see for example para 1347
[220] Ibid., para 532
[221] Ibid., para 145
[222] Ibid., para 146

provides clear evidence of non-consent, but it is not required as an element of the crime.[223] The Chamber recognized that there are situations where, though in the absence of force or coercion, a person cannot be said to genuinely have consented to the act, principally, because he or she is too young, under the influence of some substance, or suffering from an illness or disability.[224]

This explanation refers to the Kunarac appeal judgment, which described the "lack of consent" as the result of circumstances not limited to the use of force and treat of force, but in this definition, differently than in Kunarac, lack of consent is not listed as an element of rape. In fact, on this respect, the definition derives from the ICC elements of the crime of rape, where lack of consent is not an element. Consequently, it is unclear what reasoning the Sesay Chamber intended to confirm. However, given the difficulty to provide such evidence in social context where stigma is attached to rapes, the Chamber specified that the *actus reus* may be inferred from circumstantial evidence.[225]

The *mens rea* requirements for the offence of rape are the intent to commit the invasion in the knowledge that the victim was not consenting.[226]

The *mens rea* requirement for lack of consent is not included in the ICC's definition of rape, but derives from the Kunarac trial judgment. The Sesay decision provided no explanation for including this special *mens rea*, especially considering the fact that this definition does not include the lack of consent among the elements of the *actus reus* of the crime, thus, there was no reason to require that the accused possess some level of knowledge that the victim was not consenting to the act. Anyway, the issue of *mens rea* had not a significant role in the Sesay case, but as already observed it was an important issue in the Kunarac trial judgment.

It can be further noted that the *mens rea* requirement adopted in the Kunarac trial judgment is not completely identical to the one in Sesay. The Kunarac mens rea elements requires the *"intention to effect […] sexual penetration, and the knowledge that it occurs without the consent of the victim."*[227] Whereas, the Sesay decision added an alternative, *"or [the perpetrator] acted in the reasonable knowledge that this was likely to occur."* Moreover, according to the Sesay definition, it is not necessary to prove that the perpetrator knew about the victim's non-consent, but it is sufficient to prove that he *"had reason to know"* that the victim did not consent. The *"had reason to know*" clause clearly allows the prosecution even if the perpetrator sustained that he had no knowledge of the absence of the victim's consent.

The most recent trial held before the SCSL, that of Charles Taylor, concluded in 2013. The trial confirmed that sexual violence was systematically committed by the AFRC and the RUF and added that other affiliated fighters also engaged in this form of violence. The Taylor trial judgment emphasized that the rapes perpetrated by AFRC and RUF fighters were not accidental: they were part of these group's strategy to achieve their military and political objectives.[228] The legal analysis of rape in the Taylor case followed the SCSL earlier approach in the AFRC trial judgment adopting the same elements of the crime.[229] Moreover, the Taylor trial judgment, like the RUF trial judgment,

[223] Ibid., para 147
[224] Ibid., para 148
[225] Ibid., 149
[226] Ibid., para 150
[227] Ibid., para 460
[228] Prosecutor v. Charles Taylor, SCSL-03-01-T, Trial Judgment, 18 May 2012, para 6787
[229] Ibid., para 415 provides the following definition of rape:

recognized that certain individuals can never be said to have consented to sex due to age, disability, illness, or being under the influence of a substance.[230]

Conclusively, it can be observed that the Taylor/AFRC approach is slightly narrower than the RUF approach. Concerning the *actus reus,* both the definitions cover vaginal, oral or anal penetration of a victim by a perpetrator, with the penis or with objects, but the RUF approach additionally covers situations in which a perpetrator uses other parts of his body to penetrate (fingers), or a male victim is forced to penetrate (either vaginally, orally or anally) the perpetrator or another victim. However, the Taylor Chamber did not explain why it relied upon the narrower and earlier AFRC definition rather than the more recent and wider RUF definition.

4.2.7 Conclusions

Conclusively, it can be further observed that the inclusion of the crime of rape in the Statutes of the ICTY and the ICTR was not the "instinctive outcome" of the international system, but the result of the pressure made by feminist movements claiming justice for the victims of the mass rapes that were committed during the conflicts in Yugoslavia and Rwanda. This consideration is supported by the fact that no definition of the crime of rape was provided. Therefore, the task to develop such a definition was left to the Tribunals.

In fact, at the beginning of the 1990s, the international community was still not completely aware of the seriousness of this crime, traditionally considered a "private crime", not of international concern and not part of the most atrocious conflict-related crimes. Indeed, it was solely in 1998, that for the first time in history, rape was explicitly recognized by the ICTR, in the Akayesu judgment, as an instrument of genocide and as a crime against humanity and by the ICTY, in the Čelebići, Furundžija and Delalić judgments, as a war crime.

The two *ad hoc* Tribunals elaborated various definitions of rape based on the definitions given by the major national legal systems: the landmark cases on the issue are Akayesu, Furundzija and Kunarac.

The ICTR, in the Akayesu case, gave a broad definition of rape as a *"physical invasion"* of the victim's body *"under coercive circumstances".* In fact, it was intended to cover also acts that involve the insertion of objects and/or the use of bodily orifices not considered to be intrinsically sexual. However, this definition has been criticized for being too vague and, thus, for the possible violation of the principle of legality (*"nullum crimen sine lege"*). I argue that this problem could be overcome considering that in the attempt to distinguish rape from general acts of sexual violence, the Chamber explained that the concept of *"invasion"* requires *"penetration"* or at least some other

- the non-consensual penetration, however slight, of the vagina or anus of the victim by the penis of the perpetrator or by any other object used by the perpetrator, or of the mouth of the victim by the penis of the perpetrator; and
- the perpetrator must have the intent to effect this sexual penetration, and the knowledge that it occurs without the consent of the victim.

[230] Ibid., para 416; Prosecutor v. Sesay, Kallon and Gbao, SCSL-04-15-T, Trial Judgment, 2 March 2009, para 148

"physical contact" of a sexual nature.[231] However, it fails to cover cases in which two victims are forced to perform sexual acts on each other or on the perpetrator.

The ICTY, in the case of Furundžija, gave a "more technical" definition of rape that restricts the conducts possibly amounting to rape to the penetration with the penis or with objects. It does not include the possibility of a penetration with other parts of the body different from the penis. The circumstances are similar to those identified by the ICTR: it is still required coercion, but it is added force or treat of force.

The ICTY, in the Kunarac case, followed in part the definition given in Furundžija, requiring the penetration, but for the sexual penetration to be rape, it must be proved the victim's lack of consent, accompanied by the perpetrator's knowledge thereof. Therefore, it is necessary an inquiry into the consent of the victim and the perpetrator's knowledge thereof, rather than an objective inquiry into the presence of force or coercion, which however were viewed as evidence of non-consent. This definition emphasized a conception of rape as a crime violating sexual autonomy.[232]

The element of lack of consent rose problematic issues. It is an element commonly required in the domestic legal definitions of rape, which were the models to which the ICTY made reference, however, the problem is that situations of war or mass atrocities are different from the circumstances of peacetime, in which a national jurisdiction usually works. The first question arising is, if in such circumstances, true consent is possible. In some judgments, the two Tribunals recognized that the circumstances inherent to wartime situations establish *per se* the necessary element of coercion, vitiating a genuine consent. In the Akayesu case, the ICTR explained that forms of duress, such as threats or intimidation, may constitute coercion because they take advantage of the fear or desperation of victims and that coercion may be inherent in certain circumstances, such as armed conflict or the presence of soldiers.[233] Moreover, in the Muhimana case, the ICTR found that most cases charged under international criminal law, including genocide, crimes against humanity and war crimes, would almost universally involve coercive circumstances.[234] Furthermore, the ICTY, in the Furundžija case, explained that the circumstances surrounding captivity preclude consent.[235] Whereas, in the Kunarac judgment, the ICTY Trial Chamber explained that lack of consent cannot be presumed,[236] but its reasoning was contradictory. However, the Kunarac Appeals Chamber bypassed the contradictions, simply stating to concur with the Trial Chamber's finding that detention constitutes a coercive circumstance that makes consent to the sexual acts, impossible.[237]

Finally, in the case of the Prosecutor v. Gacumbitsi, the Appeals Chamber common to the ICTR and the ICTY addressed the apparent contradiction on the definition of rape in the prior jurisprudence of the *ad hoc* Tribunals. The Chamber adopted the Kunarac definition of rape, clarifying that the Prosecution has to prove the victim's non-consent and the perpetrator's knowledge thereof.

[231] Akayesu, Trial Judgment, para 686
[232] Kunarac, Trial Judgment, para 440
[233] Akayesu, Trial Judgment, para 688
[234] Prosecutor v. Mikaeli Muhimana, ICTR-95-1B-T, Trial Judgment, para 546
[235] Prosecutor v. Anto Furundžija, IT-95-17/1-T, Trial Judgment, para 271
[236] Prosecutor v. Kunarac et al., IT-96-23-T & IT-96-23/1-T, Appeal Judgment, paras 130-131
[237] Ibid., paras 132-133. See also ibid., para 464: where the victim is "subjected to or threatened with or has reason to fear violence, duress, detention or psychological oppression" or "reasonably believed that if [he or she] did not submit, another might be so subjected, threatened or put in fear, […] any apparent consent which might be expressed by the victim is not freely given".

Nevertheless, it relied on the earlier recognition that the circumstances existing in most cases charged as war crimes, genocide or crimes against humanity will be almost universally coercive.

The SCSL relied alternatively on the Kunarac definition (AFRC and Taylor cases) and on the definition provided in the ICC Elements of Crimes (RUF case). The ICC Elements of crimes, as we will see, does not require lack of consent but referred to the Furundžija "force, threat of force and coercion". Consent is relevant only to found liability in the absence of force or coercion, in cases in which a person cannot be said to genuinely have consented to the act, principally because of age, illness or disability.

Although much jurisprudence discussed the definition of the crime of rape, a consensus on its appropriate definition in international law has not been reached. The three definitions provided by the *ad hoc* Tribunals had common elements, being able to cover situations in which a sexual penetration is imposed on the victim under coercion and force, which undoubtedly are expression of lack of consent and have been overcame by the Gacumbitsi definition. The SCSL relied on the case law of the *ad hoc* Tribunals and on the ICC Elements of Crimes. However, the fact that the various definitions elaborated each time by the tribunals/courts and contained in the ICC Elements of Crimes differ is not so surprising because international criminal law is a recent body of the international legal system and it is still evolving.

It has to be further considered that, even before the World War II, the crime of rape was prosecutable, but as a crime that offended the honor of the victim.[238] A step forward was made when rape was included in the Control Council Law n. 10 as a crime against humanity, although no prosecution followed. Therefore, the *ad hoc* Tribunals have the merit to have clarified that rape offend the human dignity and the mental and bodily integrity of the victims: *"the rape of any person [is] a despicable act which strikes at the very core of human dignity and physical integrity"*.[239] In fact, before defining rape, the judges outlined the interests violated by the act of rape. This process is significant because it shows the international conception of the harm of rape: rape ceased to be perceived as the unrestrained sexual behaviour of individuals and was recognised to be a powerful tool of war, used to intimidate, persecute and terrorize the enemy, one of the most serious crimes and a threat to international peace and security.

[238] 1907 Hague Convention

[239] Prosecutor v. Mucić et al. (Čelebići case), IT-96-21, Trial Judgment, para 495. See also paras 484 and 492. See Akayesu, para 597

4.3 Forced pregnancy

4.3.1 Forced pregnancy as genocide in Bosnia and Rwanda

The first codification of this crime has occurred in the Rome Statute of the ICC, which defined forced pregnancy and deemed it both as a war crime and as a crime against humanity.[240]

Several thousand children of *"birth by forced maternity"* were born in the aftermath of the Bosnian and Rwandan and genocides.[241]

Since 1991, the Bosnian Serbs tried to realize their political goal of artificially separating the different ethnic groups to achieve an ethnically homogeneous state. They started, on a large scale and often publicly, to capture and imprison Muslim women and girls in "rape camps" and repeatedly rape them.

Some captors testified that they were ordered to impregnate the women. Pregnant women were detained until it was too late for them to obtain an abortion. A woman told that she was raped almost daily, by three or four soldiers and that, once pregnant, she was detained by her neighbor (who was a soldier) for six months. Most importantly, she was told that *"she would give birth to a Chetnik boy who would kill Muslims when he grew up"*. The captors repeatedly affirmed that their President had ordered them to act in this way.[242]

Many other reports tell similar stories of perpetrators admitting that they were ordered to rape and that their goal was to ensure that the victims would bear children of the perpetrator's ethnicity: women had to become pregnant and then held in custody until it was too late to abort.[243]

"The mass rape of women has as its purpose the ruin of women as future wives and mothers or the wrecking of their marriages. In Islamic society modesty is highly prized."[244] In these patriarchal societies, the importance of women's sexual purity makes the sexual attack against the individual woman, an attack against her entire community. Forced pregnancy causes the community to reject

[240] ICC Statute, Art. 7(1)(g) and Art. 8(b)(xxii) and 8(e)(vi) For an analysis, see Chapter "First practice of the ICC on sexual violence crimes"

[241] R. Charli Carpenter, "Assessing and Addressing the Needs of Children Born of Forced Maternity", University of Oregon - Department of Political Science Submitted on July 27, 2000 to the Secretariat for the International Conference on War-Affected Children Winnipeg, Canada, 11-17 September 2000; available at: http://web.tiscali.it/humanrights_it/ing/parttwof.htm [hereinafter: Carpenter, "Assessing And Addressing The Needs Of Children Born Of Forced Maternity"]

[242] "Final Report of the Commission of Experts Established Pursuant to Security Council Resolution 780 (1992)", para 248; available at: http://www.icty.org/x/file/About/OTP/un_commission_of_experts_report1994_en.pdf

[243] "Final Report of the Commission of Experts Established Pursuant to Security Council Resolution 780 (1992)", para 250 (b)

[244] Soh Sie Eng Jessie, "Forced Pregnancy: Codification in the Rome Statute and its Prospect as Implicit Genocide", 4 NZJPIL 311, 2006; citing Blanche D'Alpuget, "A Crack in the Human Heart", Australia Magazine 36, 1993, cited in Kelly Dawn Askin, "War Crimes Against Women: Prosecution in International War Crimes Tribunals", Martinus Nijhoff Publishers, Hague, 1997 , p. 270, available at: http://www.victoria.ac.nz/law/centres/nzcpl/publications/nz-journal-of-public-and-international-law/previous-issues/volume-42,-december-2006/soh.pdf

the victimized women as procreation candidates,[245] ultimately prompting a *"reduction in the community's reproductive pool"*.[246]

These "forced pregnancies" resulted in an unknown number of births: estimates vary, but workers running orphanages for abandoned children of rape guessed that there were 400-600 children of rape born after the conflict. However, most of the pregnancies resulted in abortions. These children were nearly always rejected by their mothers and communities, but also their mothers were stigmatized.

Similarly, the Report on the situation of human rights in Rwanda prepared by Mr. René Degni-Ségui, found that rape was systematically used as a weapon by the perpetrators of the genocide. According to consistent and reliable testimony, a great number of women were raped: *"rape was the rule and its absence the exception"*. The propaganda, to incite violence against Tutsi women, depicted them as seductresses who would corrupt a pure Hutu society.[247] With specific reference to the number of pregnancies, they would seem to be between 2,000 and 5,000.[248] In this case, since abortion was illegal,[249] manyrapes resulted in births.[250] However, many of the women resorted to back-alley abortions rather than bear the children, others abandoned the babies or gave them away to orphanages and a few resorted to infanticide.[251] Rape survivors were not considered victims, but became outcasts in their own communities, often accused of being *"wives of the Interahamwe"*.[252]

At the end of the conflict, as always happens in such cases, these children have faced stigma. In Rwanda, these children are referred to, for example, as *"les enfants mauvais souvenir"* (children of bad memories) or *"les enfants indésirés"* (children of hate) by their mothers and the community.[253]

Despite the diffusion of this crime, forced pregnancy has never been criminally prosecuted explicitly as an international crime: the *ad hoc* Tribunals prosecuted only the rapes. However, the fact that rapes were aimed at the impregnation of women emerged in the case law thanks to the testimonies of victims.

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[245] Carpenter, "Assessing And Addressing The Needs Of Children Born Of Forced Maternity", supra at 241

[246] Soh Sie Eng Jessie, "Forced Pregnancy: Codification in the Rome Statute and its Prospect as Implicit Genocide", 4 NZJPIL 311, 2006, supra at 244

[247] James C. Mckinley Jr., "Legacy of Rwanda Violence: The Thousands Born of Rape", New York Times, 23 September 1996; available at: http://www.nytimes.com/1996/09/23/world/legacy-of-rwanda-violence-the-thousands-born-of-rape.html [hereinafter: James C. Mckinley Jr., "Legacy of Rwanda Violence: The Thousands Born of Rape"]

[248] Report on the situation of human rights in Rwanda submitted by Mr. René Degni-Ségui, Special Rapporteur of the Commission on Human Rights, under paragraph 20 of resolution S-3/1 of 25 May 1994, 29 January 1996, available at: http://www1.umn.edu/humanrts/commission/country52/68-rwa.htm

[249] James C. Mckinley Jr., "Legacy of Rwanda Violence: The Thousands Born of Rape", supra at 247

[250] Marie Consolée Mukangendo, "Rwanda: Coping With Children Born of Rape", available at : http://people.umass.edu/charli/childrenbornofwar/Mukangendo%20Working%20Paper.pdf

[251] James C. Mckinley Jr., "Legacy of Rwanda Violence: The Thousands Born of Rape" , supra at 247

[252] Ibid.

[253] Jan Goodwin, "Rwanda: justice denied", On the Issues Magazines, 1997, available at: http://www.ontheissuesmagazine.com/1997fall/f97rwanda.php

In the Akayesu Trial, the Chamber expressively recognized that the rapes aimed at the impregnation of women were constituent acts of genocide.[254]

In the case of the Prosecutor v. Kunarac, it is reported that, after he and another soldier had finished to rape a woman Dragoljub Kunarac *"laughed at [the victim] and added that she would now carry a Serb baby and would not know who the father would be."*[255]

The 1996 Review of the Indictment under Rule 61[256] of the Karadžić case, recognized that: *"some camps were specially devoted to rape, with the aim of forcing the birth of Serbian offspring, the women often being interned until it was too late to undergo an abortion"* and that *"the aim of many rapes was enforced impregnation."*[257]

In the third Amended Indictment, Karadžić was charged with genocide, based *inter alia*, on rape and other acts of sexual violence,[258] which can include the forced pregnancies reported by Final Report of the Commission of Experts established by the UN.[259]

Concluding, *"the forcible conception of children who will be rejected by their families and communities is a key component in the strategy of forced pregnancy as a tool of genocide and ethnic cleansing".*[260] Forced pregnancy has two criminal aspects: the specific harms caused to the women forced to carry the children of rapists and the harm to her ethnic community by means of the *"appropriation of their reproductive capacity"* by the enemy group. These observations emphasize that the intent of the perpetrating group is the one to destroy the targeted community by *"undermining its family structure: the targeting of women for sexual violence can devastate communities where women's chastity is bound up with ideas of cultural continuity"*.[261]

4.4 Forced prostitution, sexual slavery and forced marriage

As already observed, during World War II, more than 200,000 girls and women were sexually enslaved into the so-called "comfort stations", by the Japanese Imperial Army. Considering more recent armed conflicts, girls and women, but also men and boys have been forced into sexual slavery

[254] Prosecutor v. Jean-Paul Akayesu, ICTR-96-4-T, Trial Judgment, 2 September 1998, para 507
[255] Prosecutor v. Kunarac et al., IT-96-23-T&IT-96-23/1-T, Trial Judgment, 22 February 2001, para 583
[256] Prosecutor v. Rodovan Karadžić and Ratko Mladić, IT-95-5-R61 and IT-95-18-R61, Review of the Indictments Pursuant to Rule 61 of the Rules of Procedures and Evidence, 11 July 1996 (available at: http://www.icty.org/x/cases/mladic/related/en/rev-ii960716-e.pdf), para 3 explains Rule 61: "Recourse to the Rule 61 proceedings permits the International Criminal Tribunal, which does not have a police force, to react to the failure of the accused to appear voluntarily and to the failure to execute the warrants issued against them. Should the reviewing Trial Chamber reconfirm indictments, it must issue international warrant of arrest. It may also note that the failure to effect personal service of the indictment and therefore the non-execution of the initial warrants of arrest may be ascribed to the failure or refusal to co-operate by the state or states or the self- proclaimed entity to which they were transmitted and it may request the President of the Tribunal to inform the Security Council of those failures. Rule 61 proceedings permit the charges in indictment and the supporting evidence to be publicly and solemnly exposed".
[257] Transcript of Review of the Indictments Pursuant to Rule 61 of the Rules of Procedures and Evidence relative to cases number IT-95-5-R61 and IT-95-18-R61 (Radovan Karadžić and Ratko Mladić), 11 July 1996, p. 959, available at: http://www.icty.org/x/cases/karadzic/trans/en/960711IT.htm
[258] Prosecutor v. Radovan Karadžić, IT-95-5/18-PT, Third Amended Indictment, 2009
[259] Final Report Of The Commission Of Experts Established Pursuant To Security Council Resolution 780 (1992)
[260] Carpenter, "Assessing and Addressing the Needs of Children Born of Forced Maternity", supra at 241
[261] Carpenter, "Assessing and Addressing the Needs of Children Born of Forced Maternity", supra at 241

in East and in West Timor, in the former Yugoslavia, in Angola, in Côte d'Ivoire, in the Democratic Republic of Congo, in Rwanda, in Sierra Leone, in Sudan, in Uganda and in other countries.[262]

The report "Shattered lives", referring to the situation in Rwanda, distinguished two types of sexual slavery, one collective and the other individual. It told that many women were subjected to rapes and gang rapes while being held collectively by a militia group in order to sexually service the group. Moreover, the members of militia often chosen women to held for their personal sexual service. They locked these women in their own homes. The arrangement was sometimes referred to as "forced marriages" and the women so held as "wives". After the genocide, these women were accused of having "collaborated" with the Hutu militias.[263]

Nevertheless, sexual slavery was not recognized as a crime under international law until it was explicitly included in the Rome Statute of the International Criminal Court.

4.4.1 Comparison between sexual slavery and forced prostitution

Enforced prostitution, but not sexual slavery, has been listed in legal documents since the early 1900s. Initially, enforced prostitution was viewed as the result of trafficking in women and children.[264] This interconnection between enforced prostitution and trafficking continued until 1974, when the United Nations Working Group on Slavery characterized trafficking in women and children for the purposes of enforced prostitution as a form of slavery.[265]

Demleitner observed: *"labeling forced prostitution "slavery" might have been considered an advancement because, by subsuming the practice under a well-established label, it became generally viewed as a serious human rights violation."*[266]

Enforced prostitution has also been recognized as a war crime. Already the 1919 Commission on the Responsibility of the Authors of the War and on Enforcement of Penalties, created by the Paris Peace Conference to inquire into the responsibility of the World War I's criminals, enumerated the *"abduction of girls and women for the purpose of enforced prostitution"* among the war crimes.[267]

In the aftermath of the World War II, whereas the Nuremberg and Tokyo Tribunals did not prosecute the crime of enforced prostitution, some national courts heard allegations relative to this specific offence: a Netherlands court in Batavia, the Batavia Military Tribunal, found Washio Awochi guilty of *"the war crime of enforced prostitution".*[268]

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[262] Ibid.

[263] "Shattered Lives: Sexual Violence during the Rwandan Genocide and its Aftermath", Human Rights Watch/Africa, 1996

[264] Nora V. Demleitner, "Forced Prostitution: Naming an International Offense", 18 Fordham Int'l L.J. 163, 1994

[265] Valerie Oosterveld, "Sexual Slavery and the International Criminal Court: Advancing International Law", 25 Mich. J. Int'l L. 605, 2003-2004 [hereinafter: Oosterveld, "Sexual Slavery and the ICC"]

[266] Nora V. Demleitner, "Forced Prostitution: Naming an International Offense", 18 Fordham Int'l L.J. 163, 1994

[267] Oosterveld, "Sexual Slavery and the ICC", supra at 265; reporting: Yougindra Khushalani, "Dignity and Honour of Women as Basic and Fundamental Human Rights", 1982, p. 11-12

[268] Oosterveld, "Sexual Slavery and the ICC", supra at 265; reporting: case No. 76, Trial of Washio Awochi, in United Nations War Crimes Commission, XIII Law Reports 123, 1949

The Geneva Convention of 1949 Relative to the Protection of Civilian Persons in Time of War and the Additional Protocols I and II included an express reference to enforced prostitution.[269] This explicit reference to enforced prostitution was added after that thousands women were forced to serve as sexual slaves into brothels and "comfort stations", during World War II. The drafters of the Geneva Conventions defined this crime *as "the forcing of a woman into immorality by violence or threats."*[270]

Moreover, in the ICTR Statute, Article 4(e) criminalizes enforced prostitution as a violation of Common Article 3 to the 1949 Geneva Conventions and of the Additional Protocol II, more specifically as an "outrage upon personal dignity".

Comparing sexual slavery to forced prostitution, some authors sustained that sexual slavery is a broader, more sensitive and consequently a more useful concept, able to encompass or replace enforced prostitution. Others argued that sexual slavery and enforced prostitution have different elements, thus, enforced prostitution should not be considered subsumable within sexual slavery. Askin observed that, *"while enforced prostitution is usually the term used when women are forced into sexual servitude during wartime, the term sexual slavery more accurately identifies the prohibited conduct."*[271] Fan noted that enforced prostitution shares the most fundamental characteristics of slavery and, though the terms could be used interchangeably, a reference to sexual slavery is more accurate.[272] Argibay and Askin, similarly affirmed that enforced prostitution suggests *"a level of voluntarism that is not present and stigmatizes the victims; since prostitution is a crime in many countries, the use of the prostitution confuses the victim and perpetrator and therefore does not communicate the same level of egregiousness as sexual slavery".*[273] Argibay further sustained that, *"forced prostitution tends to reflect the male view: that of the organizers, procurers and those that take advantage of the system by raping the women."* She also noted that the term "prostitute", like "prostitution", reflect *"discriminatory attitudes"* towards women, therefore, she concluded that sexual slavery is more accurate.[274]

Therefore, the inclusion of the crime of sexual slavery in the Rome Statute, in addition to that of enforced prostitution, emphasized the fact that enforced prostitution might be too narrow to

[269] Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Art. 27. Additional Protocol I Arts. 75(2)(b), 76(1). Additional Protocol II, Art. 4(2)(e)

[270] Oosterveld "Sexual Slavery and the ICC", supra at 265; reporting: The Geneva Conventions of 12 August 1949: Commentary, Jean Pictet ed., 1960, p. 260

[271] Oosterveld "Sexual Slavery and the ICC", supra at 265

[272] Oosterveld "Sexual Slavery and the ICC", supra at 265; reporting: Mary De Ming Fan, "Comment the Fallacy of the Sovereign Prerogative to Set De Minimus Liability Rules for Sexual Slavery", 27 Yale J. Int'l L. 395, 2002

[273] Carmen M. Argibay, "Sexual Slavery and the "Comfort Women" of World War II", 21 Berkeley J. Int'l L. 375, 2003, pp. 387-88, available at: cholarship.law.berkeley.edu/cgi/viewcontent.cgi?article=1242&context=bjil

Similarly Kelly D. Askin, "Women and International Humanitarian Law", in "Women and International Human Rights Law", vol. I, Kelly D. Askin and Dorean M. Koenig eds., 1999, pp. 41-87: enforced prostitution could lead many to assume that the victims were compensated in a similar manner as during "voluntary" prostitution, which often involves the exchange of sex for money.

