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Rape as a war crime: an assessment of international courts' case-law

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To the victims of violence

Introduction

Rape is the act of forcing someone to have a sexual intercourse by using violence or a threatening behaviour[1]. It is estimated that 35% of women worldwide have experienced some forms of sexual harassment during their lifetime. However, these data are not precise, as most of the victims choose not to report rape – for various reasons, – and some countries' laws are inadequate and insufficient.

Nowadays rape is a crime prohibited under both national and international law. While it is already a serious offense during peacetime, it is even more serious when committed during wartime due to its frequency, intensity, devastating effects, and intention. Rape and sexual violence have been used as a military strategy in many conflicts – from the most ancient to the most recent ones – to subjugate communities and as a tool of ethnic cleansing. It was condoned and ignored until the end of World War II.

In the first chapter, I discuss how violence against women poses a human rights concern as the result of a structural discrimination based on gender, which affects disproportionately women and girls across the world. I focus on the Italian system, considering how originally rape was regarded as crime against public morality, while now it is a crime against the person and her sexual freedom. I take into consideration how the Supreme Court of Cassation coped with the definition of sexual crimes by also considering international law. Then, I deal with the most important international treaties and agreements adopted in order to protect women – the UN Convention on the Elimination of all Forms of Discrimination against Women, the Belem do Para Convention concluded in the framework of the Organization of American States, the African Union Maputo Protocol and the Council of Europe Istanbul Convention. An account is provided of the protected rights, the role of stereotypes and gender roles in perpetrating discrimination, the role of culture and education in the fight against discrimination, and the mechanisms and committees that have been set up to implement those conventions.

In the second chapter, I focus on wartime rape. I begin by reviewing the history of wartime rape and clarify how it shifted from being an example of "spoils" of war – with women being considered a booty of war – to become a strategy and weapon of war. Then, I consider the historical context of former Yugoslavia, Rwanda, Congo, and Sierra Leone, some of the States where rape – and other war crimes – occurred on a vast scale during internal conflicts. Since *ad hoc* tribunals had been created to counter those crimes, I assess the most important judgements that contributed to the definition of the

[1] Cambridge Dictionary

crime of rape and how those definitions are broader or narrower. I also consider the contribution of the International Criminal Court, which has jurisdiction upon 123 States.

Furthermore I explain how rape has been prosecuted: as a war crime – a violation of laws or customs of war – in particular as an attack against personal dignity and as a serious breach of the Geneva Conventions; as one of the five categories of genocide, when it is committed with the intention to destroy a particular group,- (one may think of the Tutsi women case); as a crime against humanity, when it is part of a widespread attack against civilian population. I try to assess whether rape could be regarded as torture if the perpetrator has the intention to humiliate, degrade, and intimidate victims with the consent of a public official, who could also be the one who inflicts torture. Finally, I try to assess whether the prohibition of rape could amount to a *jus cogens* rule, meaning the core norms of international law that cannot be derogated.

In the third and last chapter, I mention the consequences for rape victims by dividing them into: physical consequences, with a particular attention on pregnancy and sexually transmitted diseases; psychological consequences, taking into account how humiliation and PTSD are considered during trials; and social consequences, focusing on the risk of secondary victimization and rejection. I focus on how victims are safeguarded and whether a "right" to reparation exists and, - victims could get compensation. Then, I tackle the limits of the existing international courts' case law, focusing on: the failure of interpreting rape as a stand-alone crime, the definition of gender, the matter of consent, considering the prohibition of corroboration and Rule 96 of the ICTY's Rules of Procedure and Evidence, the need for procedural reforms in every level of proceedings, and the reluctance of testimony which derives from fear, lack of women judges, and trust issues.

Finally, I recall that several authors have advocated for the creation of an international victims' compensation court, which would make it possible for survivors to obtain effective compensation and gender sensitive support.

The purpose of this dissertation is to highlight the contemporaneity of the issue and its relevance in the framework of international criminal law and human rights violation and how the efforts of the *ad hoc* Tribunals and the International Criminal Court succeeded in showing the world the reality of women who live in war zones. They have played an important role in prosecuting this heinous crime and ending impunity.

Chapter 1

Women's rights protection in international law

1.1 Discrimination and violence against women

Traditionally, before World War II, the protection of fundamental rights was regarded as a merely national issue.[2] After World War II and the tragedy of Holocaust, (some of the worst breaches of the value of dignity in human history), international law began to deal with the issue, which since has become key in the global debate. Therefore, a number of acts, treaties, and agreements were signed and ratified in order to protect fundamental rights.

The UN Charter provides for the respect of human rights without distinction as to race, sex, language or religion in Article 1. The Universal Declaration of Human Rights sets a common (although non-binding) standard for every State, by also referring to equality of the sexes in several articles.[3]

Although the denial of rights based on sex violates the principle of non-discrimination, women across the world face discrimination based on sex and gender, a phenomenon which is rooted in the patriarchal culture shared by many countries in the world, but also in political and social factors.[4] In some parts of the world, women enjoy limited,- (when any),- civil and political rights; they are not allowed to have access to all levels of education; they do not have access to health care, in particular for what concerns contraception and abortion; and women workers are not paid equally as their men colleagues. For example, according to the Global Gender Gap Report, in 2022, gender parity in the labour force stands at 62,9% and over time unemployment rates have increased and remained higher for women.[5]

Since women are not a homogenous group, it is key to consider age, socio-economic status, racial and ethnic background, religion, national origin, citizenship, status, health and disability:[6] for instance, women living in rural areas are extremely vulnerable due to poverty and exclusion, and yet they play a fundamental role in ensuring development and sustainability.[7]