In fact, the 1949 Convention for the Suppression of the Traffic in Persons and the Exploitation of the Prostitution of Others, under Article 1 obliges states to punish any person who "procures [or] entices […] for prostitution, another person, even with the consent of that person"

[274] Oosterveld "Sexual Slavery and the ICC", supra at 265; reporting: Carmen M. Argibay, "Sexual Slavery and the "Comfort Women" of World War II", 21 Berkeley J. Int'l L. 375, pp. 386-88.

capture all of the violations that the crime of sexual slavery can capture. It can be *"an aspect of sexual slavery, but sexual slavery can also capture a wider range of actions.*[275]

The Special Rapporteur on Violence against Women clarified that the case of women forced to render sexual services in wartime by and/or for the use of armed forces has to be considered a practice of *"military sexual slavery"*. For the purpose of terminology, the Special Rapporteur specified that the phrase "military sexual slaves" represented an accurate and appropriate terminology to reflect the suffering, caused by multiple daily rapes and severe physical abuses that women victims had to endure during their forced prostitution and sexual subjugation and exploitment in wartime.[276]

The Women's Caucus for Gender Justice that is an international women's human rights organization, also addressed this issue. The Caucus argued that the term enforced prostitution *"has been misapplied"* in the past, to describe situations of wartime sexual slavery and serial rape. In fact, *"just as the severity of rape has been diminished by calling it humiliating and degrading treatment, […] sexual enslavement has been diminished by calling it only enforced prostitution."*[277] The term "enforced prostitution" deadens the level of violence, coercion and control that is characteristic of sexual slavery. It suggests that sexual services are provided as part of an exchange, which is instead absent. It hides the fact that what was defined "forced prostitution" was instead sexual slavery, encompassing *"serial rape, physically invasive and psychologically debilitating"*. Women were treated as property, completely under the control of the perpetrators.[278] Indeed, women and girls who are forced to be subjected to serial rape in the context of armed conflicts are sexual slaves.[279] However, the Women's Caucus recognized that a category of forced prostitution is necessary to cover situations in which women are forced to endure serial rapes in exchange for their safety or that of others or the means of survival*. "Even though the women would not, strictly speaking, be prostitutes, they would be forced to engage in an exchange of sex for something of value for one or more men in a dominant position of power".* Anyhow, the conditions of warfare might nonetheless be so overwhelming and controlling to render them little more than sex slaves. The decision between charges with forced prostitution, sexual slavery or serial rape, would depend upon the analysis of the wider context.[280]

Concluding, it has to be emphasized that *"practices such as the detention of women in "rape camps" or "comfort stations"; forced, temporary "marriages" to soldiers; and other practices involving the*

[275] Oosterveld "Sexual Slavery and the ICC", supra at 265

[276] Report of the Special Rapporteur on violence against women, its causes and consequences, Ms. Radhika Coomaraswamy, in accordance with Commission on Human Rights resolution 1994/45: Report on the mission to the Democratic People's Republic of Korea, the Republic of Korea and Japan on the issue of military sexual slavery in wartime, I Definition, available at: http://www1.umn.edu/humanrts/commission/country52/53-add1.htm

[277] Women's Caucus For Gender Justice In The International Criminal Court Recommendations and Commentary For December 1997 PrepCom On The Establishment of An International Criminal court United Nations Headquarters December 1-12, 1997, available at: http://www.iccnow.org/?mod=prepcommittee5&idudctp=22&show=all#22 WC.5.6-9 [hereinafter: Women's Caucus For Gender Justice]

[278] Ibid., WC.5.6-10

[279] Ibid., WC.5.6-11

[280] Ibid., WC.5.6-12

treatment of women as chattel, are both in fact and in law forms of slavery and, as such, violations of the peremptory norm prohibiting slavery".[281]

4.4.2 The Women's International War Crimes Tribunal 2000 for the Trial of Japanese Military Sexual Slavery

As already emphasized, there is abundant evidence that during the World War II various forms of sexual violence were committed and among the others, sexual slavery was particularly diffused.

Witness after witness told similar stories - girls dragged of by gangs […] in uniform; abducted woman forced to wash clothes for the Army units by day and to "service" as many as fifteen to forty man at night; women forced to perform sex shows for troops at play; fathers forced at gunpoint to rape their daughters.
Many of the stories had similar endings. When a group of soldiers was finished with a captured woman, a stick was sometimes pushed up in her vagina; in some cases the woman's head was severed.[282]

According to the Nuremberg Trial documents, in the city of Smolensk the German Command opened a brothel for officers in one of the hotels into which hundreds of women and girls were driven.[283] Also in the concentration camps like Auschwitz and Ravensbruck, the women there interned were forced to provide sexual services to officers or workers at the camp.[284]

However, it was in particular in the Far East scenario that one of the most serious atrocities of the World War II was committed. There, it was in fact created the "comfort women system", in which the Japanese Government forced 200,000 Chinese, Filipino, Indonesian, Korean, European women and girls of the Asian Colonies into sexual slavery for the use of the Army.

Despite the fact that the Tokyo Charter did not contain any reference to rape, before the International Criminal Tribunal for the Far East,[285] some defendants were charged for rape as war crime: *"acts were carried out in violation of recognized customs and conventions of war […including] mass murder, rape […]."*[286] The Indictments included rape within "inhumane treatment", "ill-

[281] Systematic rape, sexual slavery and slavery-like practices during armed conflict: Final report submitted by Ms. Gay J. McDougall, Special Rapporteur, E/CN.4/Sub.2/1998/13, 22 June 1998
[282] Susan Brownmiller, "Against Our Will, Men, Women and rape", New York Fawcett Books, 1975, p. 59, available at: https://www.academia.edu/5832605/Against_our_will_men_women_and_rape_blackatk_
[283] "Sexual Violence as an international crime" Anne-Marie de Brouwer, Charlotte Ku, Renée Römkens and Larissa van den Herik (eds.), 2012, Chapter II (Kelly Askin), pp. 34-35, reporting: The official documents of the Nuremberg Trial, that are contained in the forty-two volume work, "Trial of the Major War Criminals Before the International Military Tribunal", 14 November 1945-1 October 1946 (42 Vols.,1947) [hereinafter: IMT Docs]: IMT Doc Vol. II, transcript 456
[284] IMT Doc., Vol. VI transcripts 213-214
[285] In the Pacific theater, the Allied decided to set up a military tribunal to prosecute the Japanese war criminals, subsequent to the Cairo Declaration (1943), the Potsdam Declaration (1945), the Japanese Instruments of Surrender (1945) and the Moscow Conference. On 3 May 1946 the trials began in Tokyo, known as Tokyo Trials.
The Tokyo Charter was promulgated by an executive decree of General Douglas MacArthur.
[286] "Sexual Violence as an international crime" Anne-Marie de Brouwer, Charlotte Ku, Renée Römkens and Larissa van den Herik (eds.), 2012, Chapter II (Kelly Askin), pp. 38-39, reporting: "The Tokyo war Crimes Trial: The Complete

treatment" and "failure to respect family honor."[287] Moreover, in 1948, the Batavia Military Tribunal held a trial to prosecute and condemn those responsible of heaving forced between one to two hundred Dutch women living in the Dutch Indonesia into sexual servitude, during the WWII. This trial was the only post war trial held to prosecute forced prostitution and sexual slavery.

The cases prosecuted represented an important attempt to address such atrocities, although a few judgments were not enough, if compared to widespread dimension of the crimes committed.

As an effort to remedy to such a failure, the "Women's International War Crimes Tribunal 2000 for the Trial of Japanese Military Sexual Slavery" sat in Tokyo from 8 to 13 December 2000. This Tribunal was a "People Tribunal", organized by women and human rights organizations and supported by International NGO's, therefore, its judgments lacked of formal legal force, though they had a high moral authority. The "power" of the Tribunal, *"lies in its capacity to examine the evidence and develop an enduring historical record".*[288]

This Tribunal was established *"out of the conviction that the failure to fully redress the crimes committed against the former 'comfort women' must not be allowed to silence their voices".*[289]

The Prosecutors have charged the following accused with crimes against humanity, more specifically rape and sexual slavery, under Article 2 of the Charter of the Tribunal: Emperor Hirohito, Matsui Iwane, Hata Shunroku, Terauchi Hisaichi, Itaga.Kl Seishiro, Tojo Hideki, Umezu Yoshijiro, Yobayashi Seizo and Ando Rikichi.[290] All the accused were found guilty, incurring both individual and superior responsibility, pursuant to Articles 3(1) and 3(2) of the Charter, for their aware participation in a criminal system that promoted and sustained a system of rape and sexual slavery.[291] Additionally, the government of Japan was judged to have incurred state responsibility, as recognized under Article 4 of the Charter, for its establishment and maintenance of the comfort system.[292]

The judgment demanded a formal apology, adequate victim compensation, creation of a memorial in honor of the comfort women, and the establishment of mechanisms for thorough investigation of the comfort station system.[293]

Transcripts of the Proceedings of the International Military Tribunal for The Far East, eds. R.Pritchard & S. Zaide, New York Garland Publishing, 1981 [hereinafter: IMTFE Docs]: IMTFE Docs Vol. I, transcript 29

[287] "Sexual Violence as an international crime" Anne-Marie de Brouwer, Charlotte Ku, Renée Römkens and Larissa van den Herik (eds.), 2012, p. 39, reporting: "International military Tribunal for the Far East, Dissentient Judgment of Justice Pal 624", 1953, p. 601-603

[288] Women's International War Crimes Tribunal 2000 for the Trial of Japanese Military Sexual Slavery in the matter of The Prosecutors and the Peoples of the Asia-Pacific Region v. Emperor Hirohito et Al. and the Government of Japan, Summary of Findings, 12 December 2000, para 6, [hereinafter: Women's International War Crimes Tribunal 2000 for the Trial of Japanese Military Sexual Slavery], available at: http://home.att.ne.jp/star/tribunal/jedgement-e.html

[289] Transcript of Oral Judgment delivered on 4 December 2001 by the Judges of the 2000 Women's International War Crimes Tribunal on Japan's Military Sexual Slavery, para 9 [hereinafter: Transcript of Women's International War Crimes Tribunal on Japan's Military Sexual Slavery]

[290] Ibid., para 11

[291] Ibid., para 98

[292] Women's International War Crimes Tribunal 2000 for the Trial of Japanese Military Sexual Slavery, supra at 288, para 39

[293] Sue R. Lee, Comforting the Comfort Women: Who Can Make Japan Pay, 24 J. Int'l L. 509, 2014, reporting: Ceres P. Doyo, Judgment in The Hague-Stepping Into The Breach, Philippine Daily Inquirer, 3 January 2002, available at: http://scholarship.law.upenn.edu/cgi/viewcontent.cgi?article=1256&context=jil

The Tribunal found that during their time in the facilities, women were subject to continuous abuses that resulted, intentionally or incidentally, in a variety of "reproductive harms", such as pregnancy, abortion, miscarriage, sterilization, sexually transmitted diseases and sexual mutilation.[294]

The evidence established that the Japanese military and civilian agents exercised powers attaching to the right of ownership over girls and women in the 'comfort system', *"by procuring them by force, purchase and deceitful recruitment; by confining them and brutally punishing attempts to escape; by demanding their obedience and subservience; by subjecting them to repeated rapes and other forms of sexual violence; by otherwise torturing, mutilating and punishing them for disobedience; by subjecting them to invasive and inhumane medical examinations often involving rape; by subjecting them to unwanted pregnancies, forcing them to have abortions or give up their children; and by killing them or abandoning them when their services were no longer of use".*

The Tribunal concluded that *"each of these acts and all of these acts"* were violations that certainly amounted to rape and sexual slavery as crimes against humanity.[295] Analyzing the elements of the crime, it found that the *actus reus* of the crime of sexual slavery is the exercise of any or all of the powers attaching to the right of ownership over a person, by exercising sexual control over a person or depriving a person of sexual autonomy; the *mens rea* is the intentional exercise of such powers.[296]

4.4.3 Sexual slavery in the case of the Prosecutor v. Dragoljubk Kunarac, Radomir Kovač and Zoran Vuković (Foča case) before the ICTY

The ICTY Foča case constituted a landmark regarding the crime of enslavement for sexual purposes. Indeed, the ICTY was the first international tribunal to rule on a case of sexual enslavement.

The Tribunal found that Muslim women and girls from the Foča region were detained by Serb soldiers, who repeatedly raped them. The women were personally raped by the three accused and were also lent, "rented out" and sold to soldiers for the purpose of being raped.

The Trial Chamber established that:

- the criminal actions of the three accused were part of a systematic attack against Muslim civilians, in which they participated as soldiers;
- they knew that the main purpose of the attack was to force Muslims out of the Region, terrorizing them by means of a pattern of crimes, especially of detaining women and girls in centers, where they would be raped;
- many times, they personally raped these women and girls, one was a child of only 12 years at the time;
- some of the women and girls were kept in servitude for months, treated as properties.

[294] Transcript of Women's International War Crimes Tribunal on Japan's Military Sexual Slavery, supra at 289, para 59
[295] Ibid., para 81
[296] Ibid., para 80

- Kovač also sold three of the girls to other soldiers.[297]

With reference to the guilty plea relative to sexual violence crimes, the three accused, Dragoljubk Kunarac, Radomir Kovač, Zoran Vuković, were all found guilty of rape as a crime against humanity and as a violation of the laws or customs of war. Moreover, Dragoljub Kunarac and Radomir Kovač were also found guilty for enslavement as a crime against humanity, because it was proved that girls, while detained, had to do everything they were ordered to do, including the cooking and household chores and were subjected to other degrading treatment such as sexual assaults.[298] The Chamber did not specify the sexual nature of enslavement, but *"there was no doubt in the judges's mind [about that]."*[299]

The Trial Chamber defined the *actus reus* of the crime against humanity of enslavement as *"the exercise of any or all of the powers attaching to the right of ownership over a person"*[300] and slavery as *"the status or condition of a person over whom any or all of the powers attaching to the right of ownership are exercised",*[301] referring to the 1926 Slavery Convention.

Under this definition, indicators of enslavement include elements of control of someone's movement; control of physical environment; psychological control; measures taken to prevent or deter escape; force, threat of force or coercion; duration; assertion of exclusivity; subjection to cruel treatment and abuse; control of sexuality; forced labour; the buying, selling or inheriting of a person or his or her labours or services.[302] This list of indicia of enslavement is useful to identify the other conducts that might fall within the phrase "a similar deprivation of liberty," in addition to the listed "purchasing, selling, lending or bartering" and the additional examples of exacting forced labour, reducing a person into servile status, trafficking, serfdom, debt bondage and other actions listed in the 1956 Supplementary Convention on the Abolition of Slavery, the Slave Trade and Institutions and Practices Similar to Slavery. One important factor to consider for the purpose of sexual slavery is that of *"control of sexuality"*.

The Tribunal clarified that commercial or pecuniary is not an element required in the exercise of powers of ownership: *"the 'acquisition' or 'disposal' of someone for monetary or other compensations is not a requirement for enslavement."*[303] The Appeals Chamber also added that the victim does not need to be subjected to the more extreme rights of ownership associated with the traditional "chattel slavery", in order to be qualified as a sexual slave.[304]

Additionally, the Trial Chamber provided further evidence that consent is not an issue in cases of sexual slavery: *"indications of enslavement include elements of control and ownership; the restriction or control of an individual's autonomy, freedom of choice or freedom of movement; and,*

[297] Prosecutor v. Dragoljub Kunarac et al., IT-96-23-T& IT-96-23/1-T, Trial Judgment, para 587
[298] Ibid.
[299] ICTY Landmark cases on sexual violence, available at: http://www.icty.org/sid/10314
[300] Prosecutor v. Dragoljub Kunarac, et al., IT-96-23-T& IT-96-23/1-T, Trial Judgment, 22 February 2001, para 539
[301] Ibid., para 519
[302] Ibid., paras 542 and 543
[303] Ibid., para 542
[304] Prosecutor v. Dragoljub Kunarac, Radomir Kovać and Zoran Vuković, IT-96-23&IT-96-23/1-A12, Appeal Judgment June 2002, para 117

often, the accruing of some gain to the perpetrator. The consent or free will of the victim is absent." In fact, consent is rendered impossible or irrelevant by the forcible circumstances.[305]

Accordingly, the Appeals Chamber further stated that lack of consent is not an element of the crime, *"since enslavement flows from claimed rights of ownership".* However, consent may be relevant to establish the exercise by the accused of any or all of the powers attaching to the right of ownership, which is an element of the crime.[306]

4.4.4 Difference between sexual slavery and forced marriage: the cases of the Prosecutor v. Alex Tamba Brima, Brima Bazzy Kamara and Santigie Borbor Kanu (AFRC case) and of the Prosecutor v. Charles Ghankay Taylor before the SCSL

The SCSL was the first-ever international court to give decisions specifically on the offence of forced marriage and on its difference from sexual slavery.

The indictments against the alleged members of the AFRC and RUF cases included allegations of sexual violence crimes as crimes against humanity, in particular sexual slavery, rape, outrages upon personal dignity and the "other inhuman act" of forced marriage.

In the AFRC case, the offence of sexual slavery was included in the indictment as a crime against humanity pursuant to Article 2(g) of the SCSL Statute, among rape and outrages upon personal dignity. Subsequently, the Court allowed the prosecutor to amend the indictment to include forced marriage as a crime against humanity,[307] more specifically as an "other inhumane act" under Article 2(i) of the SCSL Statute, although the Defence had argued that this was not a crime against humanity, thus, such an allegation violated the principle of legality.[308] The Trial Chamber based its decision on the idea that forced marriage was a *"kindred offence"* to those that existed in the consolidated indictment[309] and emphasized the necessity for international criminal justice to highlight the *"high profile nature"* of the emerging field of gender offences with the intention to bring the alleged perpetrators to justice.[310] Also in the RUF case the Prosecutor was allowed to amend the indictment to add the crime against humanity of forced marriage, included within the cathegory of other inhumane acts.

On the contrary, in the CDF case, initially the Prosecutor did not have sufficient evidence to press any charges of sexual or gender-based violence. Then, the Prosecutor made application to amend the indictment and include counts alleging sexual violence.[311] The majority of the Chamber

[305] Prosecutor v. Dragoljub Kunarac et al., Trial Judgment, para 542
[306] Prosecutor v. Dragoljub Kunarac et al., Appeal Judgment, para 120
[307] Prosecutor v. Brima et al. (AFRC), SCSL-04-16-PT, Decision On Prosecution Request For Leave To Amend The Indictment, 6 May 2004, paras 6, 58
[308] Ibid., para 12
[309] Ibid., para 52
[310] Ibid., para 34
[311] Prosecutor v. Norman et al., SCSL-2004-14-PT, Decision on Prosecution request for Leave to Amend the Indictments against Samuel Hinga Norman, Moinina Fofana and Allieu Kondewa, 9 February 2004, paras 7 and 15

dismissed this application because the new counts were completely new,[312] thus, allowing the amendment would have prejudiced the accused's rights to a fair and expeditious trial, which is an abuse of process.[313]

However, on his dissenting opinion on this issue, Justice Boutet affirmed the right of the victims of sexual violence to have their enforcers prosecuted for the crimes they had committed.[314] In fact, the Judge had already noted that particular considerations needed to be made with regard to sexual violence, due to the peculiarities of the offence:[315] the victims are reluctant to report, fearing ostracism, retribution and especially shame associated with rape.[316]

Because of these decisions, the CDF trial proceeded without any counts relative to sexual violence crimes, whereas the AFRC and the RUF cases dealt with charges of, *inter alia*, forced marriage and sexual slavery.

The SCSL Statute entitles the Special Court to prosecute sexual slavery under Article 2(g) of the SCSL Statute when it is committed as a part of a widespread and systematic attack against any civilian population, but does not include any explicit reference to the crime of forced marriage.[317]

In the AFCR case, the Trial Chamber adopted the definition of the crime against humanity of sexual slavery contained in Article 7(1)(g)-2 of the ICC Elements of Crimes in order to apply the Article 2(g) of its Statute.[318]

The Court specified that to fulfill the requisite of the powers of ownership there is no requirement for any payment or exchange, nor for the victims' confinement in a particular place, but it is sufficient that, those captured, remain under the control of their captors because they have nowhere else to go and fear for their lives.[319] Deprivation of liberty may include forced labor or

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[312] Prosecutor v. Norman et al., SCSL-2004-14-PT, Decision on Prosecution request for Leave to Amend the Indictment, 20 May 2004, para 62

[313] Ibid., para 86

[314] Dissenting Opinion of Justice Pierre Boutet on Decision on Prosecution Application for Leave to file an Interlocutory Appeal against the Decision on the Prosecution's Request for Leave to Amend the Indictment Against Norman, Fofana and Kondewa, 5 August 2004, para 18

[315] Prosecutor v. Norman et al., SCSL-2004-14, Dissenting Opinion of Justice Pierre Boutet on the Decision on the Prosecution's Request for Leave to Amend the Indictment, 31 May 2004

[316] Ibid., reporting: Charlotte Lindsey, "Woman facing War", Geneva: International Committee of the Red cross, 2001

[317] SCSL Statute, Art. 2(g)

[318] Prosecutor v. Alex Tamba Brima et Al., SCSL-04-16-T, Trial Judgment, 20 June 2007, para 708 (reporting Article 7(1)(g)-2 of the ICC Elements of Crimes (crime against humanity):

- The perpetrator exercised any or all of the powers attaching to the right of ownership over one or more persons, such as by purchasing, selling, lending or bartering such a person or persons, or by imposing on them a similar deprivation of liberty.
- The perpetrator caused such person or persons to engage in one or more acts of a sexual nature.
- The perpetrator committed such conduct intending to engage in the act of sexual slavery or in the reasonable knowledge that it was likely to occur.

The Rome Statute also recognizes sexual slavery as a war crime in Article 8(2)(b)(xxii)-2 (other serious violation of the laws or customs of an international armed conflict) and Article 8(2)(e)(vi)-2 (serious violation of Common Article 3)

[319] Prosecutor v. Alex Tamba Brima et Al., SCSL-04-16-T, Trial Judgment, 20 June 2007, para 709. This distinction was also insisted upon by some delegations to the Rome Statute Working Group on Elements of Crimes to ensure that the provision did not exclude from prohibition situations in which sexually abused women were not locked in a particular place but were nevertheless "deprived of their liberty" because they have nowhere else to go and fear for their lives, Commentary documented by Eve La Haye, Article 8(2)(b)(xxii)-2, Sexual Slavery, in Roy S. Lee, Ed., The International

otherwise reducing a person to servile status.[320] Furthermore, the Court clarified that, in conditions of enslavement, the consent or free will of the victim is absent.[321]

The evidence shew that during the civil war, the two rebel groups of RUF and AFRC regularly abducted civilians using them for forced labour. Women and girls were used particularly for domestic works, including cooking and laundering and for sexual exploitation, or as soldiers. In particular, they were kept as wives and those not "married" were available to all and any fighter for sexual purposes. They were frequently raped and gang-raped.

Considering forced marriage as an "other inhumane act" under Article 2(i) of the SCSL Statute, the AFRC Chamber explained that Article 2(i) is a residual clause designed to cover a broad range of underlying acts not explicitly enumerated in Article 2(a)-(h) of the Statute. However, the offence of "other inhumane acts" must logically apply only to acts of a non-sexual nature amounting to an affront to human dignity, in light of the exhaustive category of sexual crimes set forth in Article 2(g), which includes a catchall clause for "any other form of sexual violence" not expressly listed.[322]

The evidence presented by the Prosecutor in the AFRC case, showed that, when women and girls were forcibly abducted from their homes and taken to rebels' camps, fighters could chose the ones they wanted as "wives". The Prosecution provided a definition of the crime of forced marriage:

[It] consists of words or other conducts intended to confer a status of marriage by force or threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power against the victim, or by taking advantage of a coercive environment, with the intention of conferring the status of marriage.[323]

According to the Prosecutor, sexual slavery not always amounts to forced marriage; in fact, sexual slaves are not obliged to perform all the tasks attached to a marriage.[324]

However, the AFRC Trial Chamber concluded that the evidence adduced by the Prosecution as proof of "forced marriage" proved elements subsumed by the crime of sexual slavery,[325] so the Chamber considered this evidence as evidence of sexual slavery.[326] In fact, the so-called "forced marriages" imply the forceful abduction and detention of girls and women by the AFRC troops, as they moved through various districts. In the view of the Chamber, there was no lacuna in the law that would necessitate a separate crime of "forced marriage" as an "other inhumane act", so the charge of forced marriage was bad for duplicity.[327] The rebels took girls and women against their will as "wives". The evidence showed that the relationship of the perpetrators to their "wives" was one of ownership and involved the exercise of control over the victims, including control their

Criminal Court: Elements of Crimes and Rules of Procedure and Evidence (2001: Transnational Publishers, Ardsley) pp. 191-192

[320] Ibid., para 709 (reporting Footnote 18 appended to the Article 7(1)g-2 of the ICC Elements of Crimes (crime against humanity)

[321] Ibid., para 709 (reporting Kunarac Trial Judgment, para 542; Kunarac Appeal Judgment, paras 129-131)

[322] Ibid., para 697

[323] Ibid., para 701

[324] Ibid., para 701

[325] Ibid., para 711

[326] Ibid., para 713

[327] Ibid.

sexuality, movements and labour. In fact, the wives were expected to carry the rebels' possessions as they moved from one location to the next, to cook and to wash clothes.

Similarly, the Trial Chamber was satisfied that the use of the term "wife" by the perpetrators referring to the victim expressed an intent to exercise ownership over the victim, not an intent to assume a marital status with the victim in the sense of establishing mutual obligations. In fact, the relationship of the rebels to their "wives" was generally one of exclusive ownership, but the victim could be passed on or given to another rebel at the discretion of the perpetrator.[328] In fact, none of the witnesses gave evidence that they considered themselves to be really "married". Accordingly, a witness testified that she had been "married" to her rebel "husband" in a ceremony, but no consent could be inferred, given the environment of violence and coercion. Most importantly, the repeated assertion of the witnesses was that they had been "taken as wives".[329]

Justice Doherty dissented from the majority, she was persuaded that the two crimes were not subsumable, because the evidence shew that women and girls who were taken as wives, had a conjugal status forced upon them.[330] They were immediately stigmatized as "bush wives", considered "tainted by rebels' blood", rejected by their community or family and also their children were ostracized.[331] Forced marriage became a means of survival, because such women were protected against the rape by other men, were granted regular meal and had a status depending on the status of the "husband", but their situation was precarious.[332] Their "husbands" punished any transgression to their duties and, when tired, could replace them and send them as fighters. Therefore, because of their labels as "wives", they were traumatized, stigmatized and often no more able to be reintegrated in their community.[333] The Judge concluded that forced marriage constituted a crime against humanity, belonging to the category of "other inhuman acts", causing mental and moral suffering.[334]

The Prosecution appealed the decision. The Appeals Chamber recognized that the perpetrator intended to impose a *"forced conjugal association"* upon the victim, rather than exercise mere ownership's interests and that forced marriage is not predominantly a sexual crime.