[2] https://www.un.org/en/chronicle/article/international-human-rights-law-short-history
[3] B. G. Elder, "The Rights of Women: Their Status in International Law", Crime and Social Justice
[4] https://www.europarl.europa.eu/RegData/etudes/IDAN/2020/603489/EXPO_IDA(2020)603489_EN.pdf
[5] Global Gender Gap Report 2022, https://www.weforum.org/reports/global-gender-gap-report-2022/
[6] https://www.un.org/en/fight-racism/vulnerable-groups/women
[7] https://www.un.org/en/observances/rural-women-day

Violence is the result of a structural discrimination: according to the World Health Organization, 1 in 3 women in the world experiences physical or sexual violence at least once in their life, mostly by an intimate partner.[8] Reports reveal that the Covid-19 pandemic increased gender-based violence, particularly domestic one, as a consequence of the restrictions in movement and quarantines.[9]

In the past, violence against women was regarded as a private phenomenon limited to the family context; but since the end of World War II, it has become a key issue in the international public agenda.

Kofi Annan, former Secretary-General of the United Nations, defined violence against women as the most shameful, pervasive human rights violation, a widespread phenomenon which does not know geographical, cultural or social boundaries and an obstacle to the achievement of equality, peace, and development. [10]

States have adopted laws which ban all forms of violence against women and have ratified and implemented international acts, but this historical inequality has not been overcome yet, neither *de jure*, nor *de facto*.

1.2 Rape under Italian law

According to ISTAT (2014), almost 7 million women in Italy have experienced physical or sexual violence during their life.[11]

In the past, sexual activity was primarily aimed at procreation and was not considered an expression of individual freedom. Female sexuality was immediately connected to marriage and procreation. The natural derivation of this idea was the focus on virginity, which guarantee family honour and public morality.

Rape was divided into three categories: the "simple" one, consisting of a carnal conjunction with an unmarried woman, or an adultery with a married woman; the "qualified" rape, namely where the seduction of the woman was the most important feature; and the "violent" rape, which featured violence or threat. The criminal code of Tuscany (1854) punished rape with a fine, whether the judge did not sentence the accused to marry the victim.

[8] https://www.unwomen.org/en/what-we-do/ending-violence-against-women
[9] https://www.ohchr.org/en/stories/2020/07/women-most-affected-covid-19-should-participate-recovery-efforts
[10] https://press.un.org/en/1999/19990308.sgsm6919.html
[11] https://www.consiglionazionaleforense.it/documents/20182/0/Manual+on+the+law+relating+to+violence+against+women.pdf/373786e2-4af0-4579-8f14-629c28834679

The Zanardelli Code (1889) placed rape ("*violenza carnale*") under the crimes against morality and family order. Morality was interpreted as the respect for those limits which are necessary to ensure security, freedom, and decency; family order – which included the norms on sexual morality – was regulated by the State in the public interest.

Under Article 331, sexual abuse – which required penetration – was punished when committed with coercion, violence, or threat; under Article 333 acts of indecent assault, - not aimed at committing the crime of rape, but committed with violence or threat, were punishable. The Code also considered age, psychophysical conditions, and acts committed through abuse of authority, trust, or domestic relations. Violence or threat were necessary requirements, while mere dissent was not sufficient. The victim had to file an official request to the State to prosecute the crime. Adultery was a crime against society, and women were punished for it more severely than men: no evidence was required from a man who sought to formally accuse a wife of adultery, but women had to prove that a man maintained a concubine or mistress in his home or elsewhere.

The Rocco Code (1931) identified sex crimes as crimes against family morality and honour –, abortion as a crime against the integrity of the Italian race, and the use of contraception by women as a crime. It placed rape under Title IX of Book II, among the crimes against public morality and decency. Therefore, the offence was not against the actual the victim, but to public morality. It also addressed corruption of a minor, prostitution, or the trafficking of women and children as crimes against decency and sexual honour. Rape would have been prosecuted automatically by the State only if it had been committed by a parent, guardian, or public official.[12]

The Seventies were a decade of social turmoil in Italy. Several reforms were adopted. The process of reforming family law began in 1967, with the approval of the Law on Special Adoption, which transformed adoption to a means of remedying family deprivation in a means to safeguard the adopted child.[13] After almost a decade of parliamentary debates, the reform of family law was finally approved and came into force on September 20, 1975. The most important elements were that both parents came to share parental authority, as they have the same rights and duties, and they also have the obligation to maintain and educate their children; the age of majority was lowered to eighteen; in case of intestate succession, the survivor is guaranteed half of the estate, and a third or a quarter if there are one or more children, the surviving spouse is guaranteed the right of residence in the family home

[12] A. Vitale, "Fuitina: Love, Sex, and Rape in Modern Italy, 1945-Present", in The Graduate Center, City University of New York, 6, 2020, 1 ss.
[13] V. Pocar, P. Ronfani, "Family Law in Italy: Legislative Innovations and Social Change", in Law&Society Review, Vol. 12, No. 4, 1978, 607 ss.

and the right to use its furniture. Separation by mutual consent was supplemented by separation for just cause regardless of the interest of either or both spouses.[14]

After years of debate, a bill introducing divorce was approved by the Parliament in 1970 (Law 898/1970). Catholic forces gathered a large number of signatures in order to submit the law to a popular referendum, counting on the fact that 99% of Italians were Catholic at the time. The voting day was May 12, 1974. On that day, 59,3% of electors voted "no" to the abolition of the law.[15]