In fact, women were abducted in circumstances of extreme violence, compelled to move along with the fighting forces from place to place and coerced to perform a variety of conjugal duties including regular sexual intercourse, forced domestic labour such as cleaning and cooking for the "husband," endure forced pregnancy and care for and bring up children of the "marriage." In return, the rebel "husband" was expected to provide food, clothing and protection to his "wife", including protection from rape by other men, acts he did not perform when he used a female for sexual purposes only.[335]

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[328] Ibid., para 711
[329] Ibid., para 712
[330] Partly Dissenting Opinion of Justice Doherty on Count 7 (Sexual Slavery) and Count 8 (Forced Marriage), para 53, available at: http://www.rscsl.org/Documents/Decisions/AFRC/613/SCSL-04-16-T-628.pdf
[331] Prosecutor v. Alex Tamba Brima et Al., Trial Judgment, para 33
[332] Ibid., para 29
[333] Ibid., para 31
[334] Ibid., para 71
[335] Prosecutor v. Alex Tamba Brima et Al., SCSL-04-16-A, Appeal Judgment, 22 February 2008, para 190, available at: http://www.refworld.org/docid/48441e412.html

The Appeals Chamber first, held that the residual provision in Article 2(i), "other inhumane acts," includes also sexual crimes and second, agreed with the dissenting opinion of Justice Doherty, concluding that forced marriage was not subsumable in the crime against humanity of sexual slavery. Indeed, forced marriage shares certain elements with sexual slavery, such as non-consensual sex and deprivation of liberty, but there are also distinguishing factors:

- forced marriage involves a perpetrator compelling a person *"by force or threat of force, through the words or conduct of the perpetrator or those associated with him, into a forced conjugal association"* with a another person resulting in great suffering or serious physical or mental injury on the part of the victim.
- unlike sexual slavery, forced marriage implies a *"relationship of exclusivity"* between the "husband" and the "wife," which could lead to severe punishments for breach of this exclusive arrangement.
- moreover, these distinctions imply that forced marriage is not predominantly a sexual crime.[336]

Although the Appeals Chamber overturned the Trial Chamber's findings on forced marriage, it declined to enter new convictions, since the evidence adduced for forced marriage was applied to prove the outrages upon personal dignity.

After the precedent of the AFRC appeal judgment, the RUF Trial Chamber found three former members of the RUF, Hassan Sesay, Morris Kallon and Augustine Gbao, guilty of two separate crimes against humanity, sexual slavery and "other inhumane act," based on a pattern of conducts that the Trial Chamber broadly characterized as "forced marriage".[337] These "wives" were "married" against their will, forced to engage in sexual intercourse and perform domestic chores, unable to leave their "husbands" for fear of violent retribution.[338] In accordance with the AFRC Appeals Chamber, the RUF Trial Chamber concluded that *"the imposition of a forced conjugal association"* constitutes the *actus reus* of forced marriage. The Chamber then found that the testimony by various witnesses that rebels *"captured women and 'took them as their wives'"* was enough to satisfy that element of the crime.[339]

The SCSL convicted also Charles Taylor of the crime against humanity of sexual slavery, but contrary to the AFRC and the RUF accused, he was not charged with forced marriage as an inhumane act. The Prosecutor introduced evidence of the "bush wives" to prove the crime of sexual slavery.[340] The definition of sexual slavery provided by the Tylor Trial Chamber followed the ones adopted in the AFRC and the RUF cases.[341]

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[336] Ibid., para 195

[337] Prosecutor v. Sesay, Kallon and Gbao (RUF), SCSL-04-15-T, Trial Judgment, 2 March 2009, paras 152 and 164

[338] Ibid., para 1293

[339] Ibid., para 1295

[340] Prosecutor v. Charles Taylor, SCSL-03-01-T, Trial Judgment, 18 May 2012, para 422

[341] Ibid., para 418 provides a definition of sexual slavery:

1. The perpetrator exercised any or all of the powers attaching to the right of ownership over one or more persons, such as by purchasing, selling, lending or bartering such a person or persons, or by imposing on them a similar deprivation of liberty;
2. The perpetrator caused such person or persons to engage in one or more acts of a sexual nature;
3. The perpetrator intended to engage in the act of sexual slavery or acted with the reasonable knowledge that this was likely to occur.

Moreover, since the Chamber was considering evidence of what the earlier SCSL case law had defined forced marriage, gave its interpretation on this crime. The Trial Chamber considered that two harms were originally intended to be included in the term "forced marriage": sexual slavery and enslavement through forced domestic and other forms of labor.[342] In the view of the Chamber, the Prosecutor had erred in the other indictments in charging such a crime.[343] In fact, it found that the term was improper because there was not actual marriage, thus, it proposed the term "conjugal slavery" to capture these harms[344] and it added that conjugal slavery is not meant to be a new crime, different from slavery.[345] Therefore, it can be inferred that in the Chamber's view conjugal slavery encompasses both sexual slavery and forced labor.

After the Taylor trial judgment, there are two different possible approaches on how to address the "bush wives" phenomenon.

Compared to the AFRC Appeal Chamber and to the RUF Trial Chamber's approach, that of the Taylor Trial Chamber is more respectful of the *"nullum crimen sine lege"* principle, considering that the concept of forced marriage was developed by the SCSL jurisprudence after the commission of the crime. Moreover, in identifying two forms of enslavement as elements of conjugal slavery, the Trial Chamber also avoided the mischaracterization of the "bush wife" phenomenon as exclusively a sexual crime: indeed, it has both sexual and non-sexual components. It can be said that the Taylor Chamber's approach focuses attention on the fact gender-based crimes are not reducible to crimes of sexual violence. In Sierra Leone, women and girls were subjected to gender-based crimes by being forced into *"highly gendered labor roles"*: as "bush wives," they fetched water, pounded rice, harvested palm oil, cooked meals, looked for food, carried loads, cleaned houses, fished, planted seeds and weeded.[346] Substantially, the Taylor Trial Chamber recognized that enslavement through forced labor may be a gendered crime. However, this new category of conjugal slavery does not immediately shows the particular harm caused by the non-consensual attribution of a status of "wife" and the resulting damage, especially social stigmatization. In fact, the victims' labels of "wives" imply a unique harm caused by being *"affiliated in such an intimate way with a member of one of the warring parties"* and it is for this reason that they are ostracized as collaborators of the enemy.[347]

4.4.5 Forced marriage before the ECCC: second trial against Khieu Samphan and Nuon Chea (case 002/02)

From 17 April 1975 to 7 January 1979, the Khmer Rouge, a radical group of Maoists led by Pol Pot, took control of Cambodia. In this period, the population was submitted to mass atrocities by the regime: it is estimated that between 1.7 and 2.2 millions Cambodians were killed, the

[342] Ibid., para 424
[343] Ibid.
[344] Ibid., paras 425-428
[345] Ibid., para 430
[346] See Prosecutor v. Taylor, SCSL-03-01-T, Trial Judgment, 18 May 2012, paras 1697-99, 1704, 1766, 1799, 1810-11
[347] Valerie Oosterveld, "Gender and the Charles Taylor Case at the Special Court for Sierra Leone", 19 Wm. & Mary J. Women & L. 7, 2012, reporting: Beth Van Schaack, "Atrocity Crimes Litigation: 2008 Year-In-Review", 7 NW. J. INT'L HUM. RTS. 170, 2009, p. 205, available at: http://scholarship.law.wm.edu/wmjowl/vol19/iss1/3

majority of the population was subjected to forced labor, forced transfer, starvation, forced marriage, religious persecution, arbitrary detention, torture.

ECCC is a hybrid court set up to prosecute the leaders of the Khmer Rouge responsible for these crimes. It is the first internationalized tribunal dealing with mass crimes that allows victims to apply as civil parties seeking for reparations and to support the Prosecution.[348]

Silke Stundzinsky[349] stated that the practice of forced marriage was systematically employed as part of the policy implemented by the regime. The purpose of the forced marriage policy was to *"breed a new population to be able to contribute to the agrarian work of the country."*[350] Pol Pot included as objectives of the Communist Party (CPK) the rapid growth of the Cambodian population by the control of sexual interaction between individuals, to increase labour force. The forced married couples were forced to have sexual intercourses and were controlled by soldiers. If they did not consummate the marriages, the sanctions were terrible: killing, harder work or imprisonment. Several victims committed suicide.[351]

Forced marriages were clearly carried out as a matter of state policy. There were used statewide as a measure to weaken and attack Cambodian families, to produce more children to join 'Angkar's' revolution, and to control sexuality and reproductive power. There were approximately 400.000 men and women married under the Khmer Rouge regime under the above-mentioned circumstances. Hence, the crimes were committed as part of a widespread and systematic attack against the civilian population.[352]

On 3 February 2012, the Supreme Court pronounced the final judgment regarding case 001, sentencing to life imprisonment Kaing Guek Eav, alias Duch, the former Chairman of the Khmer Rouge S-21 Security Center in Phnom Penh.

In the case 001, the Amended Closing Order (indictment) alleged that there was evidence of *"at least one coercive sexual penetration"* committed at S-21, when an interrogator, inserted a stick into a female prisoner's genitals.[353] The Chamber found the accused criminally responsible, pursuant to Article 29 (new) of the ECCC Law, *inter alia* for torture, which included this only case of rape admitted, as a crime against humanity.[354]

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[348] "Sexual Violence as an International Crime" Anne-Marie de Brouwer, Charlotte Ku, Renée Römkens and Larissa van den Herik (eds.), 2012, Chapter IX (Silke Stundzinsky), p. 175

[349] This part is based on the adaptation of the speech prepared for the "Interdisciplinary Colloquium on systematic sexual violence and victims' rights'", April 2011, by Silke Stundzinsky, international civil party layer before the ECCC, included in Chapter IX "Victims of Sexual and Gender-Based Crimes Before the Extraordinary Chamber in the Courts of Cambodia: Challenges of Rights of Participation and Protection" of the book "Sexual Violence as an International Crime", pp. 173- 186 [hereinafter Stundzinsky, "Victims of Sexual and Gender-Based Crimes Before ECCC"]

[350] Stundzinsky, "Victims of Sexual and Gender-Based Crimes Before ECCC", supra at 349, pp. 180-181

[351] Stundzinsky, "Victims of Sexual and Gender-Based Crimes Before ECCC", supra at 349; See also the Transcript Of Proceedings against Nuon Chea And Khieu Samphan, Case File N° 002-02/19-09-2007-ECCC/TC, 17 October 2014, Trial Day 1, p. 35-36; available at: http://www.eccc.gov.kh/sites/default/files/documents/courtdoc/2014-10-24%2015:11/E1_242.1_TR002_20141017_Final_EN_Pub.pdf

[352] Prosecutor v. Nuon Chea et al., 002/19-09-2007-ECCC-OCIJ, Second Request for Investigative Actions Concerning Forced Marriages and Forced Sexual Relations, 15 July 2009, para 9

[353] Case 001, against Kaing Guaek Eav, No. 001/18-07-2007/ECCC/TC, [Duch Trial Judgment], 26 July 2010, para 240, reporting: para 137 of the Amended Closing Order

[354] Duch Trial Judgment, para 567

In this case, the Trial Chamber used the narrow definition of rape as "penetration" adopted by the ICTY Appeal Chamber in the Kunarac case.

Although there was evidence that other cases of rape were committed, they were not investigated. Moreover, the evidence indicated also that under the order of the accused, at least one case of forced marriage among the S-24 took place, but it was not included in the trial. The Prosecution clearly disregarded sexual violence crimes. In fact, the investigations were based on the assumption that, despite the fact that the Khmer Rouge acted cruelly against the population, they exercised high morality relative with respect to sexual matters.[355] Scholars erroneously assumed that, since Khmer Rouge leaders had promulgated the policy "Code Number Six", which prohibited any *"abuse of women"*[356], rape rarely occurred under the Khmer Rouge and when occurred it was harshly punished. It has been sustained that, at least in two cases, perpetrators would have been spared from punishments:

- if the violence was committed against individuals determined to be an "enemy" of the revolution,
- if the perpetrators could boast a "good revolutionary" background

Moreover, the Code was not meant to provide protection against sexual violence, but rather it was intended to *"regulate sexual activity as part of subordinating all human relations to the aims of the revolution".*[357]

Nuon Chea, who was the former Chairman of the Democratic Kampuchea National Assembly and the Deputy Secretary of the Communist Party of Kampuchea and Khieu Samphan, who was the former Head of State of Democratic Kampuchea are now on a second trial relative to additional charges. More specifically, the Indictment of case 002/02, included allegations of forced marriage as rape under crimes against humanity and forced marriage and sexual violence as other inhumane acts under crimes against humanity. According to the indictment the forced unions "*were part of the attack against the civilian population, in particular the imposition of sexual relation aimed at enforced procreation".*[358]

4.5 Mutilations and enforced sterilization

Wartime sexual violence frequently has taken the form of mutilation.

In Prosecutor v. Tadić, the ICTY charged the sexual mutilation of a man as torture.[359]

[355] Stundzinsky, "Victims of Sexual and Gender-Based Crimes Before ECCC", supra at 349, p. 179
[356] Abuse of women (forcing a woman to have consensual sex or having sex with a woman who is not your wife)
[357] Theresa de Langis and Silke Studzinsky, "Briefing Paper on the ECCC, the Cambodian Women's Hearing, and Steps for Addressing Sexual Violence under the Khmer Rouge Regime", 2012, available at: http://gbvkr.org/wp-content/uploads/2013/02/Briefing-Paper-on-VAWECCC-Theresa-de-Langis-Final-ENG.pdf
[358] Case against Noun Chea et Al., 002/19-9-2007-ECCC/OCIJ, D427, 15 September 2010, para 1445
[359] See Chapter 4.5.2

As the documentation of the violence against women in Rwanda illustrates, attacking or impaling women through their sexual organs, slashing breasts, as well as cutting out pregnant women's fetus were common forms of mutilation.

Furthermore, rape itself is also frequently a form of mutilation, because much of its damage is ultimately internal, thus, invisible and ignored. Brutal rapes, not only invade the body but often result in the loss of sexual function and infertility.[360]

4.5.1 Enforced sterilization during the WWII

During the World War II the Nazi had the purpose to exterminate the Jews.

When Adolf Eichmann was captured, he was convicted for *"taking measures to prevent birth among Jews by directing that birth be banned and pregnancies interrupted among Jewish women in Theresienstadt, with intent to exterminate the Jewish people."* He was then acquitted for charges of forced sterilization.[361]

An employee of the Auschwitz infirmary testified that Jewish women were subjected to abortion and when pregnancy was near the end, the babies were drowned.[362]

"The Nazis proposed to sterilize all Jews and half-Jews".[363] Jewish and other undesirable women were subjected to various forms of reproductive crimes, such as forced abortion, forced sterilization, infanticide.

"They performed castration operations in the men's camp. […] They sterilize women either by injection, or by operation or with rays."[364]

As already emphasized, also in Asia, women and girls became sterile as a consequence of the violence they were subjected to in the "comfort women stations": some lost their reproductive capacity because of the rapes, the drugs they took to avoid pregnancies, of forced or botched abortions, of sexual violence that damaged their genitalia or reproductive organs.[365]

[360] Women's Caucus For Gender Justice In The International Criminal Court Recommendations And Commentary For December 1997 Prepcom On The Establishment Of An International Criminal Court United Nations Headquarters December 1-12, 1997, WC.5.6-5

[361] "Sexual Violence as an international crime" Anne-Marie de Brouwer, Charlotte Ku, Renée Römkens and Larissa van den Herik (eds.), 2012, Chapter II (Kelly Askin), p. 35, citing: Moshe Pearlman, "The capture and the Trial of Adolf Eichmann", New York: Simon and Schuster, p. 613

[362] Ibid., pp. 35-36, reporting: IMT Docs., Vol. VII, transcripts 211-212

[363] Ibid., pp. 35-36, reporting: IMT Docs., Vol. XX transcripts 272-273

[364] Ibid., pp. 35-36, reporting: testimony Vaillant-Couturier, employee of Auschwitz infirmary, IMT Docs., Vol. VI, transcripts 211-212

[365] "Listening to the Silences: Women And War", Helen Durham, Tracey Gurd, Martinus Nijhoff Publishers, Chapter 12: Kelly D. Askin, "The Jurisprudence of International War Crimes Tribunal", p. 145

4.5.2 The jurisprudence of the ICTY and the ICTR

It is reported that in Rwanda, rapes of women were often accompanied or followed by mutilations of the sexual organs. Sexual mutilations included the opening of the womb to cut out an unborn child before killing the mother, cutting off breasts, slashing the pelvis area and the mutilation of vaginas.[366]

According to the Akayesu Trial Chamber, sexual mutilations could amount to genocide by means of imposing measures intended to prevent births within the group.[367]

In the case of the Prosecutor v. Ruzindana, the Chamber was satisfied that sexual mutilations occurred, in particular, a victim's breasts were cut off.[368] The Chamber stated that the horrific mutilations could amount the crime of "other inhumane acts", but the prosecutor failed to charge this crime.[369]

Sexual mutilations occurred also during the war in Yugoslavia, in particular, the Tadić Trial Chamber convicted the accused, *inter alia*, for the incidence that occurred at the Omarska camp, when uniformed men including Duško Tadić forced a prisoner to sexually mutilate another prisoner, by biting off his testicles.[370]

This Trial was particularly important being the first-ever trial for sexual violence against men.

4.6 Forced nudity

The Akayesu Trial Chamber defined sexual violence *"as any act of a sexual nature which is committed on a person under circumstances which are coercive".* Therefore, sexual violence is not limited to physical invasion of the human body and may include acts that do not involve penetration or even physical contact,[371] such as forced nudity.

The Furundžija Trial Chamber clarified that international criminal rules punish not only rape but also *"any serious sexual assault falling short of actual penetration".* This definition is intended to cover all *"serious abuses of a sexual nature inflicted upon the physical and moral integrity of a person"*, by means of coercion, threat of force or intimidation, in a way that is degrading and humiliating for the victim's dignity.[372]

[366] Shattered Lives, Sexual Violence during the Rwandan Genocide and its Aftermath, Human Rights Watch/Africa Human Rights Watch Women's Rights Project Fédération Internationale des Ligues des Droits de l'Homme Human Rights Watch, 1996, available at: http://www.hrw.org/reports/1996/Rwanda.htm
[367] Prosecutor v. Akayesu, ICTR-96-4-T, Trial Judgment, 2 September 1998, para 507
[368] Prosecutor v. Clément Kayishema and Obed Ruzindana, ICTR-95-1-T, Trial Judgment, 21 May 1999, para 470
[369] Ibid., para 586
[370] Prosecutor v. Dusko Tadić, IT-94-1-T, Trial Judgment, 7 May 1997, paras 260, 726, 730
[371] Prosecutor v. Akayesu, ICTR-96-4-T, Trial Judgment, 2 September 1998, para 688
[372] Prosecutor v. Furundžija, IT-95-17/1-T, Trial Judgment, 10 December 1998, para 186

4.6.1 The case of the Prosecutor v. Jean-Paul Akayesu before the ICTR

In the Akayesu case, a witness testified about an incidence of forced nudity, in which the accused told the Interahamwe to undress a young girl, whom he knew to be a gymnast, so that she could do gymnastics naked. The victim was forced to march around naked in front of many people.[373]

Analyzing this incident, the Chamber stated that it constitutes sexual violence. Moreover, the Tribunal considered that a context of coercive circumstances, which is an element of the crime, has not to be evidenced by a show of physical force. Threats, intimidation, extortion and other forms of duress, which prey on fear or desperation, may constitute coercion. Therefore, in this case, coercion could be deduced simply by the existence of the armed conflict and by the military presence of Interahamwe, among refugee Tutsi women.[374] The accused was judged criminally responsible under Article 3(i) of the Statute, "other inhumane acts", for this incident of forced undressing in public and some similar others.[375]

It can be also noted that, sometimes, victims were abandoned naked after the rapes or were naked in public to be chosen by the rapists, adding humiliation to humiliation.

4.6.2 The case of the Prosecutor v. Dragoljubk Kunarac, Radomir Kovač and Zoran Vuković (Foča case) before the ICTY

The Kunarac judgment reported some episodes of forced naked dancing. More specifically, the Indictment alleged that, while kept in Radomir Kovač's apartment, four witnesses were forced to take off their clothes and to dance naked on a table, while Kovač watched them.[376] These four witnesses described three instances when they, together or individually, were forced to dance or to stand naked on a table at the presence of the accused and other soldiers, who were pointing weapons at them.[377]

One of these victims testified that, in one occasion, some of them were forced by Radomir Kovač to stand naked on a table and then to march, naked, in the streets of Foča. Although the Trial Chamber did not found all these testimonies reliable,[378] it was satisfied that the events described in the Indictment were proved, beyond reasonable doubt, with respect to some of the witnesses.[379]

The Chamber found that the accused Radomir Kovač certainly knew that, having to stand naked on a table, while the accused watched them, pointing weapons, was a painful and humiliating

[373] Prosecutor v. Akayesu, Trial Judgment, para 429
[374] Ibid., para 688
[375] Ibid., para 697
[376] Prosecutor v. Dragoljubk Kunarac, Radomir Kovač, Zoran Vuković, IT-96-23-T& IT-96-23/1-T, Trial Judgment, 22 February 2001, para 766
[377] Ibid., paras 767 and 768
[378] Ibid., para 770
[379] Ibid., para 772

experience for the women involved.[380] For these acts, the Trial Chamber finds the accused Radomir Kovač guilty of outrages upon personal dignity, as violation of the laws or customs of war.[381]

[380] Ibid., para 773
[381] Ibid., para 782

5. LEGAL FRAMEWORK AND FIRST PRACTICE OF THE ICC ON SEXUAL VIOLENCE CRIMES

CONTENT: 5.1 Sexual violence crimes: legal framework before the ICC – 5.1.1 Rape – 5.1.2 Forced pregnancy – 5.1.3 Forced prostitution and sexual slavery – 5.1.4 Enforced sterilization – 5.1.5 Other forms of sexual violence of comparable gravity – 5.1.6 Gender-based persecution – 5.2 ICC's first attempts to prosecute sexual violence crimes – 5.2.1 The case of the Prosecutor v. Thomas Lubanga Dyilo before the ICC – 5.2.2 The case of the Prosecutor v. Callixte Mbarushimana before the ICC – 5.2.3 The case of the Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui before the ICC – 5.3 Modes of liability concerning sexual violence crimes – 5.3.1 Command responsibility and its first application by the ICC – 5.3.1.1 The case of the Prosecutor v. Jean-Pierre Bemba Gombo before the ICC – 5.3.2 Joint criminal enterprise and the ICC's "theory of control" - 5.4 Current status of the prosecution of sexual violence crimes before the ICC

The ICC Statute is the first instrument in international law to include an expansive list of sexual and gender-based crimes as war crimes relating to both international and non-international armed conflict. It also widens the list of sexual and gender-based[1] crimes as crimes against humanity to include not only rape but also other forms of sexual violence, in particular, enforced prostitution, sexual slavery, forced pregnancy, enforced sterilization and other forms of sexual violence of comparable gravity[2], as well as persecution based on gender. Moreover, as already observed,[3] sexual and gender-based crimes, whether committed with intent to destroy, in whole or in part, a national, ethnic, racial or religious group may also constitute acts of genocide.[4]

The elements of the sexual violence crimes included in the ICC Statute, which are described in the ICC Elements of Crimes, are the same, regardless if they are prosecuted as war crimes or as crimes against humanity. However, for the sexual conduct to be a crime against humanity or a war crime, the respective contextual elements must be fulfilled.

In this Chapter I analyze how sexual violence crimes are conceived in the ICC Statute and in the ICC Elements of Crimes, considering these instruments as the most recent and comprehensive crystallization of international criminal law. Once outlined the legal framework within which the ICC has to operate, I analyze its first attempts to prosecute sexual violence crimes.

[1] ICC Office of the Prosecutor, "Policy Paper on Sexual and Gender-Based Crimes", June 2014, available at: http://www.icc-cpi.int/iccdocs/otp/OTP-Policy-Paper-on-Sexual-and-Gender-Based-Crimes--June-2014.pdf
"Gender-based crimes are those committed against persons, whether male or female, because of their sex and/or socially constructed gender roles. Gender-based crimes are not always manifested as a form of sexual violence. They may include non-sexual attacks on women and girls and men and boys, because of their gender".

[2] ICC Statute, sexual crimes as crimes against humanity: Art. 7(1)(g); as war crimes: Art. 8(2)(b)(xxii) and Art. 8(2)(e)(vi)

[3] See supra Chapter 4.1.3

[4] ICC Office of the Prosecutor, "Policy Paper on Sexual and Gender-Based Crimes", June 2014, supra at 1

5.1 Sexual violence crimes: legal framework before the ICC

5.1.1 Rape

In the ICC Statute, rape is prosecutable as a crime against humanity under Article 7(1)(g) and as a war crime, more specifically as an "other serious violations of the laws and customs applicable in international armed conflict" under Article 8(2)(b)(xxii) and as an "other serious violations of the laws and customs applicable in armed conflicts not of an international character" under Article 8(2)(e)(vi). The ICC's definition of rape[5] is provided in the ICC Elements of Crimes; it is based on the ICTR Akayesu, ICTY Furundžija and Kunarac judgments.[6]

The elements of the crime of rape are identified as follows:

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.*[7]

The *actus reus*, which requires as a first element the *"invasion of the body of a person by penetration of any part of the victim or the perpetrator's body",* is the result of a compromise between the narrower traditional definition and the more expansive definition of the material act of rape elaborated in the Akayesu case.[8] In fact, it implies the penetration of the victim by the perpetrator, as well as the penetration of the perpetrator by the victim and the forced sexual intercourse between victims. The objective of the first material element is to cover *"either penetration with sexual organs or of sexual organs"* of the victim,[9] not only with parts of the body, but also with objects. This definition is also gender neutral, relive to both perpetrator and victim. Therefore, the ICC's definition allows the prosecution of various forms of forced sexual activity not covered by the traditional definition, which encompassed only a sexual intercourse between the perpetrator and the victim.

The second element of the *actus reus* concerns the conditions under which, the described relevant conduct, amounts to rape. Whereas the ICTY Kunarac definition of rape, later applied by both the ICTY and the ICTR, required the element of *"absence of consent",* the ICC's definition requires only coercive circumstances, precisely *"force or coercion,"* listing non exhaustive examples that clarify that physical violence is not necessarily needed, instead is sufficient the exercise of

[5] For a first interpretation of the crime of rape by the ICC, see infra Chapter 5.2.3 (Prosecutor v. Germain Katanga)
[6] For details, see supra Chapters 4.2.1, 4.2.2 and 4.2.3
[7] ICC Elements of Crimes, Article 7(1)(g)-1, crime against humanity of rape; Articles 8 (2)(b)(xxii)-1 and Article 8(2)(e)(vi)-1, war crime of rape
[8] For details, see supra Chapter 4.2.1
[9] Nicole Brigitte Maier, "The Crime of Rape Under the Rome Statute of the ICC: with a special emphasis on the jurisprudence of the ad hoc Criminal Tribunals", 3 Amsterdam Law Forum 146, 2011, available at: http://amsterdamlawforum.org/article/viewFile/209/397

psychological power upon the victim. According to the ICC's definition, consent is not an element of crime, except in cases in which the perpetrator exploits the victim's incapability, following a domestic law's approach to sexual assault. In fact, by including acts *"committed against a person incapable of giving genuine consent",* the ICC's definition implies that certain persons, due to age, mental or physical conditions or infirmity are not able of providing a valid consent to sexual activity.