In February 1975 the Constitutional Court declared unconstitutional several articles of the Fascist era Penal Code governing abortion. The Parliament did not accept the idea of its liberalization. This led to a mass mobilization by the feminist movements and finally, the Christian Democrats decided to abstain from the final vote in Parliament – to avoid a joint vote with the Fascists – and allowed the new legislation to be approved in 1978 (Law 194/1978). Under Law 194/1978 the woman is the only decision maker and may choose to abort not only where birth or maternity could harm her physical or mental health, but also where it could be harmful to her personal, social, and economic conditions.[16] Three years later, on May 17, 1981, a referendum took place to abrogate Law 194, but the majority of Italians reiterated their support on abortion.[17]

In 1975, two young girls, Donatella Colasanti and Rosaria Lopez, were repeatedly tortured and sexually assaulted by three men in a villa on the promontory of Circeo. Rosaria was later killed, but Donatella pretended she had died and was later saved by the police.[18]

In 1977, Claudia Caputi, 17 years old, was raped by seventeen boys. She managed to recognize some of them and reported the crime. The next day, a group of men cut her face and body 300 times. She decided to report it, but the judges accused her of faking it and even that she cut herself to become a feminist icon. She was indicted for simulation of offence, but, fortunately, she would be discharged.[19]

In 1978, Fiorella, an 18-year-old girl, denounced that she was had been to a villa to discuss about an employment proposal, but later was raped by Rocco Vallone – an acquaintance - and three other men. This case ("Processo per stupro") is remembered because for the first time the trial was transmitted

[14] V. Poncar, P. Ronfani*, supra note* 13

[15] A. Marradi, "Italy's Referendum on Divorce: Survey and Ecological Evidence Analyzed", in European Journal of Political Research, 4, 1976, 115 ss.

[16] Y. Ergas, 1968-79. Feminism and the Italian Party System. Women's Politics in a Decade of Turmoil, in Comparative Politics, Vol. 14, No. 3, 1982, 253 ss.

[17] https://espresso.repubblica.it/attualita/2021/05/13/news/40_anni_fa_il_referendum_che_difese_l_aborto_in_italia-300823052/

[18] https://www.collettiva.it/copertine/italia/2021/09/30/news/rosaria_e_donatella-1512819/

[19] https://www.ilcontroverso.it/2022/04/08/claudia-caputi-storie-di-violenze-dimenticate/

on TV (RAI) on April 26, 1979. Lawyer Tina Lagostena Bassi showed how justice was soaked with sexism and machismo and how victims had to endure prejudices and lack of credibility.[20]

"*Fuitina*" is the Italian word – in Sicilian dialect – which describes the practice by which after abducting a woman, the man would seek a reparatory marriage to restore the woman's honour – gone because of the loss of virginity. It was a form of bride theft, which was supported by the Italian legal order, as the men who kidnapped and raped women were rarely prosecuted. As a matter of fact, non-consensual *fuitina* was an act of kidnapping and rape; however, under article 544 of the Italian penal code (now abrogated), the offence of rape would be cancelled if the victim married her rapist. On December 26, 1965, in Alcamo, Sicily, Franca Viola, a young girl, was kidnapped and then raped by Filippo Melodia – her betrothed until Franca's dad learnt he was a criminal and ended the engagement. Seven days after, the police found Franca and freed her. As she had been raped, Melodia's family sought to negotiate a reparatory marriage, but Franca's family refused and pressed charges against him. The defence tried to convince the judges it was a consensual "*fuitina*"; nonetheless, Filippo Melodia was charged with kidnapping and rape and later sentenced to imprisonment. This case represented a shift in the culture of sexual violence in Italy and helped feminist movements and activists discuss about women's subordination; however, it was not until 1981 that reparatory marriage was eliminated.[21]

In 1995, the House of Representatives passed a law proposal, which was later passed by the Senate as well. Law no. 66/1996 placed sexual crimes under the crimes against personal freedom, changing the legal classification of that kind of crimes. After that reform, Article 609-bis of the Criminal Code provides that "anyone who violently or threatens or through the abuse of authority forces someone to perform or undergo sexual acts is punished with imprisonment from five to ten years".

As a consequence of the above-mentioned legal shift regarding sexual offences, the focus is on the victims and their freedom of self-determination. The law also removed the distinction between sexual abuse, which regarded an act of penetration, and indecent assault. It is now recognized that the act can pertain not only to the genital sphere, but also all the erogenous parts of the body. Violence is the key feature, but it is also taken into account whether the perpetrator has taken advantage of the situation of diminished resistance the victim had at the time. The law includes coercion and excludes the fact that the victim must raise clear and explicit opposition.

[20] https://www.ilpost.it/giuliasiviero/2018/02/01/violenza-carnale-fellatio-puo-interrotta-un-morsetto/
[21] A. Vitale, *supra note* 12

The law criminalizes sexual violence; sexual acts against a person who suffers from physical or psychological inferiority; sexual acts where the persecutor pretends to be someone else; the same acts when committed against a minor of 14 years old or with the use of weapons, alcoholic, narcotic substances, or other tools that harm the victim, or as a person who pretends to be a public official, or against a person who is restricted of his personal freedom, or again if the rape is committed by a family members or a tutor against a minor of 16 years old (article 4); gang rapes (article 9). [22]

This law represented a major step forward in the criminalization of sexual and gender crimes. During the new century, others have been approved.

Law 38/2009 introduced Article 612-bis on stalking in the Criminal Code, and included the new provision of a restraining order, prohibiting the perpetrator to approach the victim in places frequented by the victim themselves or obligating to keep a certain distance from the victim. The judge can also extend the restraining order to family members or cohabitants whether a further protection is needed.[23]

Law 119/2013 on "Urgent provisions on safety and the fight against gender-based violence", (the so-called law against femicide) was approved after the frightening increasing number of femicides in Italy. It is nowadays the basic law on preventing domestic violence. The law provides the application of aggravating circumstances of sexual violence when perpetrated by a parent or a tutor. Those aggravating circumstances are applied whether sexual violence is committed against a vulnerable person or with the abuse of trust, a pregnant woman, a person whose perpetrator is a spouse, even if separated or divorce, or a person who has a personal link with the victim, or minors who witness physical or verbal abuse (the so-called "assisted violence"). It is a tool that punish more severely those acts committed by a person linked to the victim. The law also ratified the Istanbul Convention.

By approving this law, Article 408, paragraph 3bis, of the Criminal Code was changed and now places on the prosecutor the burden of notifying the victim of the request to dismissal in all the cases concerning crimes committed with violence against an individual, notwithstanding whether that person explicitly requested.

When clarifying what violence against an individual means in the framework of gender-based violence, the Court of Cassation[24] acknowledged that the protection of the victims – in particular

[22] https://www.difesa.it/CUG/norvativa_riferimento/Documents/NormativaNazionale/Legge66_15feb1996_violenza_sessuale.pdf

[23] https://www.consiglionazionaleforense.it/documents/20182/0/Manual+on+the+law+relating+to+violence+against+women.pdf/373786e2-4af0-4579-8f14-629c28834679

[24] Comprehensive analysis of 2015 judgments

women – is encouraged by the activity of several international organizations, which has led to the adoption of a number of relevant acts. In particular, one may think of the 2012/29 European Directive on rights, assistance and protection of the victim; the Lanzarote Convention (2007) on minors protection from exploitation and sexual abuses; and the Istanbul Convention (2011) on preventing and combating violence against women and domestic violence, have an essential role in the Italian system. In the light of these sources of law, "violence against the person" may be interpreted broadly and include physical, psychological, and moral aggression. Stalking is among the cases of significant forms of gender-based violence that require special forms of protection for the victims.

Gender-based violence is defined – under international law – as violence directed against a person because of his/her gender, gender identity, or gender expression or that disproportionately affects people of a particular gender. This form of violence may have caused physical, sexual, or psychological harm or economic loss to the victim and is considered a form of discrimination and a violation of the victim's fundamental freedoms and includes violence in close relationships, sexual violence (including rape, sexual assault, and sexual harassment), human trafficking, slavery, and various forms of harm, such as forced marriages, female genital mutilation and so-called honour crimes. The international notion of violence is broader than the national one. Therefore, the "violence against the person" expression must be understood in the light of the gender-based violence concept.

The notice requirement is strictly connected with gender-based violence. However, the Joint Sections' judgment leaves unresolved the question regarding the range of crimes in reference to which the provision examined will apply. The case law of inferior courts will have to clarify whether there are additional crimes that may fall within the gender crimes: in particular, one may wonder whether the obligation to notify the offended person of the filing of request for dismissal applies to any offence against a person because of his or her gender or whether the notion of gender-based violence should be interpreted as referring only to certain types of crimes.[25]

Prime Ministerial Decree of July 7, 2015, was adopted to prevent violence against women, promote education, strengthen the measures of protection guaranteeing adequate training for all professionals who work with gender-based violence, and increase the protection of victims.

It is key to consider how the Italian Supreme Court has interpreted those crimes. As for the notion of sexual act, the Court has identified three categories of body parts and distinguishes (1) absolutely erogenous; (2) relatively erogenous; and (3) non-erogenous zones. This distinction allows to

[25] C. Bressanelli, "La violenza di genere fa il suo ingresso nella giurisprudenza di legittimità: le Sezioni Unite chiariscono l'ambito di applicazione dell'art 408 co. 3 bis c.p.p", in www.penalecontemporaneo.it , 2016

understand whether an act could be interpreted as harmful to sexual freedom and therefore be prosecuted as a sexual crime. The act must be assessed in the light of the manner of conduct, including the gradient of physical strength and the duration of the contact, the context in which the act occurred, the relations between offender and victim, and other elements that cause the impairment of sexual freedom.[26]

The Court also distinguished three types of sexual acts. Penetrative act includes anal, vaginal penetration, and oral penetration. Notwithstanding the lack of penetration, non-penetrative acts, such as masturbation, long kisses or touching the vagina or the anus, still undermine sexual freedom. Finally, sexual harassment may include brief kisses, hugs, quick touching of glutes.

The Court of Cassation opted for a concept of violence based on the subject's will, rather than on the exercise of physical force. In the case that led to judgment n. 21452/2015, the Court of dealt with the notion of environmental compulsion ("*costrizione ambientale agli atti sessuali*"), which is a situation where the victim, while not consenting to the act, does not oppose to it as a consequence of anguish, prostration, or other feelings unrelated to threat. In judgment n. 15443/2015, the Court clarified that abuse of authority can occur in any position of power, whether public or private, the latter requires that the agent forces the victim to perform or undergo sexual acts.

Gang rape is addressed In Article 609-octies. It is sufficient and necessary that at least two people are present and at least one of them abuses of the victim, while others are watching. [27]

Our system foresees a further criminalization of "consensual" sexual acts with children under fourteen years of age and a tightening of punishment proportionately to the age of the underage. This provision, however, is insufficient when the victims are children of 10 years old: most of those abuses are of penetrative nature and perpetrated during the years by a family member. A congruent average penalty level should stand at 8/9 years' imprisonment and not at 6 years and 3 months.[28]

With the approval of Law 69/2019 (Code Red Law), the crime is punishable by irrevocable lawsuit of the victim within a period of twelve months from the time of the crime, postponing the previous limit of six months.