Although the *mens rea* is not included within the specific elements of the crime of rape, Article 30 of the ICC Statute prescribes that the *"material elements are committed with intent and knowledge".* Therefore, to have the required *mens rea*, the perpetrator must (1) intend to invade the body of a person by a conduct resulting in penetration and (2) know that the invasion was committed by means of the use of force, threats, coercion or by taking advantage of a coercive context or against a person incapable of voluntarily consenting. Consequently, this last *mens rea* requirement allows for a mistake of fact defense.[10]

It has to be further considered that the definition of rape provided in the ICC Elements of Crimes is identical both in cases in which rape constitutes a crime against humanity and in which it constitutes a war crime, what changes is the contextual element. This consideration is valid also for the other sexual crimes analyzed in this Chapter, namely, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization or any other form of sexual violence of comparable gravity. For war crimes, the contextual element is defined as follows:

1. *The conduct took place in the context of and was associated with an armed conflict not of an international character.*
2. *The perpetrator was aware of factual circumstances that established the existence of an armed conflict.*[11]

For crimes against humanity, the contextual element is defined as follows:

3. *The conduct was committed as part of a widespread or systematic attack directed against a civilian population.*
4. *The perpetrator knew that the conduct was part of or intended the conduct to be part of a widespread or systematic attack directed against a civilian population.*[12]

The contextual element for crimes against humanity has to be applied also to the crime against humanity of gender-based persecution.

[10] Phillip Weiner, "The Evolving Jurisprudence of the Crime of Rape in International Criminal Law", 54 B.C.L. Rev. 1207, 2013, available at: htt://lawdigitalcommons.bc.edu/bclr/vol54/iss3/14

[11] ICC Elements of Crimes, "other serious violations of the laws and customs applicable in international armed conflict": Art. 8(2)(b)(xxii)-1 (rape); Art. 8(2)(b)(xxii)-2 (sexual slavery); Art. 8(2)(b)(xxii)-3 (enforced prostitution); Art. 8(2)(b)(xxii)-4 (forced pregnancy); Art. 8(2)(b)(xxii)-5 (enforced sterilization); Art. 8(2)(b)(xxii)-6 (sexual violence).
ICC Elements of Crimes, "other serious violations of the laws and customs applicable in armed conflicts not of an international character": Art. 8(2)(e)(vi)-1 (rape); Art. 8(2)(e)(vi)-2 (sexual slavery); Art. 8(2)(e)(vi)-3 (enforced prostitution); Art. 8(2)(e)(vi)-4 (forced pregnancy); 8(2)(e)(vi)-5 (enforced sterilization); Art. 8(2)(e)(vi)-6 (sexual violence)

[12] ICC Elements of Crimes, crimes against humanity: Art. 7(1)(g)-1 (rape); Art. 7(1)(g)-2 (sexual slavery); Art. 7(1)(g)-3 (enforced prostitution); Art. 7(1)(g)-4 (forced pregnancy); 7(1)(g)-5 (enforced sterilization); 7(1)(g)-6 (sexual violence); 7(1)(h) (persecution, which is only a crime against humanity)

5.1.2 Forced pregnancy

In the ICC Statute, the crime of forced pregnancy is included both as a crime against humanity and as a war crime, under Art. 7(1)(g) and Articles 8(2)(b)(xxii) and 8(2)(e)(vi), respectively. A definition of the crime is provided in Article 7(2)(f) of the ICC Statute and identically reported in Articles 8(2)(b)(xxii) and 8(2)(e)(vi) of the ICC Statute and in Articles 7(1)(g)-4, 8(2)(e)(vi)-4 and 8(2)(b)(xxii)-4 of the ICC Elements of Crimes.

At the Rome Conference, some delegators were worried that, if forced pregnancy covered also the attempt to keep the woman pregnant, states would have been obliged to grant women forcibly made pregnant abortion systems, but abortion is still a crime in some countries.[13] The debate concluded when it was decided to specify that the provision punishing forced pregnancy *"shall not in any way be interpreted as affecting national laws relating to pregnancy."*[14]

The crime is defined as follows:

> *The perpetrator confined one or more women forcibly made pregnant, with the intent of affecting the ethnic composition of any population or carrying out other grave violations of international law.*[15]

The definition is narrow because it refers only to situation in which the impregnated woman is confined, in order to oblige her to keep the baby. However, confinement can be interpreted broadly, including any deprivation of physical liberty.

This definition requires that the woman is made pregnant under forcible circumstances, thus, as the result of a rape. Although prosecution of this offence as a constituent act of another crime is still possible, this would miss the aggravating circumstance explicated in the crime of forced pregnancy, which is the intent to make the woman conceive a child of the rapist's ethnicity, on the purpose of affecting the ethnic composition of the victim's population or carrying out other serious violation of international law. Therefore, this crime encompasses a specific intent requirement.[16]

Comparing rape with forced pregnancy, forced pregnancy requires the evidence of the additional intent that the perpetrator acted *"with the intent of affecting the ethnic composition of any population or carrying out other grave violations of international law."* Consequently, the crime of forced pregnancy is not the *"crime of a man violating the individual woman's body, but rather an attack against the ethnic group she belongs"*. Even a woman who is member of a group different from that of the perpetrator, but was not targeted as such, could not find protection under this provision. In fact, forced pregnancy is the only sexual crime provision within the Rome Statute that

[13] 26% of world's population lives in countries where induced abortion is generally prohibited: for further details, see: Center for Reproductive Rights, "The World's Abortion Laws Map 2013 Update", available at: http://reproductiverights.org/sites/crr.civicactions.net/files/documents/AbortionMap_Factsheet_2013.pdf

[14] ICC Statute, Art. 7(2)(f)

[15] ICC Elements of Crimes, Article 7(1)(g)-4, crime against humanity of forced pregnancy; Article 8(2)(e)(vi)-4 and Article 8(2)(b)(xxii)-4, war crime of forced pregnancy. The definition given in the ICC Statute, Art. 7(2)(f) is identical.

[16] Anne-Marie de Brouwer, "Supranational Criminal Prosecution of Sexual Violence: The ICC and the Practice of the ICTY and the ICTR", Intersentia, 2005 [hereinafter: de Brouwer, "Supranational Criminal Prosecution of Sexual Violence"], pp. 144-146

requires such a specific intent. On the contrary, the crime of rape seems to be aimed at the protection only of the woman's bodily integrity.[17]

In particular, the same specific intent to affect an ethnic group is found, within the Rome Statute, not as an element of crimes against humanity or war crimes, but as the specific intent element characteristic of genocide.[18] In fact, in case of genocide, the prosecutor must prove that the perpetrator intended to destroy, in whole or in part, a specific national, ethnical, racial or religious group. Forced pregnancy is the only sexual crime that requires this additional level of intent, thus, though this offence is classified as a crime against humanity and as a war crime, it requires a higher level of intent, that of genocide.[19]

Conclusively, it can be observed that this recognition that forced pregnancy is a crime itself, distinct from that of rape, is very important. Indeed, as well observed by Robyn Charli Carpenter, *"where forced impregnation is an intentional aim of such rapes, it exacerbates the impact of rape by making it more visible and explicit, precluding victims from protecting themselves and their community through silence or denials and symbolically branding the victims with the mark of the rapes."*[20]

5.1.3 Forced prostitution and sexual slavery

In the ICC Statute, forced prostitution is prosecutable under Article 7(1)(g) as a crime against humanity and under Articles 8(2)(b)(xxii) and 8(2)(e)(vi), as a war crime. The elements of the crime are listed identically in the ICC Elements of Crimes, more specifically, in Articles 7(1)(g)-3, 8(2)(b)(xxii)-3 and 8(2)(e)(vi)-3, as follows:

1. *The perpetrator caused one or more persons to engage in one or more acts of a sexual nature by force, or by threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power, against such person or persons or another person, or by taking advantage of a coercive environment or such person's or persons' incapacity to give genuine consent.*
2. *The perpetrator or another person obtained or expected to obtain pecuniary or other advantage in exchange for or in connection with the acts of a sexual nature.*[21]

The *actus reus* requires as a first element that the perpetrator *"caused one or more persons to engage in one or more acts of a sexual nature."* For the conduct to be criminal, it has to take place

[17] Alyson M. Drake, "Aimed at Protecting Ethnic Groups or Women? A look at Forced Pregnancy under the Rome Statute", 18 Wm. & Mary J. Women & L. 595, 2012, available at: http://scholarship.law.wm.edu/wmjowl/vol18/iss3/6 [hereinafter: Drake, "Aimed at Protecting Ethnic Groups or Women? A look at Forced Pregnancy Under the Rome Statute"]

[18] ICC Statute, Art. 6, *chapeau* and ICC Elements of Crimes, Arts. 6(a)(3), 6(b)(3), 6(c)(3), 6(d)(3), 6(e)(3)

[19] Drake," Aimed at Protecting Ethnic Groups or Women? A look at Forced Pregnancy Under the Rome Statute", supra at 17

[20] Drake," Aimed at Protecting Ethnic Groups or Women? A look at Forced Pregnancy Under the Rome Statute", supra at 17; citing: Robyn Charli Carpenter, "Forced Maternity, Children's Rights and the Genocide Convention: A Theoretical Analysis", 2 J. Genocide Res. 213, 2000

[21] ICC Elements of Crimes: Article 7(1)(g)-3, crime against humanity of enforced prostitution; 8(2)(b)(xxii)-3 and 8(2)(e)(vi)-3, war crime of enforced prostitution

under forcible circumstances, which are the same enumerated for the crime of rape, thus, non-consent is not an element of the crime.

The second element of the *actus reus* is introduced to characterize forced prostitution differently from sexual slavery: the perpetrator or another person obtained or expected to obtain pecuniary or other advantages *"in exchange for or in connection with"* the acts of a sexual nature. When the advantage is obtained by the victim, it has to be considered that, if this is her/his only way to survive and so the victim has no choice but to cooperate, the crime may be better prosecuted as sexual slavery.

The *mens rea* demands that the perpetrator intended to cause one or more persons to engage in one or more acts of a sexual nature, taking advantage of coercive circumstances. Moreover, the perpetrator or another person have to have the intent to obtain or have to expect to obtain pecuniary or other advantages, in exchange for or in connection with the sexual act.[22]

The delegates that elaborated the Rome Statute believed it was important to name, in the Statute, violations such as sexual slavery, which were clearly crimes under customary international law, but have been never explicitly enumerated before in law instruments.[23]

Askin also had argued the necessity to list sexual slavery as a separate crime in the ICC Statute, noting that the specific reference to sexual slavery, rather than simply to enslavement, appropriately characterizes the crime's nature.[24] Argibay had further noted that the interest and the elements protected by sexual slavery and enslavement differs: *"sexual slavery recognizes the specific nature of the form of enslavement and ensures that it will be given the distinct attention it deserves".*[25]

Therefore, the explicit recognition of sexual slavery as a separate international crime in the ICC Statute, more precisely in Article 7(1)(g), as a crime against humanity and in Articles 8(2)(b)(xxii) and 8(2)(e)(vi), as a war crime, has not statutory precedence. In fact, at the time, it was still not so clear that sexual slavery was a crime in itself, different from enslavement and from enforced prostitution.

The following elements of the crime of sexual slavery[26] are listed identically in Articles 7(1)(g)-2, 8(2)(b)(xxii)-2 and 8(2)(e)(vi)-2 of the ICC Elements of Crimes:

1. *The perpetrator exercised any or all of the powers attaching to the right of ownership over one or more persons, such as by purchasing, selling, lending or bartering such a person or persons, or by imposing on them a similar deprivation of liberty.*
   (It is understood that such deprivation of liberty may, in some circumstances, include exacting forced labour or otherwise reducing a person to a servile status […]. It is also understood that the conduct described in this element includes trafficking in persons, in particular women and children.)

[22] de Brouwer, "Supranational Criminal Prosecution of Sexual Violence", supra at 16, pp. 141-143
[23] Ibid.
[24] Valerie Oosterveld, "Sexual Slavery and the International Criminal Court: Advancing International Law", 25 Mich. J. Int'l L. 605, 2004 [hereinafter: Oosterveld, "Sexual Slavery and the ICC"]
[25] Ibid., reporting: Carmen M. Argibay, "Sexual Slavery and the "Comfort Women" of World War II", 21 Berkeley J. Int'l L. 375, 2003
[26] For a first interpretation of this offence by the ICC, see Chapter 5.2.3 (Prosecutor v. Germain Katanga)

2. *The perpetrator caused such person or persons to engage in one or more acts of a sexual nature.*[27]

The *actus reus* requires the exercise of any or all of the powers characteristic of the right of ownership, over one or more persons. The Statute includes an open list of examples of how the right of ownership might be exercised on a person. Some delegates, who were concerned that, without any additional examples, the ICC elements of sexual slavery seemed to require some kind of commercial or pecuniary exchange, criticized this list. In fact, they argued that in wartime, in outline this crime is committed without any commercial intent.[28] On the contrary, some others underlined that the term "lending" already lightened the fact that commercial or pecuniary aspects were not necessarily involved. The disagreement was resolved by including a footnote able to explain that the deprivation of liberty should encompass also actions not listed, whether indicia of the exercise of *"powers attaching to the right of ownership"* under international law. In particular, are included: trafficking in persons, exacting forced labor and reducing a person to a servile status. Consequently, the footnote explains what situations might be comprise under *"similar deprivation of liberty"*, this category includes some of the practices that have traditionally been considered as slavery or slavery-like practices that do not have any commercial or pecuniary aspect. This footnote was an important addition because, since the enslavement of women and children that occurs through trafficking usually is of sexual nature, it was proper to add trafficking as an example of sexual slavery.[29] Another important aspect of the footnote is the mention of *"forced labour and reducing a person to a servile status as defined in the 1956 Supplementary Convention on the Abolition of Slavery, the Slave Trade and Institutions and Practices Similar to Slavery".*[30] The Supplementary Convention on Slavery defines a person of servile status as a person in the condition or status of debt bondage or serfdom. It also includes in that definition any institution or practice whereby:

1. *a woman, without the right to refuse, is promised or given in marriage or payment of a consideration in money or in kind to her parents, guardian, family or any other person or group; or*
2. *the husband of a woman, his family, or his clan, has the right to transfer her to another person for value received or otherwise; or*
3. *a woman on the death of her husband is liable to be inherited by another person; or*
4. *any institution or practice whereby a child or young person under the age of 18 years is delivered by either or both of his natural parents or guardian to another person, whether*

[27] ICC Elements of the Crimes, sexual slavery: Article 7(1)(g)-2, crimes against humanity and 8(2)(b)(xxii)-2 and 8(2)(e)(vi)-2, war crimes

[28] Gay J. McDougall, Special Rapporteur of the UN Commission on Human Rights, "Contemporary Forms of Slavery: Systematic Rape, Sexual Slavery and Slavery-like Practices during Armed Conflict", Final report, E/CN.4/Sub.2/1998/13, 22 June 1998

[29] Oosterveld, "Sexual Slavery and the ICC", supra at 24

[30] Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery, 7 September 1956, available at: http://www.justice.bm/files/18/files/SuppConvSlavery1956.pdf

> *for reward or not, with a view to the exploitation of the child or young person or of his labour.*[31]

Although the 1956 Supplementary Convention does not specifically define the crime of forced labour, in its preamble, it makes reference to the Forced Labour Convention of 1930,[32] which defines forced labour as *"all work or service which is extracted from any person under the menace of any penalty and for which the said person has not offered himself voluntarily."*[33]
The second part of the *actus reus* of sexual slavery refers to the sexual nature inherent to sexual slavery that distinguishes this crime from the more general crime of enslavement.

The other footnote explicitly recognized that, while it is possible that one person could be responsible both for exercising powers attaching to the right of ownership over a person and for causing the enslaved person to engage in acts of a sexual nature, it is also possible and more likely that two or more people could be involved:

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

Another footnote that may also be relevant to the crime of sexual slavery, even though it is not appended specifically to the elements of this crime, is the footnote attached to the crime of genocide by means of causing serious bodily or mental harm. It states that the conduct may *"include, but is not necessarily restricted to, acts of torture, rape, sexual violence or inhuman or degrading treatment."* In fact, sexual slavery could fall under this footnote and be considered a conduct causing serious bodily or mental harm.[34] This interpretation is in agreement with the general introduction to the Elements of Crimes, which emphasized that a *"particular conduct may constitute one or more crimes."*[35]

The *mens rea* of the *actus reus* of sexual slavery is the intent to exercise the powers of the right of ownership over at least a person and to *"cause"* such a person *"to engage in one or more acts of sexual nature"*.[36]

[31] Ibid., Articles 1 and 7(b)
[32] Convention Concerning Forced or Compulsory Labour, 28 June 1930, available at: http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:C029#A2
[33] Ibid., Art. 2.1
[34] Oosterveld, "Sexual Slavery and the ICC", supra at 24
[35] ICC Elements of Crimes, General Introduction, para 9
[36] de Brouwer, "Supranational Criminal Prosecution of Sexual Violence", supra at 16, pp. 137-141

5.1.4 Enforced sterilization

Enforced sterilization is included in the ICC Statute, in Article 7(1)(g) as a crime against humanity and in Articles 8(2)(b)(xxii) and 8(2)(e)(vi) as a war crime.

This offence has not been prosecuted as an independent crime in any international tribunal or court, yet. However, as already emphasized, the crime was considered during the Nuremberg Trials and implicitly prosecuted as the constitutive act of other crimes.[37]

The crime is defined identically in Articles 7(1)(g)-5, 8(2)(b)(xxii)-5 and 8(2)(e)(vi)-5 of the ICC Elements of Crimes as:

1. *The perpetrator deprived one or more persons of biological reproductive capacity.*
   (The deprivation is not intended to include birth-control measures which have a non-permanent effect in practice).
2. *The conduct was neither justified by the medical or hospital treatment of the person or persons concerned nor carried out with their genuine consent.*
   (It is understood that "genuine consent" does not include consent obtained through deception).[38]

The first part of the *actus reus* of the crime of enforced sterilization is described as the deprivation of the reproductive capacity. The footnote specifies that this offence covers only cases of permanent and not of temporary sterilization.

The second part of the *actus reus* specifies that the sterilization has to result from some sort of medical procedure, although this requirement can be widely interpreted.

It can be further observed that, in contest of widespread violence, both forced pregnancies, forced abortions and sterilizations can be the foreseeable consequences of rapes, gang rapes, rapes with objects or rapes by diseased persons.

5.1.5 Other forms of sexual violence of comparable gravity

Moreover, the ICC has jurisdiction also over *"any other form [different from those named] of sexual violence of comparable gravity"*[39], under Article 7(1)(g) of the ICC Statute, as a crime against humanity and under Articles 8(2)(b)(xxii) and 8(2)(e)(vi) of the ICC Statute, as a war crime.

The ICC Elements of Crimes, more precisely in Articles 7(1)(g)-6, 8(2)(b)(xxii)-6 and 8(2)(e)(vi)-6, lists the identical following elements of sexual violence:

1. *The perpetrator committed an act of a sexual nature against one or more persons or caused such person or persons to engage in an act of a sexual nature by force, or by threat of force or coercion, such as that caused by fear of violence, duress, detention,*

[37] For details, see Chapter 4.5
[38] ICC Elements of Crimes, enforced sterilization: Article 7(1)(g)-5 as a crime against humanity of; Article 8(2)(b)(xxii)-5 and 8(2)(e)(vi)-5 as a war crime
[39] ICC Statute, Art. 7(1)(g), Art. 8(b)(xxii) and Art. 8(e)(vi)

psychological oppression or abuse of power, against such person or persons or another person, or by taking advantage of a coercive environment or such person's or persons' incapacity to give genuine consent.

1. *Such conduct was of a gravity comparable to the other offences in Article 7, paragraph 1 (g), of the Statute.*
2. *The perpetrator was aware of the factual circumstances that established the gravity of the conduct.*[40]

This category is a residual category that embrace all the forms of sexual violence not specifically mentioned in the Statute, such as forced marriage, sexual mutilation, forced nudity, forced abortion.[41]

Sexual mutilation can be defined "*as a mutilation of the sexual organs or a part of the body considered intrinsically sexual*", typically breasts.[42]

Forced marriage can be considered *"a form of sexual slavery that has a more intimate, familiar nature."*[43]

5.1.6 Gender-based persecution

The ICC Statute was the first codification to include the crime against humanity of persecution based on gender,[44] in Article 7(1)(h).[45] The criminalization of this specific form of persecution is very important for a proper prosecution of sexual violence crimes, since gender-based crimes often display a sexual form.

[40] ICC Elements of the Crimes, sexual violence: Article 7(1)(g)-6 as a crime against humanity; Article 8(2)(b)(xxii)-6 and 8(2)(e)(vi) as a war crime

[41] Kelly D. Askin, "The Jurisprudence of International War Crimes Tribunals", in "Listening to the Silences: Women And War", Martinus Nijhoff Publishers, Chapter 12, p. 147. See also Prosecutor v. Kvočka, IT-98-30/1-T, Trial Judgment, 2 November 2001, para 180, footnote 343: "Sexual violence would also include such crimes as sexual mutilation, forced marriage, and forced abortion as well as the gender related crimes explicitly listed in the ICC Statute as war crimes and crimes against humanity, namely "rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization" and other similar forms of violence".

[42] Askin, "The Jurisprudence of International War Crimes Tribunals", supra at 41, p. 148

[43] Ibid., p. 149. The SCSL dealt with this particular offence and tried to define it: see Chapter 4.4.4

[44] In international law, persecution was first codified as a crime against humanity in the Nuremberg Charter of the International Military Tribunal (Art 6.), but the grounds were limited to political, racial or religious grounds. The IMTFE Charter also included the crime against humanity of persecution, but limited political or racial grounds (Art. 5(c)). Control Council Law No. 10 included "persecutions on political, racial or religious grounds whether or not in violation of the domestic laws of the country where perpetrated" as crimes against humanity (Art. 2(1)(c)).

[45] ICC Statute, Art. 7(1)(h): "Persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender as defined in paragraph 3, or other grounds that are universally recognized as impermissible under international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court". Art. 7(3): "For the purpose of this Statute, it is understood that the term 'gender' refers to the two sexes, male and female, within the context of society. The term 'gender' does not indicate any meaning different from the above."

Persecution is generally defined in Article 7(1)(h) of the ICC Statute as *"the intentional and severe deprivation of fundamental rights contrary to international law by reason of the identity of the group or collectivity."*[46]

In addition, the Article 7(1)(g) of the ICC Elements of Crimes enumerates the elements of persecution:

1. *The perpetrator severely deprived, contrary to international law, one or more persons of fundamental rights.*
2. *The perpetrator targeted such person or persons by reason of the identity of a group or collectivity or targeted the group or collectivity as such.*
3. *Such targeting was **based on** political, racial, national, ethnic, cultural, religious, **gender** as defined in article 7, paragraph 3, of the Statute, or other grounds that are universally recognized as impermissible under international law.*
4. *The conduct was committed in connection with any act referred to in article 7, paragraph 1, of the Statute or any crime within the jurisdiction of the Court. […].*[47]

International refugee law has acknowledged gender-related forms of persecution since 1985;[48] the legal achievements of this body of international law influenced the drafting of the Rome Statute, which includes gender within the list of persecutory grounds. Therefore, a close connection between the development of international refugee law and international criminal law, relative to the gendered aspects of persecution, can be recognized.[49] It is not possible to transfer the definition of gender-related persecution developed in international refugee law to the crime against humanity

[46] ICC Statute, Art. 7(1)(h)

[47] ICC Elements of Crimes, Art. 7(2)(g)

[48] Valerie Oosterveld, "Gender, Persecution and the International Criminal Court: Refugee Law's Relevance to the Crime Against Humanity of Gender-Based Persecution", 17 Duke Journal Of Comparative & International Law 49, 2006, p. 50 [hereinafter: Oosterveld, "Gender, Persecution and the ICC"], available at: http://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=1093&context=djcil
referring to the conclusion issued in 1985 by the United Nations High Commissioner for Refugees Executive Committee: "[r]ecognized that states, in the exercise of their sovereignty, were free to adopt the interpretation that women asylum-seekers who face harsh or inhuman treatment due to their having transgressed the social mores of the society in which they lived may be considered as a 'particular social group' within the meaning of Article 1 A, paragraph 2, of the 1951 United Nations Convention relating to the Status of Refugees." U.N. High Comm'r for Refugees, Report of the Executive Committee of the Programme of the United Nations High Commissioner for Refugees on the Work of its Thirty-Sixth Session, Addendum to the Report of the United Nations High Commissioner for Refugees, para 115(4)(k), U.N. Doc. A/40/12/Add.1, 10 January 1986. (This conclusion is commonly referred to as the Executive Committee's Conclusion No. 39(XXXVI).

[49] Oosterveld, "Gender, Persecution and the ICC", supra at 48, p. 51

of gender-based persecution,[50] however refugee law and human rights law *"can surely be used to aid interpretation where there is an absence of international criminal law jurisprudence"*.[51]

In the ICC Statute, persecution is generally prohibited *"against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender […], or other grounds that are universally recognized as impermissible under international law in connection with [any other crime against humanity] […] or any crime within the jurisdiction of the Court."*[52] More specifically, political, racial, national, ethnic and religious persecutory grounds were reproduced in the ICC Statute from those included in the earlier Statutes of the ICTY and the ICTR, but three new grounds were added: gender, cultural and *"other grounds that are universally recognized as impermissible under international law"*. In this framework, there are two elements that, when combined, differentiate gender-based persecution from persecution based on other grounds, namely, the severe deprivation, contrary to international law, of the victim's fundamental rights and the perpetrator's targeting based on gender. Refugee law can assist in the interpretation of both elements.

The first element arises the problem of how to define the "fundamental rights" within the frame of gender-based persecution. The jurisprudence of the ICTY and ICTR can provide some help. Although the ICTY clarified that there is not a comprehensive list of acts or omissions amounting to violations of fundamental rights,[53] it added that the constitutive acts of genocide, crimes against humanity and war crimes, but also acts not enumerated in the Statute, such as those involving *"physical or mental harm or infringements upon individual freedom",*[54] may be relevant for this purpose. Indeed, rape and sexual assault are certainly included among the most serious violations of human rights. Consistently, the United Nations High Commissioner for Refugees' (UNHCR) 2002 Guidelines on International Protection observed that *"there is no doubt that rape and other forms of gender-related violence, such as dowry-related violence, female genital mutilation, domestic violence and trafficking, are acts which inflict severe pain and suffering, both mental and physical, and which have been used as forms of persecution, whether perpetrated by State or private actors".*[55]

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[50] See for example, Prosecutor v. Zoran Kupreškić et al., IT-95-16-T, Trial Judgment, 14 January 2000, para 589: "It would be contrary to the principle of legality to convict someone of persecution based on a definition found in international refugee law or human rights law. In these bodies of law the central determination to be made is whether the person claiming refugee status or likely to be expelled or deported has a "well founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion." The emphasis is more on the state of mind of the person claiming to have been persecuted (or to be vulnerable to persecution) than on the factual finding of whether persecution has occurred or may occur. In addition, the intent of the persecutor is not relevant. The result is that the net of "persecution" is cast much wider than is legally justified for the purposes of imposing individual criminal responsibility."