[26] Sentence 964/2015
[27] https://dpc-rivista-trimestrale.criminaljusticenetwork.eu/pdf/macri_1_16.pdf
[28] *Ibidem.*

1.3 The Convention on the Elimination of All Forms of Discrimination against Women

The Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), adopted in 1979 by the UN General Assembly has been described as an international bill of rights for women.[29] It is the result of the efforts led by the United Nations Commission on the Status of Women. It consists of a preamble and 30 articles.

In its preamble, it acknowledges that "extensive discrimination against women continues to exist, and it violates the principles of equality of rights and respect for human dignity"[30] and it defines discrimination against women 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."[31]

The Convention provides the basis for achieving equality between women and men, ensuring women's equal access to and equal opportunities in political and public life, as well as education, health, and employment. States parties must take all appropriate measures to ensure the full development and advancement of women in order to guarantee them rights and freedoms equal to the ones enjoyed by men.[32] Furthermore, they must take positive action to prevent and protect women from violence, punish perpetrators, and compensate victims.

The Convention focus on three aspects: civil, political, and reproductive rights. As for civil rights, women must enjoy the rights to vote, to hold public office, and to exercise public functions, as well as the rights to non-discrimination in education, employment, and economic and social activities. Marriage often links their legal status to their husband's one and it is also a way to pass the control of their lives from the father to the husband. Therefore, States are under the obligation to guarantee freedom of choice of the spouse, parenthood, and command over property.[33] From this point of view, a limit to the CEDAW must be considered: several States have made some reservations. For example, Egypt has linked the equality between spouses (Article 16) to Sharia's norms and the Principality of

[29] https://www.un.org/womenwatch/daw/cedaw/
[30] https://www.un.org/womenwatch/daw/cedaw/text/econvention.htm#article1
[31] Convention on the Elimination of All Forms of Discrimination against Women, Article 1
[32] Convention on The Elimination of All Forms of Discrimination against Women, Article 3
[33] B. G. Elder, *supra note 3*

Monaco does not feel bounded to the same article to the extent that it can be interpreted as a legalization of abortion or sterilization. [34]

In addition, the Convention covers reproductive rights. The Preamble acknowledges that the role of women in procreation should not be a basis for discrimination. Maternity protection and child-care – whether dealing with employment, family law, health, or education – are key in this regard. The Convention also protects women's right to reproductive choice. States are under the obligation to include advice on family planning in the education process.[35]

Since ofttimes discrimination takes the form of stereotypes, customs and norms, the Convention provides that it is mandatory to change perceptions as for the traditional role of men and women in society and to achieve full equality between women and men in the family context.[36] The 189 States parties must work towards the modification of social and cultural patterns to eliminate prejudices and all other practices that are based on the idea of inferiority of women and stereotyped roles.

The Committee on the Elimination of Discrimination against Women, consisting of 23 experts nominated by their national governments and elected by States parties, monitors the implementation of the Convention: every four years, a national report indicating the measures the States have adopted to give effect to the provisions of the Convention is submitted by every party. The Committee discusses these reports and makes general recommendations to the Governments.[37] For example, in November 2020, the Committee issued recommendations on the trafficking, exploitation, and prostitution of women and girls in the context of global migration. Some recommendations included: the mobilization of public resources and the strengthening of public services in areas that support the achievement of gender equality; the participation of women and girls in all levels of decision-making; the development, implementation, monitoring, and evaluation of anti-trafficking legislation, policy, and programmes; the reform of family law in order to decrease the risk of sexual exploitation; the establishment of a gender-responsive and safe migration framework; the ending of discriminatory conditionalities in recruitment; the possibility of alternative employment.[38]

[34] S. De Vido, "Donne, violenza e diritto internazionale: La Convenzione di Istanbul del Consiglio d'Europa del 2011", Sesto San Giovanni, 2016, p. 89, note n°18.
[35] https://www.un.org/womenwatch/daw/cedaw/text/econvention.htm#article1
[36] CEDAW, Preamble
[37] https://www.ohchr.org/en/instruments-mechanisms/instruments/convention-elimination-all-forms-discrimination-against-women
[38] Committee on the Elimination of Discrimination against Women, General recommendation No. 38 (2020) on trafficking in women and girls in the context of global migration

1.4 The Belém do Pará Convention

The Organization of American States (OAS) adopted the Convention of Belém do Pará in 1994. It provides for the full respect for human rights; it states that violence against women constitutes a violation of women's human rights and fundamental freedoms. Violence may occur within the family or any other interpersonal relationship, as well as in the community, such as workplace, education and health care facilities; it may be perpetrated or condoned by the State, if it does not adopt effective measures.[39] The elimination of violence against women is key for their individual and social development and their full and equal participation in all walks of life.[40]

Women have the right, among others, to live a life free from violence and from any discrimination[41], to physical and psychological integrity[42], which include the interdiction of torture or any cruel, inhuman, or degrading treatment or punishment. Furthermore, they have the right to be valued and educated free from stereotyped patterns of behaviour and social and cultural practices based on concepts of inferiority or subordination.[43] The subordination of women may be associated with practices based on gender stereotypes: in order to eliminate them, a cultural transformation is needed. For this to happen, women must be made aware of their rights, with awareness raising campaigns in which medias and civil society should be involved, but also taking into account the role played by the education system.[44]

The States parties have the duty to secure the rights protected by the Convention. The areas of intervention range from educational campaigns to provision of special services for victims of violence. [45]

MESECVI, the Mechanism to Follow Up on the Implementation of the Convention on the Prevention, Punishment and Eradication of Violence against Women, evaluates States performances in relation to the implementation of the Convention. A report on the regional progress towards the elimination of violence is released every year. [46] In 2021, MESEVCI selected 83 indicators from the System of Progress Indicators to Measure Implementation of the Belem do Para Convention. As for national legislation, the CEVI suggested to reform national legal orders to protect, punish, and eradicate

[39] Chapter 1 of the Belem do Para Convention
[40] https://www.oas.org/en/mesecvi/convention.asp
[41] Convention of Belém do Pará, Article 6(a)
[42] Convention of Belém do Pará, Article 4(b)
[43] Convention of Belém do Pará, Article 6(b)
[44] MESEVCI, "Guide to the application of the Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women", 2014
[45] https://blogs.lse.ac.uk/vaw/regional/the-americas/convention-belem-do-para/
[46] https://blogs.lse.ac.uk/vaw/regional/the-americas/mesecvi/

violence against women. Other measures include the follow-up to the internal regulations and sub-legal rules that provide protocols for action and care for victims and the adaption of public policies in accordance with Article 6 of the Convention – the right to be free from violence – by promoting measures for the eradication of gender stereotypes. As for the access to justice, CEVI asked States to make efforts to adopt protocols for an administration of justice free from gender stereotypes, to develop instruments that provide tools to protect women, guarantee adequate attention to cases and prevent re-victimization of women and girls, to have female professionals from various branches helping women victims of violence, to differentiate the crime of femicide from homicide, in order to strengthen its visibility, address its roots through effective prevention, care, investigation, punishment, and reparation policies.[47]

1.5 The Maputo Protocol

In 2005, the African Union adopted the Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa, better known as the Maputo Protocol, to safeguard and advance the rights of women and girls across the continent. It defines discrimination against women in a similar way as the CEDAW, but it does not provide an exhaustive list of all the context in which discrimination can happen, as it refers to "… all spheres of life."[48] It outlines what measures States parties are required to take both in the private and public sphere to promote and achieve equality between men and women. [49]

African culture is rooted in various beliefs and customs which derive from morality.[50] The Protocol does not deny the importance of those features, but acknowledges that morality evolves; thus, it manages to reconcile it with wider aspirations for gender equality, reaffirming positive values while eradicating harmful traditional practices: unequal rights due to different roles and responsibilities between men and women are not permitted.[51]

States must condemn and prohibit all forms of harmful practices which affect women's rights. For example, female genital mutilation is mentioned under Article 5 as a damaging practice, and it is formally interdicted.

[47] https://www.oas.org/en/MESECVI/docs/Tercer-Informe-Seguimiento-EN.pdf
[48] Maputo Protocol, Article 1(F)
[49] https://ukzn-dspace.ukzn.ac.za/bitstream/handle/10413/14989/Msuya_Norah_H_2017.pdf?sequence=1&isAllowed=y
[50] http://www.scielo.org.za/scielo.php?script=sci_arttext&pid=S1561-40182015000200006#:~:text=African%20culture%20is%20embedded%20in,curses%20on%20them%20and%20others.
[51] J. Geng, Research Handbook on Feminist Engagement with International Law, Northampton, MA, 2019, Chapter 24

Women's right to live in a positive cultural context[52], to equal pay for equal work, to paid maternity leave, to participate in the decision-making process[53] and at the judiciary levels,[54] and to reproductive health[55], which includes freedom to choose whether to have a baby and contraception – which has been met by an opposition from the Catholic community[56] – must be protected. As for the right to reproductive health, it has been highlighted that restricted or penalized access to abortion does not reduce the number of abortions, as it leads to clandestine and unsafe practices.[57]

Adolescent girls and particularly vulnerable groups of women, such as widows, elderly women, disabled women, and poor women must form the object of higher standards of protection.[58]

As for family rights, the Protocol states that women must be regarded as equal partners, marriages must take place with the free and full consent of both parties and the minimum age for marriage for women must be set at 18 years, which makes it possible to fight the practice of child marriage.[59] The African Court on Human and People's Rights has the jurisdiction over cases concerning the application of the Protocol.[60]

1.6 The Istanbul Convention

In 2008, the Council of Europe opened a path for creating a legal framework at a pan-European level to prevent and combat all forms of violence against women, including domestic violence, as well as to protect and support the victims of such violence, and to prosecute the perpetrators.

This led to the signature of the Convention on preventing and combating violence against women and domestic violence, better known as Istanbul Convention, which was signed by 45 States, including European Union, and ratified by 36.[61] In 2021, Turkey became the first State to withdraw from the Convention.[62]

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[52] Maputo Protocol, Article 17
[53] Maputo Protocol, Article 9
[54] Maputo Protocol, Article 8
[55] Maputo Protocol, Article 14
[56] https://www.ohchr.org/sites/default/files/Documents/Issues/Women/WRGS/MaternalMortality/Catholics_for_choice.pdf
[57] "Policy Change for Women's Rights: A case study of the domestication of the Maputo Protocol in the Democratic Republic of the Congo", African Population and Health Research Center, Safe Engage, 2021
[58] K. Makay, "The Maputo Protocol 10 years on: How can it be used to help end child marriage?", 2013
[59] Maputo Protocol, Article 6
[60] https://www.african-court.org/wpafc/training-for-lawyers-on-using-the-protocol-to-the-african-charter-on-human-and-peoples-rights-on-the-rights-of-women-in-africa-for-legal-action-justice-gerard-niyungeko/
[61] https://www.coe.int/en/web/conventions/full-list?module=signatures-by-treaty&treatynum=210
[62] https://www.coe.int/en/web/istanbul-convention/turkey

In the Convention it is acknowledged that violence against women is a structural violation of human rights, which results in physical, sexual, psychological, or economic harm or suffering[63], and that it is a manifestation of the historical unequal power relations between women and men: the eradication of violence against women may make it possible to fight discrimination and achieve gender equality in law and in fact. It is so pervasive, it affects not only women, but society itself. [64]

The Convention is based on the so-called 4 "Ps": Prevention, Protection, Prosecution, and Policy. The preventive action is key because violence against women is rooted in the historical gender inequality between men and women. States must adopt the necessary measures to promote changes in social and cultural patterns of behaviour in order to eliminate prejudices and traditions, which are based on the idea of inferiority of women or on stereotyped roles for women and men; they must consider the specific needs of vulnerable people, such as disabled, migrants, and rural women and must take measures that encourage all members of society, in particular men and boys, to contribute actively to this cause.[65] Everyone can challenge gender stereotypes, harmful traditional practices, and discrimination against women. By achieving real gender equality, violence against women can be prevented.