[51] Oosterveld, "Gender, Persecution and the ICC", supra at 48, p. 52, citing: A. Widney Brown and Laura Grenfell, "The International Crime of Gender-Based Persecution and the Taliban", 4 Melb. J. Int'l L. 347, 2003

[52] ICC Statute, Art. 7(1)(h)

[53] Prosecutor v. Mitar Vasiljević, IT-98-32-T, Trial Judgment, 29 November 2002, para 246

[54] Ibid.

[55] Oosterveld, "Gender, Persecution and the ICC", supra at 48, p. 65, citing the UN High Comm'r for Human Rights, "Guidelines on International Protection: Gender-Related Persecution within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees", U.N. Doc. HCR/GIP/02/01, May 7, 2002 [hereinafter: 2002 UNHCR Gender Guidelines]

The element of targeting because of gender can be explained considering the definition of gender given in the Rome Statute: gender refers "*to the two sexes, male and female, within the context of society*".[56] Therefore, *"gender is a construct built upon social understandings of what is expected of those of the male and female biological sex".*[57] The definitions of the term "gender" developed within the United Nations context also provide indicators of the current international understanding of this concept,[58] in particular, the definition of gender given in the 2002 UNHCR's Gender Guidelines:

> *Gender refers to the relationship between women and men based on socially or culturally constructed and defined identities, status, roles and responsibilities that are assigned to one sex or another, while sex is a biological determination. Gender is not static or innate but acquires socially and culturally constructed meaning over time.*[59]

It is sometimes difficult to identify gendered motivations at the basis of persecution. Audrey Macklin, in the refugee law context, has proposed a way to distinguish how gender, motivation and intent are or not, causally connected. According to Macklin, it is necessary to distinguish between "persecution that takes gender-specific forms" and "persecution because of gender": "*the idea of women being persecuted as women is not the same as women being persecuted because they are women*. *The former addresses forms of persecution that are gender-specific […]. [The latter] addresses a causal relationship between gender and persecution."*[60] Therefore, Macklin identified two categories of persecution:

- persecution that results in acts that can be considered to have a "gender-specific manifestation";
- persecution perpetrated because of "gender motivations."

Macklin provided the following examples to explain her categorization: *"one may be persecuted as a woman (e.g., raped) for reasons unrelated to gender (e.g., membership in an opposition political party), not persecuted as a woman but still because of gender (e.g., flogged for refusing to wear a veil) and persecuted as and because one is a woman (e.g., genital mutilation)."* [61] In her view, even though all the three examples concern gendered persecution, it cannot be inferred that each of them constitutes persecution on the ground of gender.

Roberts reached similar conclusions: *"gender-specific harm"* refers *"to harm that is unique to, or more commonly befalls, members of one sex,"* and *"gender-related persecution refers to a causal relationship between the persecution and the reason for the persecution."*[62]

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[56] ICC Statute, Art.7(3)

[57] Valerie Oosterveld, "The Definition of "Gender" in the Rome Statute of the International Criminal Court: A Step Forward or Back for International Criminal Justice?", 18 Harv. Hum. Rts. J. 55, 2005, pp. 72, 73, available at http://wikigender.org/images/6/62/Definition_of_gender_in_the_Rome_Statute.pdf [hereinafter: Oosterveld, "The Definition of "Gender" in the Rome Statute"]

[58] Oosterveld, "The Definition of "Gender" in the Rome Statute", supra at 57, pp. 81, 82

[59] Oosterveld, "Gender, Persecution and the ICC", supra at 48, p. 77, citing the 2002 UNHCR Gender Guidelines, supra at 55

[60] Oosterveld, "Gender, Persecution and the ICC", supra at 48, pp. 82-83, citing Audrey Macklin, "Refugee Women and the Imperative of Categories", 17 Hum. Rts. Q. 213, 1995, pp. 258-259

[61] Ibid.

[62] Anthea Roberts, "Gender and Refugee Law", 22 Austl. Y.B. Of Int'l L. 159, 2002, p. 174

According to Oosterveld, Macklin's analysis may be relevant also in the contest of the ICC's persecution based on gender ground: indeed, "*the causal link between gender and persecution should be pursued by the ICC only in cases where persecution occurs because of gender"*. Instead, when the persecution is gender-specific, but not because of gender, it might be more appropriate to pursue other grounds.[63] However, she commented that whereas Macklin's approach can provide a conceptual elucidation of the causal link between gender and persecutory targeting, in practice it may be very difficult to distinguish cases of "persecution because of gender" from cases of "gender-specific persecution". In fact, the difference between the two categories is not always evident and the two categories can be inseparably interconnected, in practice. In addition, it can be sustained that sexual violence committed against a woman always has *"an underlying persecutory intent, even if there is an overlying political, religious, or other intent*".[64] On this issue, Roberts provided a clear example:

If a woman who was vaginally raped would have been persecuted in another way had she been a man, then the crime may be gender-specific, but it may not amount to gender-related persecution. However, if that woman would not have been subjected to persecution had she been a man, then the persecution may be gender-related.
It is also arguable that the sexual nature of the violence perpetrated against women represents an expression of hatred against women.
After all, if the motivation for harm were gender-neutral, why would the harm take a gender-specific form?[65]

Consequently, although it can be argued that certain violations can never be divided into Macklin's categories, her categorization may anyway assist the ICC's Prosecutor to decide whether a charge of gender-based persecution or a charge of persecution based on other grounds is more appropriate and not simply easier to be proved.

In conclusion, it has to be emphasized the importance to prosecute gender-based violence specifically, alongside the underlying gender-based acts, in order to underline the specific harm of the crimes committed. Indeed, *"gender violence is regularly employed alongside and to exacerbate other forms of violence and repression".*[66]

[63] Oosterveld, "Gender, Persecution and the ICC", supra at 48, p. 84
[64] Oosterveld, "Gender, Persecution and the ICC", supra at 48, p. 85, referring to Catharine A. Mackinnon, "Are Women Human? And Other International Dialogues", 2006, p. 180-91. (Although Mackinnon discusses rape in the context of genocide, her analysis also extends to gender-based persecution)
[65] Oosterveld, "Gender, Persecution and the ICC", supra at 48, p. 85, citing: Anthea Roberts, "Gender and Refugee Law", 22 Austl. Y.B. Of Int'l L. 159, 2002, p. 189
[66] Beth Van Schaack, "Obstacles on the Road to Gender Justice: The International Criminal Tribunal for Rwanda as Object Lesson", 17 Am. U.J. Gender Soc. Pol'y & L. 361, 2009, p. 377, available at: https://www.academia.edu/6475852/Obstacles_on_the_Road_to_Gender_Justice_The_International_Criminal_Tribunal_for_Rwanda_as_Object_Lesson

5.2. ICC's first attempts to prosecute sexual violence crimes

5.2.1 The case of the Prosecutor v. Thomas Lubanga Dyilo before the ICC

Although in Congo sexual violence has been widespread, the International Criminal Court's first trial did not include any explicit allegation of sexual violence crimes. Consequently, the Defendant Thomas Lubanga Dyilo was convicted only of enlistment, conscription and use of child soldiers. On 1 December 2014, the Appeals Chamber confirmed the trial verdict, declaring Lubanga guilty and sentencing him to 14 years of imprisonment.

Despite the fact that, in this case, the Prosecutor Luis Moreno-Ocampo did not include charges of gender-based crimes, choosing to focus on the use of child soldiers, he made multiple references to the commission of sexual violence crimes by the militia groups under Lubanga's command. In fact, although the Prosecutor's Arrest Warrant for Lubanga did not include such charges, in its opening statement, in January 2009, the Prosecution reported that rape was used during recruitments: child soldiers were encouraged to rape women as part of their training, girl soldiers, some as young as 12 years old, were the everyday sexual victims of other fighters. Indeed, girl soldiers were used as cooks and fighters, cleaners and spies, scouts and sexual slaves. In this occasion, the Trial Chamber also heard a significant amount of direct testimonies on sexual violence by witnesses. Based on these testimonies, on 22 May 2009, the Legal Representatives of Victims attempted to widen the charges against Lubanga to include gender-based crimes. More specifically, they requested the Trial Chamber to consider the modification of the legal characterization of the facts, pursuant to Regulation 55 of the Regulations of the Court, on the purpose of adding crimes of sexual slavery and inhuman and cruel treatment, to the existing characterization. Whereas the Trial Chamber allowed such a modification, the Appeals Chamber overturned this decision because the legal re-characterization of facts cannot include facts and circumstances not originally contained in the charges. Therefore, it sustained that Regulation 55 of the Regulations of the Court may not be used to introduce new facts and circumstances to those described in the charges.

Because of the lack of amendments to the charges and the unsuccessful attempt by the Legal Representatives to use Regulation 55, the Trial Chamber held that, given the Prosecution's omission of factual allegations regarding sexual violence in the indictment, it was precluded from taking allegations of sexual violence into consideration for the purpose of the judgment. However, the Trial Chamber noted that evidence of sexual violence could be taken into account to establish the responsibility of the accused, with implications for sentencing.

Moreover, the Chamber did not include sexual violence as an aspect of the crimes of conscription, enlistment and use of child soldiers, as proposed by the Prosecution. The Chamber simply argued that the active participation in hostilities implies numerous roles to support the combatants, all with an underlying common feature: the child concerned is a "potential target". In fact, it did not adopt the perspective suggested by the Prosecution in its closing arguments. More specifically, in its closing arguments, the Prosecution urged the Chamber to make clear that the *"girls forced into marriage with commanders were not the wives of commanders but victims of*

recruitment." Judge Odio-Benito asked how could sexual violence be relevant to the case and how the Prosecution could expect the Trial Chamber to refer to the sexual violence crimes, if they were not included in the charges against Lubanga. Although this question was directed at Deputy Prosecutor Fatou Bensouda, Chief Prosecutor Moreno-Ocampo was granted permission by the Chamber to answer. He stated:

We believe the facts are that the girls were abused, used as sexual slaves and raped. We believe this suffering is part of the suffering of the conscription.
We did not allege and will not present evidence linking Thomas Lubanga with rapes. We allege that he linked it with the conscription and he knows the harsh conditions. So, what we believe in this case is a different way to present the gender crimes. It presents the gender crimes not specific as rapes.
Gender crimes were committed as part of the conscription of girls in the militias. And it is important to have the charge as confined to the inscription, because if not [...] the girls are considered wife and ignored as people to be protected and demobilized and cared.[67]

The Prosecutor explained that he had decided to not to charge sexual violence in order make clear that the sexual abuses and the gender crimes suffered by the girls in the camps, were a "gendered" component of the crime of conscription. In fact, the Prosecutor clarified that he believed that a commander's order to abduct girls to use them as sexual slaves or rape them, was an order to use the children in hostilities.

Accordingly, in her separate and dissenting opinion, Judge Odio Benito found that sexual violence was an *"intrinsic element"* of the criminal conduct of use to participate actively in the hostilities.[68] She argued that the majority's decision not to include sexual violence within the concept of "use to participate actively in the hostilities" rendered this aspect of the crime *"invisible".*[69] She emphasized that *"children are protected from child recruitment not only because they can be at risk for being a potential target to the enemy but also because they will be at risk from their 'own' armed group who has recruited them and will subject these children to brutal trainings, torture and ill-treatment, sexual violence and other activities and living conditions that are incompatible and in violation to these children's fundamental rights."*[70]

5.2.2 The case of the Prosecutor v. Callixte Mbarushimana before the ICC

As the Office of the Prosecutor acknowledged, the ICC is currently attempting to keep a gender perspective when prosecuting war criminals. This gender perspective requires an understanding of the *"differences in status, power, roles and needs between males and females and the impact of gender on people's opportunities and interactions"*. This approach is meant to enable

[67] Ibid.
[68] Prosecutor v. Thomas Lubanga Dyilo, Trial Judgment, Separate and Dissenting Opinion of Judge Odio Benito, para 20
[69] Ibid., para 17
[70] Ibid., para 19

the Prosecutor to better understand the nature of the crimes committed, as well as the experiences of individuals and communities.[71]

Eight out of the 13 charges against Callixte Mbarushimana,[72] concerned gender-based crimes, including rape, torture, mutilation, cruel treatment, other inhumane acts and, most importantly, persecution.[73] In fact, he was charged for the first time in an international criminal tribunal, with gender-based persecution achieved through means including rape, committed in North and South Kivu, Congo, under the mode of responsibility set forth in Article 25(3)(d) of the Rome Statute. In particular, the ICC's Decision on the Prosecutor's Application for a Warrant of Arrest detailed how the *Forces Démocratiques pour la Libération du Rwanda* (FDLR) exploited rape to punish women and girls suspected of collaborating with opposing forces; raped women and girls before killing them; raped pregnant women, causing miscarriages; forced civilian boys to rape civilian girls; killed women and girls who resisted rape and sexually mutilated women and girls during and after rape.[74] The Prosecutor emphasized that these acts *"intentionally and in a discriminatory way target[ed] women and men seen to be affiliated with FARDC [Forces Armée de la République Démocratique du Congo] on the basis of their gender, trough torture, rape, inhumane acts and inhuman treatment".*[75]

However, the Pre-Trial Chamber declined to confirm the charges due to the lack of sufficient evidence to establish substantial grounds to believe that Mbarushimana could be held criminally responsible for these crimes. The Prosecutor appealed, but on 30 May 2012, the Appeals Chamber of the ICC unanimously dismissed his Appeal.

It has to be further considered that there is a concrete risk that the underlying gender-based conducts, usually encompassing sexual violence acts, could be considered prevailing and absorbing the crime of persecution, as it happened for other offences, such as torture and other outrages upon personal dignity,[76] despite the fact that the ICC Elements of Crimes are different. In particular, persecution contains one additional element, if confronted to sexual violence crimes, that of the targeting a specific group. This consideration is particularly important because currently other accused are charged with gender-based persecution, among the others, Ahmad Muhammad Harun,

[71] ICC Office of the Prosecutor, "Policy Paper on Sexual and Gender-Based Crimes", June 2014, supra at 1

[72] Callixte Mbarushimana, the Executive Secretary of the Forces Dèmocratiques pour la libération de Rwanda (FDLR) since 2007 and heir of certain executive powers of FDLR Presidency in 2009

[73] Women's Initiative for Gender Justice, "DRC: Pre-Trial Chamber I declines to confirm charges against Mbarushimana and orders his release", available at: http://www.iccwomen.org/news/docs/WI-LegalEye3-12-FULL/LegalEye3-12.html "The eight out of 13 charges for gender-based crimes were: torture as a crime against humanity, torture as a war crime, rape as a crime against humanity, rape as a war crime, other inhumane acts (based on rape and mutilation of women) as a crime against humanity, inhuman treatment (based on rape and mutilation of women) as a war crime, persecution (based on gender) as a crime against humanity, and mutilation as a war crime".

[74] Situation in the Democratic Republic of the Congo, Prosecutor v. Callixte Mbarushimana, ICC-01/04-01/10, Decision on the Prosecutor's Application for a Warrant of Arrest, 28 September 2010, para 12

[75] Ibid., para 10, Count 11

[76] See *inter alia*, Prosecutor v. Jean-Pierre Bemba Gombo, Decision on the Confirmation of Charges, ICC-01/05-01/08, 15 June 2009, paras 202-205, 302-312: the prosecutor charged Jean-Pierre Bemba Gombo. He was charged with the crime against humanity and the war crime of rape and torture and other war crimes as outrages upon personal dignity. The Pre-Trial Chamber declined to confirm the charges relative to torture and outrages upon personal dignity because they were cumulative to the crime of rape charges. In fact, according to the Chamber, they were fully subsumed by rape charges: torture and outrages upon personal dignity did not constitute "distinct crimes" because they were based on the same conduct, thus, rape was the most appropriate qualification of the facts.

Ali Muhammad Ali Abd-Al-Ramen (Aly Kushayb), Abdel Raheem Muhammad Hussein with reference to the crimes they had allegedly committed in Darfur.[77]

Concluding on the issue, as Valerie Oosterveld well affirmed: *"[the risk to subsume persecution into the underlying gender based acts] is of concern, because if not remedied, the associated harm resulting from the various gender related charges will not be fully captured in the judgment".*[78]

5.2.3 The case of theProsecutor v. Germain Katanga and Mathieu Ngudjolo Chui before the ICC

Mathieu Ngudjolo Chui was tried jointly with Germain Katanga for the crimes they had supposedly committed in the Democratic Republic of Congo, as commanders of the *Forces de Résistance Patriotique d'Ituri* (FRPI) and *Front des Nationalistes et Intégrationnistes* (FNI), respectively. The Katanga and Ngudjolo case was the first case in which crimes of sexual violence, in particular rape and sexual slavery, were charged.

On 21 November 2012, the Trial Chamber decided to separate the two cases.[79]

On 18 December 2012, in the ICC's second trial judgment, Trial Chamber II acquitted Mathieu Ngudjolo Chui of all crimes charged. The Ngudjolo's acquittal was based on the Trial Chamber's factual findings relative to the evidence concerning, in particular, the function, the organization and structure of the Lendu combatants and the Ngudjolo's role in the militia.[80] In fact, contrary to the Prosecution's statement, Ngudjolo could not have been the Commander-in-Chief of the FNI, in the relevant period, because the evidence presented during trial revealed that the FNI was officially created later. However, the Trial Chamber held that this change of the name of the militia did not constitute a modification of the charges and referred to the Lendu combatants, instead of the FNI.[81]

Nevertheless, although the Chamber was satisfied that the alleged crimes, including rape and sexual enslavement,[82] had taken place, it concluded that, in the absence of sufficient evidence, it could not find beyond a reasonable doubt that Ngudjolo was the commander of the Lendu combatants during the relevant period.[83]

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[77] These men were charged for their involvement in governmental and Janjaweed attacks directed against the Fur population, including persecution achieved through rape, in Bindisi and Arawala towns and in their surrounding areas. It is reported that the criminal acts targeted women and girls for their ethnicity. See also the tab at the end of this Chapter.

[78] "Sexual Violence as an international crime", Anne-Marie de Brouwer, Charlotte Ku, Renée Römkens and Larissa van den Herik (eds.), 2012, Chapter III (Valerie Oosterveld), p. 75

[79] Gender Report Card of the International Criminal Court, 2013, Women's Initiatives for Gender Justice, p 89, available at: http://www.iccwomen.org/documents/Gender-Report-Card-on-the-ICC-2013.pdf [hereinafter: "Gender Report Card of the International Criminal Court, 2013"]

[80] Gender Report Card of the International Criminal Court, 2013, p. 89

[81] Prosecutor v. Mathieu Ngudjolo Chui, ICC-01/04-02/12-3, Trial Judgment, 18 December 2012, paras 347-352

[82] Ibid., para 338: "The Chamber further notes that there is a wealth of evidence to show that […] women were raped and some were kept in captivity by the attackers"

[83] Ibid., paras 430-443

Despite its final decision was to acquit Ngudjolo, being this decision based on the absence of sufficient evidence to prove his criminal responsibility, the Chamber specified that the failure to establish his guilt beyond a reasonable doubt, did not affect the certainty that the alleged facts occurred. It further stated that *"finding an accused person not guilty does not necessarily mean that the Chamber considers him or her to be innocent"*.[84]

On 23 May 2014, a majority of Trial Chamber II of the International Criminal Court sentenced Germain Katanga to 12 years' imprisonment. Katanga was convicted, Judge Van den Wyngaert dissenting, as an accessory within the meaning of Article 25(3)(d) of the ICC Statute for the war crimes of directing an attack against a civilian population, pillaging and destruction of property, as well as for murder as a war crime and a crime against humanity. Katanga was unanimously acquitted as an accessory to rape and sexual slavery as war crimes and crimes against humanity. He was also acquitted of the war crime of using child soldiers.[85]

On 25 June 2014, the Defence for Germain Katanga and the Office of the Prosecutor both discontinued their appeals against the judgment of the Trial Chamber; therefore, the judgment is now final.[86]

In order to pronounce its decision, the ICC Trial Chamber analyzed, for the first time, the elements of the crime of rape as a war crime under Article 8(2)(e)(vi) of the Statute and as a crime against humanity under Article 7(1)(g) of the Statute, making reference to the ICC Elements of Crimes.[87]

Concerning rape, the Chamber found that the first element, that of *"the perpetrator's invasion of the body of a person by conduct resulting in penetration"*, can be established also if the perpetrator does not personally undertake the penetration, because it includes instances in which the perpetrator is himself penetrated or brings about the penetration.[88]

The Chamber further explained that the second element lists the circumstances that render the invasion of the person's body a criminal act. In particular, it clarified that, with the exception of the specific situation in which the perpetrator takes advantage of the inability of a person to give genuine consent, the ICC Elements of Crimes does not require the absence of consent, thus, this factor does not need to be proved;[89] on the contrary, it is sufficient to prove one of the circumstances of a coercive nature listed in the second element.[90]

The Chamber also added that, for the crime of rape to be a crime against humanity, the conduct must have been part of a widespread or systematic attack against a civilian population,[91] whereas,

[84] Ibid., para 36
[85] Women's Initiatives for Gender Justice, "Katanga Sentenced to 12 Years by ICC: The Prosecutor v. Germain Katanga", 2014, available at: http://www.iccwomen.org/documents/Statement-Katanga-Sentencing.pdf
[86] The Prosecutor v. Germain Katanga, Press Release: 25/06/2014, "Defence and Prosecution discontinue respective appeals against judgment in Katanga case", ICC-CPI-20140625-PR1021, available at: http://www.icc-cpi.int/en_menus/icc/press%20and%20media/press%20releases/Pages/pr1021.aspx
[87] Prosecutor v. Germain Katanga, ICC-01/04-01/07-3436, Trial Judgment, 23 May 2014, para 962, reporting: ICC Elements of Crimes, Articles 7(1)(g)-1 and 8(2)(e)(vi)-1
[88] Ibid., para 963
[89] Ibid., paras 964-965
[90] Ibid., para 966
[91] Ibid., para 967

for the crime of rape to be a war crime, the conduct must have taken place in the context of and be associated with an armed conflict.[92]

With regard to the mental elements of the crime, the Chamber referred to the knowledge and intent requirements set forth in Article 30 of the ICC Statute. Therefore, it is necessary to demonstrate that the perpetrator intentionally *"took possession"* of the victim's body, by deliberate action or failure to act. Furthermore, the perpetrator must have known that the act was committed by force, threat of force, coercion or by taking advantage of the inability of the victim to give genuine consent.[93]

Finally, the Chamber specified that, in addition to the knowledge and intent requirements under Article 30 of the Statute, it is necessary to establish the intent element for the crimes against humanity and war crimes. Respectively, the perpetrator must be aware that the conduct was part of or have intended it to be part of a widespread or systematic attack against a civilian population or the perpetrator must have known of the factual circumstances establishing the existence of an armed conflict.[94]

The Chamber also analyzed the elements of the crime of sexual slavery, as a crime against humanity[95] and as a war crime,[96] as provided in the ICC Elements of Crimes.[97]

Regarding the first element, that of the practice *"of any or all of the powers attaching to the right of ownership over one or more persons"*, the Chamber defined this powers as *"the possibility to use, enjoy and dispose of a person as one's property, by placing the person in a situation of dependence that leads to a full deprivation of autonomy."* Therefore, the exercise of these powers does not necessitate a commercial transaction, but rather relates to the inability of a victim to change his or her condition. On this issue, it is also relevant the victim's subjective perception of his or her situation.[98] Moreover, the Chamber clarified that the forms of the power of ownership enumerated in the ICC Elements of Crimes do not constitute an exhaustive list.[99] The Chamber specified that the second element concerns the victim's incapacity to decide matters relating to his or her sexual activity. In this regard, it found that sexual slavery covers situations in which women and girls are coerced to *"share their lives with a person with whom they must perform acts of a sexual nature".*[100]

The Chamber also noted that for the crime of sexual slavery to be a crime against humanity or a war crime the respective contextual elements have to be satisfied. Namely, the conduct must have been part of a widespread or systematic attack against a civilian population for crimes against humanity and the conduct must have taken place in the context of and be associated with an armed conflict for war crimes.[101]

Considering the mental elements of the crime, as required in Article 30 of the Statute, the perpetrator must have been aware that he exercised, individually or collectively, one of the

[92] Ibid., para 968
[93] Ibid., paras 969 and 970
[94] Ibid., paras 971-972
[95] Ibid., para 10, referring to: ICC Statute, Article 7(1)(g)
[96] Ibid., para 10, referring to: ICC Statute, Article 8(2)(b)(xxii)
[97] ICC Elements of the Crimes, Article 7(1)(g)-2 and 8(2)(b)(xxii)-2
[98] Prosecutor v. Germain Katanga, Trial Judgment, paras 976 and 977
[99] Ibid., paras 975 and 976
[100] Ibid., para 978
[101] Ibid., paras 979 and 980

attributes of the right of ownership over a person and that he have intentionally coerced this person to perform acts of a sexual nature or have known that such a result, would occur in the ordinary course of events.[102] The Chamber observed that, according to the ICC Elements of Crimes, the commission of sexual slavery can involve more perpetrators with the intention to realize a common criminal purpose and clarified that, in case of collective conduct, the *mens rea* elements must be verified with regard to each perpetrator.[103]

Lastly, the Chamber considered that for sexual slavery to be a crime against humanity or a war crime, the perpetrator must be aware that his conduct was part of or have intended it to be part of a widespread or systematic attack against a civilian population or the perpetrator must have known of the factual circumstances establishing the existence of an armed conflict, respectively.[104]

The Chamber found that the crimes of rape and sexual slavery, both fulfilling the constitutive elements of war crimes and crimes against humanity, were committed by the Ngiti militia, during the attack in Bagoro.[105] Nevertheless, the Chamber found Katanga not guilty of contributing to the acts of sexual violence, because sexual crimes were not, in the opinion of the Chamber, part of the common purpose of the attack, unlike the crimes of directing an attack against a civilian population, pillaging, murder and destruction of property, for which he was convicted.[106]

[102] Ibid., para 981
[103] Ibid., para 982
[104] Ibid., paras 983 and 984
[105] Ibid., paras 999 and 1023
[106] Prosecutor v. Germain Katanga, Trial Judgment, para 1693: "*La Chambre rappelle qu'elle a conclu que les crimes de viol et d'esclavage sexuel ne faisaient pas partie du dessein commun; elle n'entend donc retenir aucune des quatre charges pertinentes contre l'accusé*". See also para 1691: "*La Chambre estime que l'ensemble de ces constatations démontre, au-delà de tout doute raisonnable, le caractère significatif de la contribution intentionnelle que Germain Katanga a apportée aux crimes de meurtre (constitutifs de crimes de guerre et de crimes contre l'humanité), d'attaque contre des civils, de destruction de biens et de pillage (constitutifs du crimes de guerre) et ce, en pleine connaissance de l'intention du groupe de les commettre*".
For a comment on the Katanga's acquittal of sexual violence crimes, see Chapter 5.3.2

5.3 Modes of liability concerning sexual violence crimes

Askin well explained that:

In a culture of mass atrocity, it may sometimes be difficult to determine which crimes were part of the agreed-upon enterprise and which were outside the scope of the intended crimes but nonetheless foreseeable.
But in most situations of mass violence and oppression, rape and other common forms of sexual violence will not be mere foreseeable consequences; rather, they should be considered integral parts of the destruction, of the physical and mental violence intentionally inflicted on the targeted group.[107]

As already observed, throughout history, sexual violence crimes have been condoned or tolerated by military commanders, as a result of opportunistic calculations. Moreover, since sexual violence has been used as a weapon of war, its commission has been also specifically planned, organized and ordered by civil and military leaders and implemented by the militias.

Consequently, it is important to consider how leaders, usually not "direct perpetrators", in the sense that they do not materially commit the crime, can be held responsible for the crimes committed by their subordinates, who are the "direct perpetrators".

Indeed, the ICC is empowered to prosecute not only the physical perpetrators, but also others responsible for sexual violence, in particular civil and military leaders who ordered, instigated, aided, abetted or otherwise facilitated commission of the crimes, pursuant to "individual responsibility", established in Article 25 of the ICC Statute; or who knew or had reason to know about crimes committed by subordinates under their control but failed to prevent, halt or punish the crimes, pursuant to "command/superior responsibility", established in Article 28 of the ICC Statute.[108]

5.3.1 Command responsibility and its first application by the ICC

The doctrine of command responsibility emerged in the military field and nowadays has enlarged to include the responsibility also of non-military superiors. In fact, Article 28 of the ICC Statute refers to the "responsibility of commanders and other superiors".

"Command responsibility" is generically and improperly used to indicate every form of responsibility of superiors for the crimes committed by subordinates, namely persons under his/her authority and control. However it is necessary to specify that if a superior issues criminal orders, he/she will share the responsibility for the execution of those criminal orders with his/her subordinates, thus, he/she is responsible pursuant to the general principles on accomplice liability, under Article 25(3) of the ICC Statute. Instead, command responsibility is used appropriately in cases in which the superior is aware of the criminal acts committed or about to be committed by his/her

[107] Kelly Dawn Askin, "Holding Leaders Accountable in the International Criminal Court (ICC) for Gender Crimes Committed in Darfur," 1(1) Genocide Studies and Prevention Journal 6, 2006, [hereinafter: Askin, "Holding Leaders Accountable in the International Criminal Court (ICC) for Gender Crimes Committed in Darfur"] available at: http://scholarcommons.usf.edu/gsp/vol1/iss1/6
[108] Ibid. See ICC Statute, Articles 25 and 28

subordinates, but he/she fails to respect his/her duty to punish them, if the criminal acts are already committed or to intervene preventing their commission. Indeed, in such situations, the responsibility of the superior is found on his/her culpable omission to act, pursuant to the principle of command responsibility set forth in Article 28 of the ICC Statute.[109]

The doctrine of command responsibility was used for the first time as the basis to establish criminal liability during the war crimes trials held in the aftermath of the World War II: the Japanese General Yamashita was the first person to be condemned thanks to this theory of liability by the United States Military Commission. General Yamashita was charged with a great number of criminal acts, including rape, committed by those under his command because *"he unlawfully disregarded and failed to discharge his duty as a commander to control the operations of the members of his command, permitting them to commit brutal atrocities"*.[110]

In the Yamashita case, the Prosecutor argued that *"so notorious and so flagrant and so enormous, both as to the scope of their operations and as to the inhumanity, the bestiality involved, that they must have been known to the accused if he were making any effort whatever to meet the responsibilities of his command or his position; and if he did not know of those acts, notorious, widespread, repeated, constant as they were, it is simply because he took affirmative action not to know."*[111]

Therefore, even though the Prosecutor was not able to prove that Yamashita had ordered the commission of these crimes, he succeed in arguing that he did know or anyway should have known about them, given the widespread dimension of the atrocities and the long time that, supposedly, it have taken to soldiers to perpetrate such a huge number of brutalities.

On 7 December 1945, the United States Military Commission illustrated the essence of command responsibility:

It is absurd to consider a commander a murderer or a rapist because one of his soldiers commits murder or rape.
Nevertheless, when murder and rape and vicious and revengeful actions are widespread offences and there is no effective attempt by a commander to discover and control the criminal acts, such a commander may be held responsible and even criminally liable, for the lawless acts of his troops, depending upon their nature and the circumstances surrounding them.[112]

It has to be further noted that in Nuremberg, on the contrary, the concept of responsibility for omission was not developed because the conviction of the high-ranking commanders were

[109] Chantal Meloni, "Command Responsibility in International Criminal Law", Asser Press, 2010, pp. 2-3
[110] Ibid., pp. 43, citing: United States v. Tomoyuki Yamashita, Manila, October 1945, the trial is reported in "Law Reports of Trials of war Criminals", prepared by the UN War Crimes Commission, Vol. IV, London: HMSO, 1948
[111] "Sexual Violence as an international crime" Anne-Marie de Brouwer, Charlotte Ku, Renée Römkens and Larissa van den Herik (eds.), 2012, Chapter II (Kelly Askin), pp. 46-47, reporting: Richard L. Lael, "The Yamashita precedent, war Crimes and Command Responsibility", Lanham, M.D.: Rowman & Littlefield Publishers, 1982, pp. 82-83, citing: IMTFE transcript at 100
[112] "Sexual Violence as an international crime" Anne-Marie de Brouwer, Charlotte Ku, Renée Römkens and Larissa van den Herik (eds.), 2012, Chapter II (Kelly Askin), pp. 46-47, reporting: Richard L. Lael, "The Yamashita precedent, war Crimes and Command Responsibility", Lanham, M.D.: Rowman & Littlefield Publishers, 1982, pp. 94-95.
The Court that tried Yamashita was a United States Military Commission established under, and subject to, the provisions of the Pacific Regulations of 24th September, 1945, Governing the Trial of War Criminals.

normally based on their "participation in the commission" of the crime, if not by means of the physical commission thereof, at least by means of ordering it.[113]

Both the Statutes of the ICTY and of the ICTR contain identical provisions relative to individual responsibility, in general and superior responsibility, in particular.

In general, the principle of individual criminal responsibility is set forth in Article 7(1) of the ICTY Statute and in Article 6(1) of the ICTR Statute. These provisions cover any form of commission of the crime and any form of complicity or participation in the commission of the crime, also by means of omission.[114] The two parallel Articles, in their first paragraphs, list the various forms of participation in a criminal act:

A person who planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of a crime covered by the Statute, shall be individually responsible for the crime.

Moreover, Articles 7(3) of the ICTY Statute and 6(3) of the ICTR Statute refer to the so-called "doctrine of command or superior responsibility":

The fact that any of the acts referred to in Articles 2 to 5 of the present Statute was committed by a subordinate does not relieve his superior of criminal responsibility if he knew or had reason to know that the subordinate was about to commit such acts or had done so and the superior failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof.

The problem of how to establish the individual criminal responsibility of persons that have a role in the commission of the crime but that do not participate in its physical execution, concerns essentially civil and military leaders. In fact, more specifically, although leaders seldom have the role of actually committing the crimes during an armed conflict, they may however have a fundamental role in the commission of such crimes, not only for ordering, instigating or planning criminal acts carried out by subordinates, but also for failing to take measures to prevent or repress the unlawful conduct of subordinates.[115]

The ICTY Trial Chamber, in Čelebići, clarified that all the *"individuals in positions of authority, whether civilian or within military structures, may incur criminal responsibility under the doctrine of command responsibility on the basis of their de facto as well as de jure positions as superiors".*[116] Irrespective of *de facto* or *de jure* authority, a superior is someone who has the power to prevent and repress the violations of his subordinates, thus, who exercises "effective control" over subordinates.[117]

[113] Meloni, "Command Responsibility in International Criminal Law", supra at 109, pp. 50-51
[114] Ibid., p. 79
[115] Prosecutor v. Zdravko Mucić, Hazim Delić, Esad Landžo & Zejnil Delalić (Čelebići camp), IT-96-21-T, Trial Judgment, 16 November 1998, para 333
[116] Ibid., para 354
[117] Ibid., para 378: "It is the Trial Chamber's view that, in order for the principle of superior responsibility to be applicable, it is necessary that the superior have effective control over the persons committing the underlying violations of international humanitarian law, in the sense of having the material ability to prevent and punish the commission of these offences".

In the Čelebići case, the ICTY Trial Chamber identified three constitutive objective requirements for superior responsibility, namely:

- the existence of a superior-subordinate relationship;
- the fact that the superior knew or had reason to know that the criminal act was about to be or had been committed;
- the fact that the superior failed to take the necessary and reasonable measures to prevent the criminal act or punish the perpetrator thereof.[118]

The Čelebići Trial Chamber further identified the subjective elements of superior responsibility:

- the superior had actual knowledge, established through direct or circumstantial evidence, that his subordinates were committing or about to commit crimes within the jurisdiction of the Tribunal; or
- the superior had in his possession information of a nature, which at the least, would put him on notice of the risk of such offences by indicating the need for additional investigation in order to ascertain whether such crimes were committed or were about to be committed by his subordinates.[119]

In the Čelebići case, the Trial Chamber was satisfied that the extensive evidence proved the terrible physical and psychological abuses, which included sexual violence,[120] to which the detainees in the Čelebići camp were continually subjected. Consequently, the Chamber found Delić and Landžo guilty of being personally responsible for their direct participation in the crimes committed against detainees, in their respective positions as deputy commander and guard at the camp. Mucić, the *de facto* commander of the camp, was found guilty for crimes committed by his subordinates. Delalić was acquitted of all charges, because the Chamber found that he did not have command and control over the camp or over the guards who worked there and thus, he could not be held criminally responsible for their actions.

The ICTR followed the Čelebići case law. The first notable ICTR judgment addressing the issue of superior responsibility was the case of the Prosecutor v. Bagilishema, rendered by the Appeals Chamber in 2002.

The Bagilishema Appeals Chamber, referring and concurring with the Čelebići case, explained that a proper interpretation of the "had reason to know" standard does not require a third inquiry aimed at the establishment of the accused eventual negligence[121] in failing to acquire knowledge, which

[118] Ibid., para 346

[119] Ibid., para 383

[120] For further details on sexual violence crimes, see Chapter 4.1.1

[121] For further details, see Prosecutor v. Ignace Bagilishema, ICTR-95-1A-A, Appeal Judgment, 3 July 2002, para 32: "[…] with regard to the concept of "criminal negligence", […] the Appeals Chamber observes that the Trial Chamber identified criminal negligence as a "third basis of liability." This form was qualified as a liability by omission, which takes the form of "criminal dereliction of a public duty."" See also para 33: "The Appeals Chamber wishes to recall and to concur with the Čelebići jurisprudence, whereby a superior's responsibility will be an issue only if the superior, **whilst some general information was available** to him which would put him on notice of possible unlawful acts by his subordinates, did not take the necessary and reasonable measures to prevent the acts or to punish the perpetrators thereof". See also para 34: "The Statute does not provide for criminal liability other than for those forms of participation stated therein, expressly or implicitly. […]"

was instead undertaken by the Trial Chamber.[122] Therefore, Trial Chamber should have had evaluated knowledge solely to determine whether the accused "knew" or "had reason to know" of the subordinates' crimes. In this way, the Appeals Chamber conformed the interpretation of command responsibility of the two Tribunals.

Comparing the ICC Statute to those of the two *ad hoc* Tribunals, the ICC Statute contains a more detailed provision, Article 28. In fact, contrary to the Statutes of the *ad hoc* Tribunals, the ICC Statute explicitly distinguishes between the responsibility of military commanders and that of *"other superiors"*. Responsibility arises for both military commanders and other superiors as the result of his or her failure to exercise proper control over subordinates;[123] however, responsibility for "other superiors" only arises where *"the crimes concerned activities that were within the effective responsibility and control of the superior."*[124]

Under the Statutes of the ICTY and of the ICTR, a superior should be held responsible whether he ***"knew or had reason to know"*** that his subordinates had already committed or were about to commit the crimes within the jurisdiction of the Tribunals. A similar, but not identical knowledge requirement is included in Article 28 of the ICC Statute, differentiated for civil and military superiors:

*the military commander or person either **knew** or, owing to the circumstances at the time, **should have known** that the forces were committing or about to commit such crimes*;[125]

*the superior either **knew**, or **consciously disregarded information** which clearly indicated, that the subordinates were committing or about to commit such crimes.*[126]

5.3.1.1 The case of the Prosecutor v. Jean-Pierre Bemba Gombo before the ICC

In this paragraph, I analyze how the Bemba decision confirming the charges[127], which is the ICC's first decision interpreting Article 28 of the ICC Statute, took advantage of the case law of the *ad hoc* Tribunals.

Jean-Pierre Bemba Gombo was the president and commander-in-chief of the *Mouvement de Libération du Congo* (MLC) and the former vice-president of the Democratic Republic of the Congo (DRC). In 2008, the ICC Trial Chamber considered that there were reasonable grounds to believe that, in the context of the armed conflict that occurred in the Central African Republic (CAR) at least from 25 October 2002 to 15 March 2003, the MLC forces led by Jean-Pierre Bemba Gombo, responding to the call of the president of the CAR Ange Félix Patassé to support part of the national army of the CAR and acting with a common purpose, committed mass crimes, including sexual offences.[128]

[122] Prosecutor v. Ignace Bagilishema, ICTR-95-1A-A, Appeal Judgment, 3 July 2002, para 35
[123] ICC Statute, Art. 28 (a) and (b)
[124] ICC Statute, Art. 28 (b)(ii)
[125] ICC Statute, Art. 28(a)(i)
[126] ICC Statute, Art. 28(b)(i)
[127] Prosecutor v. Jean-Pierre Bemba Gombo, Decision on Confirmation of Charges, 15 June 2009
[128] Prosecutor v. Jean-Pierre Bemba Gombo, ICC-01/05-01/08, Warrant of Arrest for Jean-Pierre Bemba Gombo, 23 May 2008, paras 11 and 12

On 3 March 2009, the Pre-Trial Chamber decided to adjourn the confirmation hearing in the case of Jean-Pierre Bemba Gombo and requested the Prosecutor to consider submitting to it an amended document containing the charges (DCC), in order to take into account that the legal characterization of the relevant facts may correspond to the criminal responsibility as a military commander or superior, within the meaning of Article 28 of the ICC Statute, instead of the individual responsibility invoked by the Prosecutor, i.e. co-perpetration under Article 25(3)(a) of the ICC Statute. Accordingly, in the Amended DCC, the Prosecutor charged the accused with criminal responsibility as a co-perpetrator under article 25(3)(a) of the Statute or, alternatively, as a military commander or person effectively acting as a military commander or superior under Article 28 (a) or (b) of the Statute for the crimes against humanity and war crimes he allegedly committed, which included rape.[129]

On 15 June 2009, the Pre-Trial Chamber II considered that there was sufficient evidence to establish substantial grounds to believe that Jean-Pierre Bemba Gombo was criminally responsible for the alleged crimes, having effectively acted as a military commander within the meaning of Article 28(a) of the ICC Statute.

In order to reach this conclusion, the Chamber analyzed the elements of command responsibility as identified in Article 28 of the ICC Statute.

According to Article 28 of the ICC Statute, a superior may be held responsible for the prohibited conducts of his subordinates for failing to fulfil his duty to prevent or repress such unlawful conducts or submit the matter to the competent authorities. Therefore, criminal responsibility for omissions may exist only when a legal obligation to act exists.[130]

The Chamber considered that, in order to establish criminal responsibility within the meaning of Article 28(a) of the ICC Statute, the Prosecutor has to prove the following elements for any of the alleged crimes:

1. the suspect must be either a military commander or a person effectively acting as such;
2. the suspect must have effective command and control, or effective authority and control over the forces (subordinates) who committed one or more of the crimes set out in Articles 6 to 8 of the Statute;
3. the crimes committed by the forces (subordinates) resulted from the suspect's failure to exercise control properly over them;
4. the suspect either knew or, owing to the circumstances at the time, should have known that the forces (subordinates) were committing or about to commit such crimes; and
5. the suspect failed to take the necessary and reasonable measures within his or her power to prevent or repress the commission of such crime(s) or failed to submit the matter to the competent authorities for investigation and prosecution.[131]

The Chamber explained that the term "military commander" refers to a category of persons formally or legally appointed to carry out a military commanding function, i.e. *de jure*

[129] Situation in the Central African Republic in the Case of the Prosecutor v. Jean-Pierre Bemba Gombo, Decision on Confirmation of Charges, ICC-01/05-01/08, 15 June 2009, para 341
[130] Ibid., para 405
[131] Ibid., para 407

commanders.[132] Instead, the term *"person effectively acting as a military commander"* refers to those who are not mandated by law to carry out a military commander's role, but they perform it *de facto,* by exercising "effective control" over a group of people, through a chain of command.[133] More specifically, the existence of an "effective control" over the forces that committed one or more offences within the jurisdiction of the Court,[134] in the context of Article 28(a) of the ICC Statute, means the material ability to prevent or punish the commission of the crimes or submit the matter to the competent authorities.[135] The Court evidently referred to the ICTY Čelebići case.[136]

The Chamber explained that a further element to be satisfied for the purpose of Article 28(a) of the ICC Statute is the evidence that the crimes committed by the suspect's forces resulted from his failure to exercise control properly over them.[137] In cases in which the subordinates had already committed the crime, a military commander or a person acting as a military commander is responsible for the crimes committed by his forces, if it is demonstrated that his failure to exercise his duty to prevent crimes, for example by means of punishing previous transgressions, *"increased the risk"* that the forces would commit these crimes.[138] On this respect, the Chamber considered that Article 28(a) of the ICC Statute encompasses two standards of fault element. The first, requires that the commander "knew", thus it encompasses the existence of actual knowledge. The second, "should have known", is a form of negligence,[139] it requires the superior to have merely *"been negligent in failing to acquire knowledge"* of his subordinates' illegal conduct.[140] Therefore, in the view of the Chamber, the "should have known" standard requires a commander's active duty to take the necessary measures to secure knowledge of the conduct of his troops and to inquire, in case of the commission of the crime.[141] Consequently, this criterion is different from the "had reason to know" criterion contained in the Statutes of the ICTR, of the ICTY and of the SCSL.[142]

Moreover, in order to fulfill the *mens rea* element, it is necessary to prove that the superior failed to respect at least one of the three duties listed in Article 28(a)(ii) of the ICC Statute: the duty to prevent crimes, the duty to repress crimes or the duty to submit the matter to the competent authorities for investigation and prosecution.[143] These three duties arise at three different stages in the commission of crimes: before, during and after. Thus, *"a failure to fulfil one of these duties is itself a separate crime"* under Article 28(a) of the ICC Statute.[144]

More specifically, the duty to prevent arises when the superior knew or should have known that people under his effective control *"were committing or about to commit",* thus, at any stage prior to the actual commission of crimes he/she has to intervene to prevent.[145]

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[132] Ibid., para 408
[133] Ibid., para 409
[134] Ibid., para 411
[135] Ibid., para 415
[136] See supra in this Chapter
[137] Prosecutor v. Bemba Gombo, Decision on Confirmation of Charges, para 420
[138] Ibid., para 426
[139] Ibid., para 428
[140] Ibid., para 432
[141] Ibid., para 433
[142] Ibid., para 434
[143] Ibid., para 435
[144] Ibid., para 436
[145] Ibid., paras 437 and 438

Differently, the duty to repress encompasses two duties arising at two different stages of the commission of crimes: a duty to stop ongoing crimes, interrupting a possible chain effect, which may lead to other similar events and, alternatively, a duty to punish perpetrators after the commission of crimes.[146] The only useful intervention would encompass the adoption of all the *"necessary and reasonable measures"* according to a *de facto* evaluation of the contextual circumstances.[147]

Conclusively it can be observed that, in this case, the Chamber *"relied on and borrowed extensively"*[148] from the ICTY's command responsibility case law.[149]

5.3.2 Joint criminal enterprise and the ICC's "theory of control"

In order to bring to justice leaders who, though not present on the crimes' scene, control and direct the commission of the atrocities, both the *ad hoc* Tribunals and more recently also the ICC[150] adopted a widened notion of the "commission of the crime", thus principal liability, including forms of participation to the common plan that would be more appropriately contextualized as accessorial forms of responsibility.

However, the ICC adopted the "theory of control of the crime" to distinguish between principals and accessories, immediately detaching itself from the JCE doctrine developed by the two *ad hoc* Tribunals.

It has been difficult for the ICTY and the ICTR to condemn leaders for sexual crimes, by means of superior responsibility,[151] which requires a high standard of proof especially relative to the element of "effective control" over the subordinates.[152] Therefore, the two Tribunals developed the doctrine of "joint criminal enterprise", which requires a lower standard of proof. Indeed, *"JCE through its 'mutual attribution' mechanism was extensively used to charge as perpetrators individuals who did not perform the actus reus of the crime"*.[153] Consequently, JCE undermined command responsibility, covering situations that would have been more properly qualified as cases of superior responsibility.[154]

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[146] Ibid., paras 439 and 440

[147] Ibid., paras 443

[148] Adria de Landri, "Command Responsibility in the International Tribunals: Is There a Hierarchy?", 2011, available at: http://works.bepress.com/adria_delandri/1

[149] Ibid. See also the Čelebići case. Further, consider that the ICTR itself relied on the ICTY jurisprudence on command responsibility.

[150] Consider the Katanga and Ngudjolo case, where both defendants were charged as principals and, more precisely, as indirect co-perpetrators, under Article 25(3)(a) of the ICC Statute. Nevertheless, Mathieu Ngudjolo was acquitted and Germain Katanga was partially acquitted. Moreover, Katanga's responsibility was, for the remaining part, reclassified and downgraded from principal liability to accessory liability. These judgments make it clear that the ICC failed to apply effectively its theory of liability.

[151] Superior responsibility: Art. 7.3 of the ICTY Statute

[152] Prosecutor v. Dario Kordić and Mario Čerkez, IT-95-14/2, Trial Judgment, 26 February 2001, para 415

[153] Chantal Meloni, "Command Responsibility, Joint Commission and 'Control over the Crime' Approach in the first ICC Jurisprudence: Who is (the Most) Responsible for the Commission of International Crimes?", in "The International Criminal Court in Search of Its Purpose and Identity", Triestino Martinello eds., 2014, pp. 39-56 [hereinafter: Meloni, "Command Responsibility, Joint Commission and 'Control over the Crime' Approach in the first ICC Jurisprudence"]

[154] Ibid.

In fact, according to the ICTY jurisprudence, the Prosecutor, in order to demonstrate superior responsibility, has to prove that the superior "had knowledge" or "had reason to have knowledge" of the risk that the "specific type of crime" could occur. More specifically, in cases of sexual violence, the Prosecutor has to prove that the accused had, at least, reason to know of the risk that his/her subordinates would commit sexual violence, specifically. Regarding the level of the risk required by the Court, it is sufficient that the superior knew about the possibility that such crimes could be committed. For this purpose, any element supporting the suspect that the risk of the commission of sexual violence crimes was more concrete than the general risk of the commission of crimes, may be relevant.[155]

The theory of joint criminal enterprise may be useful to reveal the connection existing between the physical criminal conduct of subordinates and the high-level official who exercises control upon them. Although the provisions on individual criminal responsibility contained in the Statutes of the ICTR and of the ICTY, in Article 6(1) and 7(1) respectively, do not explicitly refer to "joint criminal enterprise", the ICTY Chambers sustained that this theory of liability was *"firmly established in customary international law"*, as a form of commission, under these two Articles. [156]

Substantially, the two *ad hoc* Tribunals established that individual criminal responsibility can arise also when several individuals with a common purpose carry on a criminal activity, either jointly or by some members of the group. Anyone who contributes to the criminal activity, which aims at the fulfilment of a common criminal purpose, may be held criminally liable.

The three categories of JCE, elaborated by the *ad hoc* Tribunals, share the same objective elements:

1. a plurality of persons;
2. the existence of a common plan, design or purpose which amounts to or involves the commission of a crime within the governing statute and
3. the participation of the accused in the common design. It is required a "significant contribution" in the common plan.[157]

However, the subjective requirements vary with each category:

1. basic (JCE I, liability for a common purpose), applicable when all co-defendants act pursuant to a common criminal design or plan and share the *"intent to perpetrate a certain crime"*. Thus, each of them will be held liable as a co-perpetrator, regardless of the role played in the commission of the crime;
2. systemic (JCE II, liability for participation in a common criminal plan within an institutional framework), characterized by an organized criminal system, such as a concentration camps or a system of persecution, demands the perpetrator's *"personal knowledge of the system of ill-treatment"* implemented, as well as *"the intent to further this common concerted system of ill-treatment"*. In JCE II, it is understood that every person who knows about the system of ill-treatment and by his tasks, contributes to the maintenance of this system,

[155] "Sexual Violence as an international crime" Anne-Marie de Brouwer, Charlotte Ku, Renée Römkens and Larissa van den Herik (eds.), 2012, Chapter V (Michelle Jarvis, Elena Martin Salgado), p. 109
[156] Prosecutor v. Duško Tadić, IT-94-1-A, Appeal Judgment, 15 July 1999, para 220. See also, Prosecutor v. Édouard Karemera and Matthieu Ngirumpatse, ICTR-98-44-T, Trial Judgment, 2 February 2012, para 1433
[157] Ibid., para 227

implicitly shares the criminal intent of the members of the JCE, who directly commit the crimes. Consequently, JCE II requires the same subjective element of JCE I: (explicitly or implicitly) shared intent of the co-perpetrators.

3. extended (JCE III, criminal liability based on foresight and voluntary assumption of risk), applicable in situation when someone, joining in with a criminal purpose, commits an act that, although falling outside the common plan, is a natural and foreseeable consequence of the plan itself, for which the defendant willingly takes the risk. Therefore, if a member has the intention to participate in and further the criminal purpose of the group, will be held liable as a co-perpetrator for the crimes committed, regardless if they were not part of the common criminal design, once proved that the commission of the additional crimes by other members was *"foreseeable"* and the accused *"willingly took that risk"*.[158]

More specifically, in case of sexual violence crimes, it is necessary to prove that the sexual violence was part of a common plan in which the accused participated (JCE categories I and II) or that it was the natural and foreseeable consequence of the its implementation (JCE category III).

However, Askin commented that treating wartime sexual crimes as simply foreseeable (JCE III) could *"ignore the gravity and potency"* of these crimes, so commonly used a weapon of war. Thus, rape crimes should be prosecuted under JCE I and II, restricting the application of JCE III to situations in which the joint criminal plan is very specific and the rapes that occur, though not planned, are nonetheless foreseeable.[159]

In the major part of JCE cases judged by the ICTY Trial Chambers, the common purpose referred to crimes of forcible transfer and deportation, however, it was recognized that sexual violence itself could constitute part of the common plan.