Protection is the second aim: it focuses on the victims, who must be informed about their rights, as well as where and how they can get help. They can rely on support services, which consist in legal and psychological advice, financial assistance, accommodation, education, job-seeking, access to health services. States parties must ensure assistance in individual and/or collective complaints, specialist support services, accessible shelters, telephone helplines, rape crisis or sexual violence referral centres which guarantee medical and forensic examination, trauma support, and counselling for victims.

Chapter V concerns prosecution. The offences must be punishable under national law by effective, proportionate, and dissuasive sanctions. Parties shall introduce new offenses where they do not exist and they must implement other measures, such as monitoring or supervision of convicted persons or the withdrawal of parental rights.[66] There are aggravating circumstances which may be taken into consideration, in particular if the offence was committed against a former or current spouse or partner, by a member of the family, a person cohabitating with the victim or a person having abused her or

[63] Istanbul Convention, Article 3
[64] Explanatory Report to the Council of Europe Convention on preventing and combating violence against women and domestic violence
[65] Istanbul Convention, Article 12
[66] Istanbul Convention, Article 45

his authority, if the offences were committed repeatedly, if the offence was committed against a vulnerable person, and if the offence was committed against or in the presence of a child.[67]

Investigations and judicial proceedings shall be carried out without undue delay while taking into consideration the rights of the victims during all stages of the criminal proceedings.[68] Victims cannot be blamed for their past behaviour in order to reduce or cancel the responsibility of the perpetrator.

Victims, as well as their families and witnesses, must be protected from intimidation, further victimisation, and retaliation; they must be informed whether the perpetrator escapes or is released and regarding their rights and the services at their disposal.

As for Policy, as reported by Article 7, preventive, protective, and prosecutive actions require a solid normative system and cooperation between all relevant agencies, institutions, and organisations. An effective response to such violence requires concerted policies by different actors, such as government agencies, NGOs, national, regional, and local parliaments and authorities, but also society itself, because everybody must understand that violence against women cannot be tolerated anymore.[69]

States parties can adopt more favourable measures than the ones provided for under the Convention and can ratify more advanced treaties; likewise, other international agreements could give in on the Istanbul Convention. Under Article 23, the CEDAW stipulates that any more conducive provisions will not be affected by the Convention itself: the result is a synergy between the CEDAW and the Istanbul Convention, as the latter make it possible to strengthen international standards.[70]

As for rape, the Convention demands to penalize every non-consensual sexual act, including vaginal, anal, or oral penetration with any bodily part or any object. Consent must be given voluntarily as the result of a person's free will, which must be assessed in the light of the relevant context.[71]

[67] Istanbul Convention, Article 46
[68] Istanbul Convention, Article 49
[69] https://www.coe.int/en/web/istanbul-convention/the-convention-in-brief#{%2211642062%22:[3]}
[70] S. De Vido, "Donne, violenza e diritto internazionale: la Convenzione di Istanbul del Consiglio d'Europa del 2011", pp 104-105
[71] Istanbul Convention, Article 36

Chapter 2

Wartime rape: history and jurisprudence of the crime

2.1 Rape: from "spoils" of war to "weapon of war"

Rape is not a matter of sex; rather, it is a matter of power, control, and dominance.[72]

Abuses of women during armed conflicts have a long history: women have been raped in every war.[73] Although rape has been considered as an abominable phenomenon, at the same time it has been viewed as an inevitable collateral consequence of armed conflicts.[74]

Among ancient Hebrews, captured women became slaves and concubines; among ancient Greeks, women were a legitimate booty, useful as wives, concubines, slaves, or battle-camp trophies. During the Middle Ages, rape was one of the few advantages open to foot soldiers and sexual violence was committed in the name of God during the Wars of religion in France.[75]

The military codes of Richard II (1385) and Henry V (1419) subjected rape to capital punishment;[76] but it was not until the late eighteenth and nineteenth centuries that national codes began to deal with the protection of civilians, in particular women and children, from sexual assault. The Lieber Code (1863) stated that rape was prohibited under the penalty of death[77] and the Hague Convention (1907) – the leading pre-World War I regulation of international warfare – protected women to protect family honour.[78]

During World War I, rape and forced prostitution of French and Belgian women by German soldiers became a propaganda tool, as they were considered typical German crimes. This represents the first shift in the perception of rape, as it began to be viewed as a real form of tactic of war. However, an international tribunal to punish war crimes, including sexual offences, was never established.[79]

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[72] C. Niarchos, "Women, War, and Rape: Challenges Facing the International Tribunal for the Former Yugoslavia", in Human Rights Quarterly, Vol. 17, No. 4, 1995, 649 ss.
[73] S. Fabijanic Gagro, "The Crime of Rape in the ICTY's and the ICTR's Case-Law", 2010
[74] N. Henry, "The Fixation on Wartime Rape: Feminist Critique and International Criminal Law", 2014
[75] S. Brownmiller, "Contro la nostra volontà. Uomini, donne e violenza sessuale", Milano, 1976
[76] T. Meron, "Rape as a Crime Under International Humanitarian Law", 1993
[77] I. Powell, "From Incidental to Instrumental: The Codification of Rape as an International Crime", 2015
[78] M. Ellis, "Breaking the Silence: Rape as an International Crime", 2006
[79] I. Powell, *supra note 76*