In the cases of the Prosecutor v. Stakić,[160] the Trial Chamber convicted the accused of murder, extermination and persecution based, among other crimes, on rape and sexual assault, with reference to the sexual crimes committed in Omarska, Keraterm and Trnopolje detention centers.[161] The Appeals Chamber substantially confirmed the Trial Chamber's guilty plea and clarified that Stakić was found guilty as a participant in a JCE I, aimed at the ethnical cleansing of Bosnian Muslim and Bosnian Croats and at the establishment of Serbian control on a determined territory.[162] Therefore, the JCE had the purpose of persecution, deportation and forcible transfer. In particular, the Chamber explained that persecution was perpetrated through sexual violence crimes, which were part of the common criminal purpose.[163]

Moreover, in the case of the Prosecutor v. Krajišnik,[164] the Trial Chamber found that the accused shared the intent to commit the original crimes of deportation, forcible transfer and persecution

[158] Ibid., para 228. See also: Miren Odriozola-Gurrutxaga, "The Doctrine of Joint Criminal Enterprise at the *ad hoc* Tribunals and Its Applicability in the Rome Statute of the ICC", 2013, available at: http://www.penal.org/spip/IMG/Miren%20Odriozola.pdf

[159] Askin, "Holding Leaders Accountable in the International Criminal Court (ICC) for Gender Crimes Committed in Darfur", supra at 115

[160] Stakić was the President of the Crisis Staff of Prijedor municipality in Bosnia and Herzegovina

[161] Prosecutor v. Milomir Stakić, IT-97-24-T, Trial Judgment, 31 July 2003, para 881

[162] Prosecutor v. Milomir Stakić, IT-97-24-A, Appeal Judgment, 22 March 2006, paras 78, 85, 326, 104

[163] Ibid., paras 78 and 85

[164] Krajišnik was the President of Bosnian Serb Assembly and a member of the Presidency of the Bosnian-Serb Republic

based on these crimes from the beginning of the JCE. With respect to the expanded crimes of murder, extermination and persecution based, among the other crimes, on sexual violence, the Trial Chamber generally found that such offences were added to the JCE I.[165] In fact, despite the fact that such crimes were reported to the Bosnian-Serb leader, he did nothing to stop their commission. On the contrary, he persisted in the implementation of the common objective of the JCE, thereby coming to intend also these expanded crimes. Consequently, the Trial Chamber found that Krajišnik was liable pursuant to JCE I for the commission of these expanded crimes because they became part of the JCE.[166] Considering sexual violence crimes in particular, it can be argued that the Trial Chamber deduced, from the accused's behavior, that he agreed on the commission of sexual violence and thus, that he intended to pursue the common plan also through the expanded means of sexual crimes.[167] The Appeals Chamber, approved the theory of an expanded JCE elaborated by the Trial Chamber, but specified that in order to prove individual criminal responsibility for the expanded methods, which may be inferred from circumstantial evidence,[168] the Prosecutor has to demonstrate *"how and when"* the scope of the common objective broadened.[169] Lacking findings on this issue, the Appeals Chamber overturned the trial judgment due to unsufficient evidence relative to the expanded crimes that fell outside the original common objective of the JCE, which only encompassed the crimes of deportation and forcible transfer.[170] Indeed, the JCE could come to involve expanded criminal instruments, as far as it is verified that the members consented to the expanded method.[171]

Sexual violence was prosecuted before the ICTY also as a natural and foreseeable consequence of the common plan.

In fact, the case of the Prosecutor v. Kvočka[172] furnished further support to apply the JCE III theory to hold responsible for sexual crimes those who did not physically commit them, when the crimes were a natural and foreseeable consequence of the plan that the accused shared and contributed to implement. In particular, the ICTY Trial Chamber found that at the Omarska camp occurred a systemic ill-treatment (JCE II) to persecute non-Serbs, by means of various form of physical, mental and sexual violence:

> *Any crimes that were natural or foreseeable consequences of the joint criminal enterprise of the Omarska camp, including sexual violence, can be attributable to participants in the criminal enterprise if committed during the time he participated in the enterprise.*[173]

According to the Chamber, it would be unrealistic and irrational to expect that none of the women held in Omarska, placed in circumstances rendering them especially vulnerable, would be subjected to rape or other forms of sexual violence. This conclusion was further supported by the clear intent

[165] Prosecutor v. Momčilo Krajišnik, IT-00-39-T Trial Judgment, 27 September 2006, paras 4, 1126, 1145, 1182
[166] Prosecutor v. Momčilo Krajišnik, IT-00-39-A, Appeal Judgment, 17 March 2009, para 170: Trial Judgment as interpreted by the Appeals Chamber
[167] Prosecutor v. Momčilo Krajišnik, IT-00-39-T Trial Judgment, 27 September 2006, paras 1098, 1115-1119;
[168] Prosecutor v. Momčilo Krajišnik, IT-00-39-A, Appeal Judgment, 17 March 2009, para 163
[169] Ibid., para 175
[170] Ibid., paras 175-178
[171] Ibid., para 163
[172] For further information on Prosecutor v. Kvočka et al., see Chapter 4.1.2
[173] Prosecutor v. Miroslav Kvočka et al., IT-98-30/1-T, Trial Judgment, 2 November 2001, para 327

of the criminal enterprise to subject the targeted group to persecution through means encompassing violence and humiliation.[174]
The Appeals Chamber found that the Trial Chamber considered the crimes in the Omarska camp to have been committed primarily as part of a systemic type of joint criminal Enterprise (JCE II).[175] However, the Appeals Chamber observed that, although the Trial Chamber did not hold any of the appellants responsible *"for crimes beyond the common purpose of the joint criminal enterprise",* it had also considered the possibility of the case to fall in an extended form of joint criminal enterprise (JCE III). In particular, it held that the crimes committed, including those of sexual violence, could be deemed as natural or foreseeable consequences of the joint criminal enterprise of the Omarska camp, thus, attributable to participants in the criminal enterprise, if committed during the time they participated in the enterprise. On the issue, the Appeals Chamber further clarified that, an accused may be responsible for crimes committed beyond the common purpose of the systemic joint criminal enterprise, if they were a natural and foreseeable consequence thereof, assessed in relation to the knowledge of any particular accused.[176]

The ICTR Prosecution also solved the problem of establishing the criminal liability of leaders, who were considered "the most responsible" for the genocide, trying to connect the sexual violence crimes to the genocidal campaign by means of the joint criminal enterprise theory.

In fact, in the case of the Prosecutor v. Karemera, it was sustained that the civil authorities on trial were responsible for the widespread rapes committed throughout Rwanda in 1994, adopting the JCE III theory.

In particular, the Prosecutor charged Édouard Karemera, Mathieu Ngirumpatse and Joseph Nzirorera with rape as a crime against humanity, pursuant to Articles 6(1) and 6(3) of the ICTR Statute. The Prosecution followed a precise logical pattern:

- considered them responsible for raping or causing Tutsi women and girls to be raped, as part of a widespread or systematic attack against a civilian population on political, ethnic or racial grounds;
- affirmed that the accused were aware that rape was the natural and foreseeable consequence of the execution of the joint criminal enterprise;
- affirmed that the accused knowingly and willfully participated in that enterprise;
- sustained that, given the widespread and systematic nature of these rapes, the accused knew or had reason to know that the militia men were about to commit these crimes or that they had committed them;
- concluded that, although the accused had the material capacity to stop or to prevent the rapes or to punish those who committed them, they failed to take the necessary and reasonable measures.[177]

[174] Ibid.
[175] Prosecutor v. Miroslav Kvočka et al., IT-98-30/1-A, Appeal Judgment, 28 February 2005, para 84
[176] Ibid., para 86
[177] Prosecutor v. Édouard Karemera et al., Amended Indictment of 24 August 2005, paras 67, 68, 69, 70

Similarly, the Prosecutor charged Édouard Karemera, Mathieu Ngirumpatse and Joseph Nzirorera with rape as genocide or alternatively with complicity in genocide, pursuant to Articles 6(1) and 6(3) or 6(1) of the ICTR Statute, respectively. The Prosecutor argued that:

- the Interahamwe and the militiamen raped, sexually assaulted and mutilated Tutsi women and girls throughout Rwanda, causing them serious bodily and mental harm;
- such serious bodily or mental harm inflicted upon Tutsi women and girls was intended to destroy Tutsi's ethnic or racial identity and capacity to sustain themselves physically and psychologically as a group and to reproduce themselves as a group;
- the accused were aware that rape was the natural and foreseeable consequence of the execution of the joint criminal enterprise;
- anyway, knowingly and willfully participated in that enterprise.[178]

The Trial Chamber accepted the line proposed by the Prosecutor and convicted Karemera and Ngirumpatse for the rapes and sexual assaults as genocide[179] and as crimes against humanity,[180] under the mode of liability pursuant to Article 6(1) of the Statute, through JCE III.

The ICC Pre-Trial Chamber, in the Lubanga case, developed the "control over the crime" theory in order to distinguish between perpetration and participation. More specifically, the Chamber focused upon the concept of "control" to distinguish between principal liability and accessorial liability. It also established the existence of a hierarchical structure in the Rome Statute's Article 25(3), according to which the forms of perpetration included in Article 25(3)(a) prevailed over the other (accessorial) forms of criminal participation contained in Articles 25(3)(b), 3(c) and 3(d) of the Statute.[181]

It can be argued that the tendency of the ICC is interpreting Article 25 of the ICC Statute in a way that strains the scope of Article 25(3)(a), in order to include under "commission" also situations that would be better regarded as cases of command responsibility under Article 28 of the ICC Statute or accessory liability under Article 25(3)(b) or (c) of the ICC Statute.[182]

According to the ICC's theory of "control over the crime", three forms of principal liability exist within the meaning of Article 25(3)(a) of the ICC Statute. In fact, Article 25(3)(a) explicitly criminalizes three forms of "commission", namely direct perpetration, co-perpetration and indirect perpetration:

[178] Ibid., para 66
[179] Prosecutor v. Édouard Karemera et al., ICTR-98-44-T, Trial Judgment, 2 February 2012, para 1670
[180] Ibid., para 1682
[181] Miren Odriozola-Gurrutxaga, "The Doctrine of Joint Criminal Enterprise at the *ad hoc* Tribunals and its Applicability in the Rome Statute of the ICC", 2013, supra at 158
[182] Meloni, "Command Responsibility, Joint Commission and 'Control over the Crime' Approach in the first ICC Jurisprudence", supra at 153

1. direct perpetration or commission of the crime as an individual, applicable when the accused further an "essential contribution", i. e. possesses the required *mens rea* elements and his conduct fulfills the *actus reus* elements of the offence.[183]
2. co-perpetration or commission of the crime jointly with others, applicable when the accused has, together with others, control over the offence due to the "essential tasks" assigned to each of them.[184] In these cases, even though none of the co-perpetrators has overall control over the offence because they all depend reciprocally on one another for its commission, they all share control because each of them could impede the commission of the crime by not accomplishing his or her essential task.[185]
3. indirect perpetration or commission of the crime through another person, applicable if the accused has "control over the will" of those who directly commit the criminal act (although the accused does not perpetrate any of the criminal actions).[186]

The ICC case law has also established a fourth form of commission, not explicitly indicated in Article 25(3)(a), namely indirect co-perpetration.[187] More specifically, it is a form of co-perpetration where another person, who does not share the common plan or a hierarchical organization, carries out the essential contribution entrusted to a co-perpetrator. This mode of liability encompasses all of the elements of co-perpetration and indirect commission, as described above.

Whether the elements of the theory of control of the crime by virtue of a hierarchical organization are not fulfilled, the leader can only be held responsible as an accessory for ordering, soliciting or inducing the commission of the crimes by subordinates (direct perpetrators). And even when the ordering, soliciting or inducing by the leader cannot be proved, he or she could still be held criminally liable under the other forms of participation included in Articles 25(3)(c) and 3(d) of the ICC Statute, or under the provision on Superior Responsibility envisaged in Article 28 of the ICC Statute.[188]

Trial Chamber I found Lubanga guilty as a co-perpetrator of the crimes of conscripting and enlisting children under the age of fifteen years into the FPLC and using them to participate actively in hostilities within the meaning of Articles 8(2)(e)(vii) and 25(3)(a) of the ICC Statute.[189] To reach this finding, the Chamber analyzed the five factors of individual criminal liability enunciated by the Pre-Trial Chamber in its confirmation of charges decision and found that the evidence presented by the Prosecution satisfied all the five elements of co-perpetration (two objective and three subjective elements).

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[183] Miren Odriozola-Gurrutxaga, "The Doctrine of Joint Criminal Enterprise at the *ad hoc* Tribunals and its Applicability in the Rome Statute of the ICC", 2013, supra at 158, reporting: K. Ambos, "La Parte General del Derecho Penal Internacional. Bases para una Elaboración Dogmática", Konrad Adenauer-Stiftung E. V., 2005, p. 174-175

[184] Ibid., referring to: Katanga, Confirmation Decision (Decision on the Confirmation of Charges), para 520; Lubanga, Confirmation Decision, para 326

[185] Ibid., supra at 166, referring to: Katanga, Confirmation Decision, para 488 and 519-526; Lubanga, Confirmation Decision, para 332 and 342

[186] Ibid., referring to: Katanga, Confirmation Decision, para 488 and 495-502; Lubanga, Confirmation Decision, para 332

[187] Prosecutor v. Thomas Lubanga Dyilo, ICC-01/04-01/06, Decision on the Confirmation of Charges, 29 January 2007, paras 318-367

[188] Katanga, Confirmation of Charges Decision, para 517

[189] Prosecutor v. Thomas Lubanga Dyilo, ICC-01/04-01/06, Trial Judgment, 14 March 2012, para 1358
Fur further consideration on the Lubanga case, see Chapter 5.2.1

In fact, in the confirmation of charges decision, the Pre-Trial Chamber had set forth two objective elements of co-perpetration: (1) the existence of a common plan between two or more persons and (2) the coordinated "essential contribution" by each co-perpetrator that results in the realization of the objective elements of the crime.[190] Following the Pre-Trial Chamber's reasoning, the Trial Chamber established that in case of co-perpetration, two or more individuals must act jointly to realize a common plan. The plan must include *"an element of criminality, although it does not need to be specifically directed at the commission of a crime."*[191] It is necessary, as a minimum, for the prosecution to demonstrate that the *"common plan included a critical element of criminality, namely that, its implementation embodied a sufficient risk that, if events follow the ordinary course, a crime will be committed"*. The existence of the common plan, which may be inferred from circumstantial evidence, grants a sufficient connection between the individuals who together commit the crime and allows responsibility to be established on a *"joint basis".*[192]

Moreover, in the view of the Majority, principal liability "objectively" requires a greater contribution than accessory liability. More specifically, if an accessory must have had *"a substantial effect on the commission of the crime"* to be held liable, then a co-perpetrator must have had, pursuant to a systematic reading of this provision, more than a substantial effect. [193] Therefore, the Majority found that the contribution of a co-perpetrator must be *"essential".*[194] To establish if a co-perpetrator had an essential role in accordance with the common plan, it has to be assessed if the exercise of the role and tasks assigned to him, were essential, on a case-by-case basis.[195] Those who commit a crime jointly include, *inter alia*, those who assist in formulating the relevant strategy or plan, thus, the accused does not need to be present on the scene of the crime, if he exercised, jointly with others, *"control over the crime"*.[196]

Conclusively on the objective elements, the Majority found that the commission of a crime jointly with another person involves two objective requirement:

- the existence of an agreement or common plan between two or more persons that, if implemented, will result in the commission of a crime and
- an essential contribution to the common plan that resulted in the commission of the relevant crime is provided by the accused.[197]

In addition to the two objective elements of co-perpetration, the Pre-Trial Chamber had also set forth three subjective, i.e. mental, elements. The Trial Chamber followed the Pre-Trial Chamber's approach and held that the Prosecution must demonstrate that: (1) the accused was aware that, by implementing the common plan, the criminal consequences would occur in the ordinary course of events; (2) the accused was aware that he provided an essential contribution to the implementation

[190] Ibid., para 923
[191] Ibid., para 924
[192] Ibid., paras 981 and 988
[193] Ibid., para 997
[194] Ibid., para 999
[195] Ibid., paras 1000 and 1001
[196] Ibid., paras 1004-1005
[197] Ibid., para 1006

of the common plan; and (3) the accused was aware of the factual circumstances that established the existence of an armed conflict and of the link between these facts and his conduct.[198]

However, the control theory is controversial. Judge Fulford, in his separate opinion in the Lubanga case, disagreed with the standard elaborated by the Pre-Trial Chamber and adopted by the Trial Chamber. He believed that the "control theory": (1) has no basis in the Statute, (2) does not create a hierarchy in the mode of liability and (3) that joint perpetration does not require an "essential contribution" of each co-perpetrator. The last requirement, in his opinion, would establish a too high standard for liability. He supported a plain interpretation of Article 25(3)(a) of the ICC Statute. With reference to joint perpetration, he proposed that a contribution to the crime is *"direct or indirect, provided either way there is a causal link between the individual's contribution and the crime"*.[199]

The Charging Document indicted Ngudjolo and Katanga under Article 25(3)(a) as principals who "indirectly co-perpetrated" war crimes and crimes against humanity, both including rape and sexual slavery.[200] The Trial Chamber affirmed that *"through a combination of individual responsibility for committing crimes through another person together with the mutual attribution among the co-perpetrators at the senior level, a mode of liability arises, which allows the Court to assess the blameworthiness of "senior leaders" adequately"*.[201] To understand this form of perpetration it is necessary to recall the constitutive elements of co-perpetration based on joint control over the crime, which were elaborated by the ICC Trial Chamber in the Lubanga case.

The Chamber developed this mode of participation in order to overcome the difficulties in establishing the responsibility of the accused as a principal responsibility, for all the crimes physically committed by members of the two militias they headed (the FRPI and the FNI), during a joint attack on a village. In fact, the Court considered that, although Katanga and Ngudjolo acted following a common plan, some of the members of the militias only accepted orders from the leader belonging to their own ethnic group.[202] Therefore, not all the direct perpetrators of the crimes could be said to be under the control of each of the two leaders:

> *[…] an individual who has no control over the person through whom the crimes would be committed cannot be said to commit the crime by means of that other person. However, if he acts jointly with another individual, one who controls the person used as an instrument, these crimes can be attributed to him on the basis of mutual attribution.*[203]

Considering more specifically sexual violence crimes, as already observed, Ngudjolo was acquitted of all crimes because the Prosecution failed to prove his responsibility. Instead, Katanga

[198] Ibid., paras 1013-1018
[199] Prosecutor v. Thomas Lubanga Dyilo, Separate and Dissenting Opinion Adrian Fulford, para 16
[200] For further details, see Chapter 5.2.3
[201] Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui, ICC-01/04-01/07, Decision on the Confirmation of Charges, 20 September 2008, paras 493 e ss. Such findings partly recall the ICTY Appeals Chamber elaborating the JCE doctrine in Tadić case (Prosecutor v. Duško Tadić, IT-94-1-T, Trial Judgment, 7 May 1997), see, in particular, para 190: "all those who have engaged in serious violations of international humanitarian law, whatever the manner in which they may have perpetrated, or participated in the perpetration of those violations, must be brought to justice".
[202] Situation in the Democratic Republic of the Congo, Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui, ICC-01/04-01/07, Decision on the Confirmation of Charges, 30 September 2008, para 493
[203] Ibid., para 493

was found guilty of all the crimes committed by the militia he commanded during the attack in Bogoro, except for sexual violence crimes, because these offences were not, in the opinion of the Chamber, part of the common purpose of the attack.[204]

Such conclusions present some critical aspects. In fact, the Chamber reasoned that since the evidence demonstrated that, in the weeks prior to the attack, Katanga was in charge to transport, stockpile and distribute weapons and ammunition to his militia,[205] his actions contributed to the commission of all of the crimes connected with the attack, except for the acts of sexual violence. Indeed, his conduct demonstrated planning, intent and preparation for the attack and proved Katanga's contribution to the common purpose, which did not include sexual violence acts. Substantially, the Chamber made *"an explicit connection between the type of contribution to the plan and the types of crimes committed"*.[206]

Considering whether the crimes charged were part of the common purpose, the Judges identified four indicators:

1. whether the crimes were numerous and committed repetitively
2. whether the crimes were necessary to fulfilling the common purpose
3. whether the perpetrators of rape and sexual slavery, the Ngiti combatants, had committed these crimes prior to the attack on Bogoro
4. whether the rape and sexual slavery were ethnically motivated, in light of the Prosecution's theory that ethnic hatred was a key dimension of the common plan.[207]

The Chamber stated to be satisfied that sexual crimes were committed by Katanga's combatants, during and after the attack on Bogoro. In fact, they considered the witnesses reliable. However, although the witnesses testified to be repeatedly raped and held in captivity and that there were other women in this condition, the Chamber concluded that these crimes were not part of the common purpose, partly because of an insufficient number of these crimes were committed.[208]

Moreover, the Chamber found that the acts of rape and sexual slavery were not ethnically motivated and they were not essential in order to achieve the objective to evacuate the Bogoro village. The majority sustained that it was the intensity of the firepower, deployed during the attack, that forced the population to flee. On the contrary, the Chamber did not seem to consider that also rape, capture and enslavement were effective ways to terrorize the population and force it to leave.

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[204] Prosecutor v. Germain Katanga, Trial Judgment, para 1693: "*La Chambre rappelle qu'elle a conclu que les crimes de viol et d'esclavage sexuel ne faisaient pas partie du dessein commun; elle n'entend donc retenir aucune des quatre charges pertinentes contre l'accusé*". See also para 1691: "*La Chambre estime que l'ensemble de ces constatations démontre, au-delà de tout doute raisonnable, le caractère significatif de la contribution intentionnelle que Germain Katanga a apportée aux crimes de meurtre (constitutifs de crimes de guerre et de crimes contre l'humanité), d'attaque contre des civils, de destruction de biens et de pillage (constitutifs du crimes de guerre) et ce, en pleine connaissance de l'intention du groupe de les commettre*". See also ibid., paras 999 and 1023.

[205] Ibid., paras 1671, 1679-1681

[206] Brigid Inder, "Expert Panel: Prosecuting Sexual Violence in Conflict - Challenges and Lessons Learned: A critique of the Katanga Judgment", Women's Initiatives for Gender Justice Global Summit to End Sexual Violence in Conflict, 11 June 2014; available at: http://www.iccwomen.org/documents/Global-Summit-Speech.pdf [hereinafter: "Expert Panel: Prosecuting Sexual Violence in Conflict"]

[207] Ibid.

[208] Ibid.

In reaching this conclusion, the Chamber appeared to have ignored the precedents from the ICTY and ICTR, which established that sexual and gender-based crimes are commonly used as effective means to achieve a purpose of ethnic cleansing. Moreover, the majority stated *"that women who were raped, abducted and turned to slavery had their life spared and escaped a certain death because they pretended to belong to an ethnicity other than Hema."*[209] This statement recognized that ethnicity was instead relevant and regrettably, re-proposed the overtaken idea of an existing hierarchy in the seriousness of the crimes, according to which sexual crimes are less grave than other crimes.[210]

It can be observed that the Chamber seemed to require that sexual violence should have been a more explicit element of the common plan than it was expected for other crimes, in order to convict Katanga. This reasoning is not agreeable: the preparation necessary to commit rape and sexual slavery has not to be considered different from that necessary to commit other crimes occurring simultaneously.[211]

Moreover, it can be noted that Katanga was found guilty of murder and of directing an attack against a civilian population under *dolus directus* of the first degree, meaning that he intended to commit these crimes. Whereas, the Chamber did not find Katanga guilty of intending to commit rape and sexual slavery, but it did not considered *dolus directus* of the second degree, namely whether Katanga knew that in the ordinary course of the attack, crimes of sexual violence would be committed by the militiamen. On the contrary, under this theory of intent not applied for sexual crimes, the Chamber found him guilty of pillaging and destruction of property, believing he knew that the ordinary course of events would have led to the commission of these crimes.[212]

As already emphasized, the doctrine of JCE is clearly inconsistent with the ICC Statute, as interpreted by the ICC.

In fact, JCE I, which is the only category of JCE that can be viewed as a form of co-perpetration, if included in the Rome Statute, should have been encompassed in the concept of co-perpetration under Article 25(3)(a), second alternative. However, the ICC has adopted a different concept of co-perpetration based on the functional control over the crime by the individuals who, due to the importance of their tasks, can impede the commission of the offence, by means of refusing to exercise them.[213] Consequently, if the accused played an inessential role in the commission of the crime, he or she can only be liable under some form of accessorial liability, whereas the same contributions would give rise to responsibility as co-perpetrator under JCE I. Therefore, since JCE I cannot be included in Article 25(3)(a) and JCE II is a subtype of JCE I, it also cannot find space in Article 25(3)(a). Moreover, as a form of co-perpetration, JCE I and, thus JCE II too, cannot be included in the mode of accessorial liability included in Article 25(3)(d).

Furthermore, with reference to JCE III, it is neither included in subparagraph (a) nor in subparagraph (d) of Article 25(3). JCE III cannot be considered as a form of co-perpetration, and thus, it cannot be included in Article 25(3)(a). Concerning the possibility of including it in Article 25(3)(d), it has to be

[209] Prosecutor v. Germain Katanga, Trial Judgment, para 1663
[210] Inder, Expert Panel: Prosecuting Sexual Violence in Conflict, supra at 206
[211] Ibid.
[212] Ibid.
[213] Katanga, Confirmation Decision, paras 488 and 519-526; Lubanga, Confirmation Decision, paras 332 and 342

specified that this provision requires that the contribution is made *"with the aim of furthering the criminal activity or criminal purpose of the group"* or, at least, *"in the knowledge of the intention of the group to commit the crime"*. It therefore excludes the criminal liability for the crimes that are not intended by the group, because they are just a possible consequence of the implementation of the common plan, where the awareness and acceptance of the risk of the commission of the crime is not shared with the rest of the members. On the contrary, under JCE III, members of a JCE can be held liable for the crimes of other members not explicitly agreed upon before, if the crimes were a natural and foreseeable consequence of the plan and they consciously took that risk. This explains why JCE III does not fall into Article 25(3)(d) either.[214] This reasoning can clarify why Katanga was acquitted[215] for the crimes of rapes and sexual slavery,[216] although the Chamber had been satisfied that they occurred, arguing that they were not part of the common purpose. It can be considered that applying the "possibility standard" of JCE III, probably the decision would have been different. In fact, the ICTY Appeals Chamber in the case of the Prosecutor v. Karadžić explained that it is not important whether the common plan explicitly encompasses all the crimes committed, the participants will be responsible for each of the crimes committed, if it was foreseeable that such crimes might be perpetrated:

[In case of] crimes going beyond [the common] purpose, the accused may be found responsible for such crimes provided that he participated in the common criminal purpose with the requisite intent and that, in the circumstances of the case, (i) it was foreseeable that such a crime might be perpetrated [...] in order to carry out the actus reus of the crimes forming part of the common purpose; and (ii) the accused willingly took that risk - that is the accused, with the awareness that such a crime was a possible consequence of the implementation of that enterprise, decided to participate in that enterprise.[217]

Conclusively, the following reasons explain why the ICC departed from the JCE doctrine, notwithstanding the fact that the ICTY Chambers affirmed that this theory of liability was established in customary international law.[218]

First, the three categories of JCE identify forms of participation of an individual in the commission of a crime. However, in particular the "extended form" of JCE dubiously fit the concept of perpetration. In fact, according to several authors, JCE in general, but especially its extended form, *"threaten the principle of individual and culpable responsibility by introducing a form of collective liability, or guilt by association, manifest in a strong subjective approach".*[219] Moreover, it has been argued that this doctrine may challenge the principle of legality, as far as it is based on cases that have dubious value as precedents under international criminal law.

[214] Miren Odriozola-Gurrutxaga, "The Doctrine of Joint Criminal Enterprise at the *ad hoc* Tribunals and its Applicability in the Rome Statute of the ICC", 2013, supra at 158

[215] See Chapter 5.2.3

[216] For further information, see Chapter 5.2.3

[217] Prosecutor v. Radovan Karadžić, Public Decision on Prosecution's Motion Appealing Trial Chamber's Decision on JCE III Foreseeability, para 15, citing: Radoslav Brđanin, IT-99-36-A, Appeal Judgment, 3 April 2007, para 411

[218] Prosecutor v. Duško Tadić, IT-94-1-A, Appeals Judgment, 15 July 1999, para 220

[219] Especially by the third form of JCE, because of its lower standard for *mens rea*: a member of a criminal enterprise may be considered a co-perpetrator of a crime that falls outside the scope of the common plan, even if he/she does not share the intent to commit such a crime and does not essentially contribute to its commission.

Secondly, considering the *ad hoc* Tribunals' decisions as a whole, the interpretation of the three forms of JCE, sometimes diverges, resulting alternatively in a form of perpetration (or commission) or of accomplice liability. Moreover, on some occasion*, "the international tribunals departed from the traditional notion of JCE to embrace the notion of 'joint criminal enterprise at the leadership level', which mixes elements of indirect perpetration with the common-purpose doctrine."* These considerations challenge the firm recognition of JCE under customary law and even emphasize some problems of precision, which is a corollary of the principle of legality.

Thirdly, even if the forms of JCE were recognizable as forms of participation established under customary international law, the ICC would not be obliged to follow it, due to the hierarchy of applicable law set forth in Article 21 of the ICC Statute.

Lastly, as already observed, an additional reason is that the JCE theory seems not to be consistent with the ICC Statute.[220]

5.4 Current status of the prosecution of sexual violence crimes before the ICC

The previous Prosecutor at the ICC, Luis Moreno-Campo described the ICC's first practice on sexual violence crimes in a speech he gave in the Hague, in 2009.[221]

He contextualized sexual violence crimes as forms of gender-based violence, mentioning that, as we have seen, the ICC Statute punishes explicitly some gender-crimes: rape, sexual slavery, enforced prostitution, forced pregnancy and enforced sterilization as war crimes and/or crimes against humanity. Moreover, under Article 7(1)(h) of the ICC Statute, persecution against any identifiable group or collectivity on the ground of gender can constitute a crime against humanity, if committed in connection with any other crimes under the jurisdiction of the court. He remembered that the ICC Statute defines the term gender as *"the two sexes, male and female, within the context of society."*[222]

In its first case, the Court convicted Thomas Lubanga Dyilo of children enlistment only, although the evidence showed that one of the methods used to force child soldiers of both sexes to obedience was sexual violence.

In its second case, although Katanga and Ngudjolo Chui were charged with sexual slavery and rape, both as crimes against humanity and war crimes, the Court failed again to condemn the defendants for such offences.

The investigation into the situation of the Central African Republic, shows that Bemba sent his soldiers to intervene in this country to help the then President Patassé to maintain his power. The

[220] Stefano Manacorda and Chantal Meloni, "Indirect Perpetration versus Joint Criminal Enterprise: Concurring Approaches in the Practice of International Criminal Law?", 9 JICJ 159, 2011, p. 165-167 (explaining why the ICC departed from the JCE theory).
See also, in this Chapter, how the Lubanga Trial Judgment interpreted Article 25 of the ICC Statute.

[221] "Sexual Violence as an international crime" Anne-Marie de Brouwer, Charlotte Ku, Renée Römkens and Larissa van den Herik (eds.), 2012, Chapter VII (The Place of Sexual Violence in the Strategy of the ICC Prosecutor), p. 151 et ss.: Luis Moreno-Campo, adapted version of his keynote address given at the interdisciplinary Colloquium "Sexual Violence as an International Crime: Interdisciplinary Approach to Evidence", The Hague, 2009

[222] ICC Statute, Art. 7(3)

result was a human catastrophe, which included widespread rapes and other acts of sexual violence. Therefore, Bemba, as a military commander, was charged with rape as a war crime and a crime against humanity.[223]

Investigations in Uganda shows that the the Lord's Resistance Army (LRA) systematically abducted girls for sexual enslavement and rape. Kony, the leader of LRA, was accordingly charged with sexual enslavement and rape as crimes against humanity and rape as a war crime.

In the application for arrest warrant of the Sudanese President Al Bashir, the Prosecution submitted that rape and sexual violence were part of his attempt to destroy the Fur, Massalit e Zaghawa groups, thus acts of genocide. In fact, it is reported that since 2003, members of the militia/Janjaweed and Armed Force have raped thousands of women and girls belonging to the targeted groups, in all three states of Darfur. A third of the victims of rape are children.

Since 2009, charges for sexual violence crimes increased, nevertheless the update result, in terms of convictions of sexual violence crimes, is not satisfactory. To reverse this trend, on 9 December 2014, the current ICC Prosecutor, Fatou Bensouda, launched her Office's Policy on Sexual and Gender-Based Crimes and described the status of the prosecutions of sexual violence crimes at the ICC. She said:

To date, the Court has charged 17 individuals […] with gender related crimes, whilst specific charges of sexual violence were proffered in 70 per cent of our cases. These high numbers illustrate the prevalence of such horrific acts. They also highlight the commitment to hold the perpetrators of such crimes accountable and in the process, to send a strong message that the culture of impunity for such crimes will be met with the full force of the law.[224]

The Policy she presented was the first and most comprehensive of its kind adopted by an international institution. It aims at the strengthening of the Office's capacity to investigate and prosecute perpetrators of sexual and gender-based crimes. A strengthening that is essential, if we consider that, although all the first three trials held before the ICC brought evidence of widespread sexual violence, none of the accused was convicted thereof.

The following tab emphasizes the status of the prosecution of sexual violence crimes before the ICC, as described in this paragraph.

[223] See Chapter 5.3.1.1

[224] Fatou Bensouda, ICC Prosecutor, launches Policy on Sexual & Gender-Based Crimes: Ensuring victims have a voice in court today can prevent these crimes tomorrow #EndSexualViolence, at the United Nations, New York, 09/12/2014, available at: http://www.icc-cpi.int/en_menus/icc/press%20and%20media/press%20releases/Pages/pr1073.aspx

Country	Accused	Stage	Counts of crimes against humanity of sexual violence	Counts of war crimes of sexual violence
Congo	Bosco Ntaganda	confirmation of charges by Pre-Trial Chamber II: 9 June 2014	rape; sexual slavery; persecution (including acts of sexual violence)	rape; sexual slavery of civilians; rape, sexual slavery, of child soldiers under the age of fifteen
	Sylvestre Mudacumura	warrant of arrest issued by Pre-Trial Chamber II: 13 July 2012		Rape
	Mathieu Ngudjolo Chui	on 18 December 2012, Trial Chamber II acquitted Mathieu Ngudjolo Chui of the charges of war crimes and crimes against humanity. The Office of the Prosecutor has appealed the verdict.	sexual slavery and rape	sexual slavery and rape
	Callixte Mbarushimana	no charges confirmed for trial, Mbarushimana suspect released from custody	rape; persecution (based on gender); other inhumane acts (including acts of rape and mutilation of women)	rape and inhuman treatment (including acts of rape and mutilation of women)
	Germain Katanga	On 7 March 2014, Trial Chamber II acquitted Germain Katanga of the charges concerning rape and sexual slavery	rape and sexual slavery	rape and sexual slavery
Central African Republic	Jean-Pierre Bemba Gombo	commencement of trial: 22 November 2010	rape	rape
Uganda	Joseph Kony	warrant of arrest issued by Pre-Trial Chamber II	rape and sexual enslavement	inducing rape
	Vincent Otti	warrant of arrest issued by Pre-Trial Chamber II	sexual enslavement	inducing rape

Country	Accused	Stage	Counts of crimes against humanity of sexual violence		Counts of war crimes of sexual violence
Darfur, Sudan	Ahmad Muhammad Harun ("Ahmad Harun")	warrant of arrest issued by Pre-Trial Chamber I: 27 April 2007	rape; persecution by means of sexual violence		rape
	Ali Muhammad Ali Abd-Al-Rahman ("Ali Kushayb")	warrant of arrest issued by Pre-Trial Chamber I: 27 April 2007	rape; persecution by means of sexual violence		rape
	Omar Hassan Ahmad Al Bashir	second warrant of arrest issued by Pre-Trial Chamber I: 12 July 2010	rape	sexual violence causing serious bodily or mental harm as an act of genocide	
	Abdel Raheem Muhammad Hussein	warrant of arrest: 1 March 2012	rape and persecution (including acts of sexual violence)		rape
Kenya	Uhuru Muigai Kenyatta	decision on the confirmation of charges: 23 January 2012	rape and persecution (by means of rape and other inhumane acts)		
Côte d'Ivoire	Laurent Gbagbo	decision on the confirmation of charges: 12 June 2014	rape		
	Charles Blé Goudé	confirmation of charges hearing: 29 September - 2 October 2014	rape and other forms of sexual violence		
	Simone Gbagbo	warrant of arrest	rape and other forms of sexual violence; persecution (including acts of rape and sexual violence)		

6. CONCLUSIONS

Conflict-related sexual violence is not specific to any culture or continent,
[...] it is neither cultural nor even sexual - but criminal, a crime of international concern.[1]

The widespread use of sexual violence in armed conflicts all around the world is one of the *"greatest, most persistent and most neglected injustices"*[2] of our time.

In the context of conflicts such as the recent ones in the former Yugoslavia, in Colombia, in Sierra Leone, in Sudan, in the Central African Republic, in the Democratic Republic of Congo, in Liberia, in Libya, in Afghanistan, in Rwanda, just to mention some examples, sexual violence has been widespread. Women and girls are the principal target, but an increasing number of men and boys are victims of this form of violence.

The present work focuses on the idea that the phenomenon of sexual violence during war is explicable considering that it is not reducible to an unfortunate and inevitable byproduct of war, but it is a crime planned by commanders and voluntarily committed by combatants with the purpose of destroying the enemy. In fact, sexual violence has become part of the strategy to control territories, being an effective *"tool of intimidation and social control"*.[3] Indeed, nowadays, wartime sexual violence is widely recognized to be an instrument to humiliate, dominate, instil fear in, disperse and force civilians to flee from determined territories.[4] It is a tool designed to destroy individuals, families and communities; in this regard, it has a collective dimension since it annihilates not only people, but also *"their sense of being a people"*.[5]

We argued that sexual violence in conflict is a weapon that is *"as deadly as any bullet and as destructive as any bomb"* because its consequences often linger on long after the end of the conflict. Survivors of rape always face long-term psychological trauma and often also unwanted pregnancies and sexually transmitted diseases, including HIV/AIDS.[6]

We have also considered that the peculiarity of sexual violence is that its impact is exacerbated by social and religious norms and taboos, which amplify its damaging effects, extending them from the victims to their family and community. In fact, sexual violence turns victims into outcasts, splitting up the entire community. Accordingly, we further observed that sexual violence is a form of gender-based violence.[7] In fact, since gender-based crimes are those committed against

[1] Margot Wallström, (previous) Special Representative of the Secretary-General on Sexual Violence in Conflict (SRSG), Statement to the Security Council, 14 October 2010, available at: http://www.stoprapenow.org/uploads/images/features/pdf/21_oct_SRSG_SVC_Statement_to_Council_on_DRC1.pdf
[2] Foreign Secretary William Hague and UN Special Representative on Sexual Violence in Conflict Zainab Bangura, Policy Paper: A Declaration of Commitment to End Sexual Violence in Conflict, declaration launched on 24 September 2013, in New York, during the United Nations General Assembly, available at: https://www.gov.uk/government/publications/a-declaration-of-commitment-to-end-sexual-violence-in-conflict
[3] UN Secretary-General (UNSG) Report on Sexual Violence in Conflict, 13 March 2014, S/2014/181
[4] S/RES/1820 (2008)
[5] Margot Wallström, (previous) SRSG, Statement at the Security Council Open Meeting on "Women, Peace and Security: Sexual Violence in Situations of Armed Conflict", New York, 27 April 2010, available at: http://www.stoprapenow.org/uploads/advocacyresources/1282163350.pdf
[6] UN Team of Experts on the Rule of Law/Sexual Violence in Conflict (TOE), Annual Report 2012, available at: http://www.stoprapenow.org/uploads/advocacyresources/1372365509.pdf
[7] Declaration on the Elimination of Violence Against Women (1993), Article 2 states that: "Violence against women shall be understood to encompass, but not be limited to, the following:

persons because of their sex and/or socially constructed gender roles, they are usually, though not always, manifested in acts of a sexual nature. The various forms of sexual violence exploit the "gendered roles" of men and women in order to destroy not only the individuals, but also their community, by means of attacking the social roles traditionally attributed to men and women. This consideration better explains why sexual violence has been used as a powerful weapon of war, more precisely, we referred to the concept of "gendered weapon of war", directed at the annihilation of the enemy. A destruction of the group that is not only physical but undermines, to its very core, the group's identity.

The effect of rape is particularly devastating in patriarchal societies, where women's status is often conceived in relation to marriage and motherhood, because the consequences of rape, including stigma and infertility, may permanently exclude victims from the community life.[8]

Moreover, for the men not able to protect the women of their community, rape is a symbol of total defeat. Furthermore, it has been well sustained that in the cases in which the victims are men, since in patriarchal societies *"social and cultural norms reinforce gender inequality by casting men as inherently strong and expected to protect women and children, attacks on markers of gender identity are a powerful weapon of war"*.[9] Therefore, where social norms and taboos on sexuality and sexual orientation stigmatise same-sex relations, sexualised attacks against men are meant to diminish their masculinity in their own eyes and in the eyes of the community.[10] In this respect, it has been suggested that sexual violence against men aims at their "womanization", namely, at the attribution to the male victim, in his relation with the perpetrator, who is often another men, of the subordinate role that traditionally is attached to women.

More generally, being raped, labelled as "rebel wives" or "child of the enemy" is likely to result in lifelong social ostracism and neglect.[11]

For all these reasons, sexual violence is a crime of domination, meant to express the superiority of the perpetrator over the victim.

- Physical, sexual and psychological violence occurring in the family, including battering, sexual abuse of female children in the household, dowry-related violence, marital rape, female genital mutilation and other traditional practices harmful to women, non-spousal violence and violence related to exploitation;
- Physical, sexual and psychological violence occurring within the general community, including rape, sexual abuse, sexual harassment and intimidation at work, in educational institutions and elsewhere, trafficking in women and forced prostitution;
- Physical, sexual and psychological violence perpetrated or condoned by the State, wherever it occurs."

[8] M. Wallström, (previous) SRSG, Statement, Publication launch: "Addressing Conflict-Related Sexual Violence: An Analytical Inventory of Peacekeeping Practice", New York, 30 June 2010, available at: http://www.stoprapenow.org/uploads/advocacyresources/1282163226.pdf

[9] UNHCR, "Working with Men and Boy Survivors of Sexual and Gender Based Violence in Forced Migration", 2012, available at: http://www.stoprapenow.org/uploads/advocacyresources/1343219299.pdf

[10] Ibid.

[11] M. Wallström, (previous) SRSG, Statement, Publication launch: "Addressing Conflict-Related Sexual Violence: An Analytical Inventory of Peacekeeping Practice", supra at 8

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Regrettably, for long time, rape has been treated as a private crime, the result of the actions of renegade soldiers and as a "lesser evil", if compared to other wartime crimes. Consequently, it was usually the object of amnesty agreements, traded by negotiating parties as the price of peace.[12]

In fact, notwithstanding the dimension of the phenomenon and its destructive effects, only recently, especially from the 1990s on, we witnessed an increasing attention of the international community on conflict-related sexual abuses against women. In this work, we considered that numerous legal instruments of international humanitarian law and human rights law can be applied to protect women from violence. Moreover, we saw that the UN showed great concern for the problem of violence against women and thus, organized four world conferences on women and the UN Security Council unanimously adopted Resolution 1820 (2008) acknowledging sexual violence as a *"tactic of war"* challenging international peace and security.[13] Indeed, sexual violence is a security issue because, through it, armed forces assert control and dominance over a geographic area, dispersing families and creating an atmosphere of insecurity and fear.[14] As a result of this acknowledgement, the UN Security Council has passed a series of resolutions designed to end rape in war and other forms of conflict-related sexual violence. In particular, the UN SC Resolution 1888 (2009) created the Office of the Special Representative of the Secretary General on Sexual Violence in Conflict.

Moreover, the central part of this work is devoted to the important contribution of the international and internationalized courts and tribunals, which have shown an increasing tendency in prosecuting crimes of sexual violence.

In particular, considering the sexual violence crimes mentioned in the Statutes of the *ad hoc* Tribunals, we observed that the ICTY Statute includes only rape, among the crimes against humanity and the ICTR Statute includes rape both as a crime against humanity and as a war crime, more specifically, among the war crime of outrages upon personal dignity, which encompasses also enforced prostitution and any other form of indecent assault. However, in these Statutes, no definition of sexual crimes was provided. Notwithstanding these incomplete and inadequate provisions, the two Tribunals elaborated a definition of rape and convicted numerous defendants for sexual violence crimes as rape and outrages upon personal dignity. Moreover, they recognized that sexual offences, which are not limited to rape and enforced prostitution, but include also forced sterilization, sexual slavery, forced pregnancy and any other form of sexual violence of comparable gravity, can constitute the underlying acts of other crimes, in particular, torture, cruel treatment, inhumane treatment and willfully causing great suffering or serious injury to the body or health and enslavement.

Thanks to the achievements of the *ad hoc* Tribunals, nowadays it is widely recognized that the various forms of sexual violence are criminal acts that can amount to war crimes, genocide and crimes against humanity,[15] because of the multiple damages they can cause to the victims and to

[12] M. Wallström, (previous) SRSG, Statement, "Peace and Security: Conflict-Related Sexual Violence", New York, 23 February 2012, available at: http://www.un.org/sexualviolenceinconflict/statement/the-kenya-elections-must-be-free-of-politically-motivated-rape-and-other-forms-of-sexual-violence/

[13] S/RES/1820 (2008)

[14] Margot Wallström, (previous) SRSG, Statement to the Security Council, 14 October 2010, supra at 1

[15] Consider, in particular, that the ICC Statute is the first international instrument expressly including various forms of sexual and gender-based crimes (rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization

their communities. Moreover, these two Tribunals tried to focus the prosecutions on civil and military leaders, who were considered the most responsible for the crimes committed during the conflicts in Yugoslavia and Rwanda; this is particularly evident with respect to sexual violence crimes, which were part of the military strategy, thus, planned and ordered by civil and military leaders.

We have also emphasized that all these accomplishments found a crystallization in the ICC Statute that, completed by its Elements of Crimes, is the most recent codification in international criminal law.

We also took into account the case law of the Special Court for Sierra Leone and of the Extraordinary Chambers in the Courts of Cambodia. The two internationalized courts prosecuted a controversial form of sexual violence, forced marriage. Indeed, the decisions are contrasting, thus, it is not clear if forced marriage can be considered or not a crime different from sexual slavery.

Some scholars sustain that the prohibition of sexual violence crimes, or at least of rape and sexual slavery, possesses the character of *jus cogens*. Indeed, the growing attention of the international community on the issue and especially, the increasing tendency of the international and internationalised courts and tribunals in prosecuting such crimes, confirm that prohibiting them is, *"both morally and legally, a value so basic and fundamental to the international public order that this prohibition has acquired the status of jus cogens".*[16]

Much has been done to try to contrast this phenomenon, however it is not enough as it is demonstrated by the fact that sexual violence is still widespread in the ongoing conflicts and by the ICC's up to date failure to convict of sexual violence crimes.

Presenting to the Security Council the 2013 Report on sexual violence in conflict, Zainab Hawa Bangura, the Special Representative of the Secretary-General on Sexual Violence in Conflict, claimed to break the silence and to combat the *"war's oldest and least condemned crime"*:

For too long has war been waged on the bodies of women. For too long have women borne the crippling consequences – physical, psychological, social, economic – of wartime rape. They have been ostracized from their communities, cast out by husbands and families, left destitute with their children.

With sexual violence women lose everything; and in the process communities themselves are lost. Because women are the life force of their communities. They are mothers and care-givers to the next generation; they are the healers, the economic backbone, the peacemakers and the peacekeepers.[17]

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and other forms of sexual violence) as underlying acts of both crimes against humanity and war crimes committed in international and non-international armed conflicts. The Statute also criminalizes persecution based on gender as a crime against humanity. Sexual and gender-based crimes may also fall under the Court's jurisdiction if they constitute acts of genocide or other acts of crimes against humanity or war crimes. (ICC Office of the Prosecutor, Policy Paper on Sexual and Gender-Based Crimes, June 2014, available at: http://www.icc-cpi.int/iccdocs/otp/OTP-Policy-Paper-on-Sexual-and-Gender-Based-Crimes--June-2014.pdf)

[16] David S. Mitchell, "The Prohibition of Rape in International Humanitarian Law as a Norm of *Jus Cogens*: Clarifying the Doctrine", 15 Duke Journal Of Comparative & International Law 219, 2005, p. 256

[17] Zainab Hawa Bangura, Special Representative of the Secretary-General on Sexual Violence in Conflict, Statement to the Security Council, 17 April 2013, supra at 16

Moreover, we have to further consider that the attempts to put an end to sexual violence in conflict have been principally focused on women. Violence against men was historically ignored and, nowadays, it is still substantially neglected. However, recently, Zainab Hawa Bangura expressed her concern on the issue and tried to draw attention to male victims. She said that sexual violence against men *"was always there, we never saw it, because we didn't look for it. […] It has been so well hidden, out of shame, out of stigma".*[18] The latest (2014) UN Security Council report on violence in conflict, highlighted sexual violence in 21 countries affected by conflicts and urged governments and the international community to combat rape during war. However, the report underlined also that the efforts to help male victims are hampered because the attention is focused on female victims.

Indeed, Zainab Hawa Bangura stated that *"today it is still largely cost-free to rape a woman, child or man in conflict"*. Sexual violence has been used, over the years, precisely because it is a *"cheap and devastating weapon",*[19] surrounded by *"walls of silence and shame"*[20], *"it thrives on silence and impunity"*.[21] Indeed, rape is an effective *"secret weapon"* because, usually, the victim and not the perpetrator is shamed and stigmatized, thus, the society is more likely to pass judgment, than to administer justice.[22]

In order to reverse this reality, it is necessary to raise the costs and consequences for the perpetrators of such crimes, while, until now, the price for these crimes has been mostly paid by their victims. It is necessary to ensure full liability for those who commit, command or condone sexual violence in conflict:[23] granting accountability is the most important way to re-direct stigma and blame attached to sexual violence, from the survivors to the perpetrators. However, it is contemporarily necessary a cultural change, because the fear of stigma and marginalization leads victims not to denounce the violence, making effective prosecutions impossible.

The UN Secretary General Ban Ki Moon gave a speech in a media event on sexual violence in conflict at the margins of the 16th African Union Summit and said that the crime of sexual violence *"is not particular to any culture or continent"*. The challenge to face is the prevention of the *"cycle of violence and vengeance; discrimination and disempowerment; rage and recrimination that give rise to rape as a tactic of war."*[24] The UN Secretary General added that it is necessary to create

[18] Charlotte Alfred, "UN Representative Zainab Bangura Draws Attention to Male Victims of Sexual Violence in Conflict", The Huffington Post, 30 April 2014

[19] Zainab Hawa Bangura, Special Representative of the Secretary-General on Sexual Violence in Conflict, Statement to the Security Council, 17 April 2013, available at: http://www.un.org/sexualviolenceinconflict/statement/statement-by-srsg-zainab-hawa-bangura-to-the-security-council-17-april-2013/

[20] Statement by the Special Representative of the (previous) Secretary-General on Sexual Violence in Conflict Margot Wallström, International Day for the Elimination of Violence Against Women, Abidjan, 25 November 2011, available at: http://www.un.org/sexualviolenceinconflict/statement/statement-by-united-nations-special-representative-of-the-secretary-general-on-sexual-violence-in-conflict-zainab-hawa-bangura-sexual-violence-can-not-be-used-as-a-weapon-of-retaliation-in-drc-7-d/

[21] Secretary-General Ban Ki-moon, Opening remarks to joint press conference with his Special Representative on Sexual Violence in Conflict, Margot Wallström, Addis Ababa (Ethiopia), 31 January 2011, available at: http://www.un.org/apps/news/infocus/sgspeeches/statments_full.asp?statID=1079#.VKGXusDWs

[22] Statement by the Special Representative of the Secretary-General on Sexual Violence in Conflict Margot Wallström Women, Peace and Security: Conflict-Related Sexual Violence, New York, 23 February 2012, supra at 4

[23] Ibid.

[24] Secretary-General Ban Ki-moon, Opening remarks to joint press conference with his Special Representative on Sexual Violence in Conflict, Margot Wallström, Addis Ababa (Ethiopia), 31 January 2011, supra at 21

conditions where *"sexual violence [is viewed by armed groups] as a liability, rather than a tool in the struggle for power."*[25] Therefore, granting accountability for perpetrators means that the cost of committing such atrocities rises to the point where it harms the perpetrators even more than the victims.

In this work, we mentioned the fact that violence against women in general and, sexual violence in particular, can be better understood in the wider context of inequality and discrimination to which women are subjected in their everyday lives. As already stated, notably, in the Declaration on the Elimination of Violence against Women, the UN General Assembly clarified that violence against women is the manifestation of the historical unequal power relations between men and women, which have led to *"domination over and discrimination against women by men"*. However, on the other hand, violence against women constitutes *"an obstacle to the achievement of equality"*,[26] gender-equality. Therefore, discrimination is at the same time, the cause and the consequence of violence against women. Although in this work we did not have space to treat in depth this issue, we can make some conclusive considerations. Indeed, it has been sustained that violence against women continues to be *"one of the crucial social mechanisms by which women are forced [and kept] into a subordinate position compared with men"*. One of the consequences of this inequality is the prevention of the *"full advancement of women"*, notwithstanding the fact that no custom, tradition or religious consideration should be invoked by states to avoid their obligation to eliminate violence against women.[27] Consistently, the UN SC affirmed, in its Resolution 2106 (2013), that women's political, social and economic empowerment and gender equality are goals of the long-term efforts to prevent sexual violence in armed conflict and post-conflict situations.[28]

Indeed, ensuring women's and girls' full human rights and women's active, full and equal political, social and economic participation, also in all processes of conflict prevention and resolution, especially in the field of justice and security, is fundamental to end sexual violence in conflict.[29]

In conclusion, in order to prevent and stop violence against women and girls, including sexual violence, the starting point is to challenge the culture of discrimination and impunity that allows it to continue, by means of introducing and implementing laws for this purpose. It is necessary to shatter negative gender stereotypes and attitudes and to contrast customs that encourage, ignore or tolerate violence against women and girls.[30] Effective policies in combating violence require proposals able to provide concrete alternatives to a male model that draws its strength and identity from the possibility to abuse women's bodies, both in time of war and peace.

Therefore, all and each of us have to *"condemn all acts of violence, establish equality in our work and home lives, starting by changing the everyday experience of women and girls"*.[31]

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[25] Ibid.
[26] Declaration on the Elimination of Violence against Women, A/RES/48/104, 20 December 1993, Preamble
[27] Declaration on the Elimination of Violence against Women, Art. 4
[28] S/RES/2106 (2013)
[29] Foreign Secretary William Hague and UN Special Representative on Sexual Violence in Conflict Zainab Bangura, Policy Paper: A Declaration of Commitment to End Sexual Violence in Conflict, declaration launched on 24 September 2013, in New York, during the United Nations General Assembly, supra at 2
[30] Ban Ki-moon, Secretary-General's Message for 2014, International Day for the Elimination of Violence against Women, 25 November 2014, available at: http://www.un.org/en/events/endviolenceday/2014/sgmessage.shtml
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