After World War II, when the Nuremberg Charter was adopted, rape was not mentioned and therefore it was not prosecuted, notwithstanding that the Nazis used it to achieve their purpose of humiliation and destruction of supposedly inferior people.[80]

At the Tokyo Tribunal, records of 20000 cases of rape during the occupation of the city of Nanking ("Rape of Nanking") under the threat of death, sexual slavery, forced prostitution, and forced incest were presented, but none of the victims was called to testify and, in those trials, the crimes or rape were not prosecuted as stand-alone crimes, but under the clauses concerning inhumane treatment, ill-treatment, and failure to respect family honour and rights.[81] Recently, in the framework of the Women's International War Crimes Tribunal in Tokyo (December 2000),[82] victims told their experiences as "comfort women" (*jugun-ianfu*) – forced prostitution cases in Japanese brothels –, but they did not receive any compensation or apology.[83] On June 25, 2021, the Japanese government announced that Prime Minister Yoshihide Suga had apologized for Japan's aggression in World War II and admitted the military had a role in coercing women to work in brothels.[84]

Even Allied soldiers committed rape: it is likely it was not done with the intention of destroying inferior peoples, as it was regarded as the manifestation of the ideal of the heroic, fighting man. Still, it was rape. Cornelius Ryan, author of "The Last Battle", wrote that in Berlin, women were assaulted by Russian soldiers and some of them were killed if they refused to have sexual intercourse with them; some committed suicide, either in fear of rape or in shame after it, some made themselves appear diseased or unattractive to avoid sexual violence, some hided, and some fought back.[85]

Unfortunately, systematic rape remains a major issue in recent wars, as confirmed by the 1990 invasion of Kuwait by Iraqi soldiers, who wanted to erase the nation's identity[86]. One may also

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[80] M. Ellis, *supra note 77*

[81] S. Fabijanic Gagro, *supra note 72*

[82] The International Military Tribunal for the Far East (1946-1948) did not mention systematic sexual slavery - occurred from 1938 - which was ignored until the 1990s.
Women's International War Crimes Tribunal in Tokyo – organised by Violence Against Women in War Network - had the purpose to collect testimonies from victims of Japanese soldiers. Its Charter established the jurisdiction upon crimes against humanity, including sexual crimes. The accused also included Emperor Hirohito, who was found guilty of criminal negligence. ("The Women's International War Crimes Tribunal, Tokyo 2000: a feminist response to revisionism?", C. Lévy, Clio [Online], 39, 2014)

[83] M. Ellis, *supra note 77*

[84] https://web.archive.org/web/20210628003534/https://mainichi.jp/english/articles/20210626/p2g/00m/0na/016000c

[85] S. Brownmiller, *supra note 74*

[86] https://www.newsweek.com/kuwait-rape-nation-201584

think of what happened in Kashmir (1988), under the administration of the Indian army, where rapes by security personnel were frequent during crackdowns, cordon-and-search operations, reprisal attacks. Civilians became the target of retaliation.[87] In Peru (1980-1999) women were assaulted by both government security forces and the Communist Party. Sexual violence was used to fight the rebels and it was also used as a form of torture during interrogations.[88]

During the Liberian civil war (1989-1994), soldiers and fighters raped, attempted to rape, or sexually coerced women and girls who were accused of belonging to a particular ethnic group or fighting faction.[89] In East Timor, during Indonesia occupation (1975-1999), rape was used as a weapon against women who were rebels or sympathetic to the rebel cause.[90] In Vietnam, both American soldiers and South Vietnamese Rangers used rape to obtain information on the enemy, instil fear, and warn opposing forces by humiliating women.[91] In 1971, Bangladesh was created by the break-up of Pakistan. The Pakistani army – while attempting to crush he Bengali nationalists – raped Bengali women aa a form of ethnic cleansing, mob violence, or criminality.[92]

Rape as a specific crime was first mentioned in Control Council Law No. 10 – enacted by the Four Powers (France, the United States, the Soviet Union, and the United Kingdom) which occupied defeated Nazi Germany to prosecute war criminals in accordance to the Nuremberg Trials[93] where the term was included in the definition of crimes against humanity.[94] Article 27 of the 1949 Geneva Convention on the Protection of Civilian Persons in Time of War protects women against rape, forced prostitution, or any form of indecent assault. Furthermore, rape is specifically prohibited under the 1977 Protocols Additional to the Geneva Conventions (Additional Protocol I and Protocol II). The International Committee of the Red Cross (ICRC) declared that the serious breach of "wilfully causing great suffering or serious injury to body or health" (article 147 of the Fourth Geneva Convention) covers rape.[95]

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[87] https://www.hrw.org/sites/default/files/reports/INDIA935.PDF
[88] M. L. Leiby, Wartime Sexual Violence In Guatemala and Peru, in International Studies Quarterly, Vol. 53, No. 2, 2009, 445 ss.
[89] https://pubmed.ncbi.nlm.nih.gov/9486762/
[90] http://what-when-how.com/women-and-war/east-timor-abuse-of-women-during-war-rape-in-war/
[91] https://www.gendersecurityproject.com/post/crsv-vietnam-war
[92] S. Bose, Losing the Victims: Problems of Using Women as Weapons in Recounting the Bangladesh War, in Economic and Political Weekly, Vol. 42, No. 38, 2007, 3864 ss.
[93] https://crimeofaggression.info/documents//6/1945_Control_Council_Law_No10.pdf
[94] http://hrlibrary.umn.edu/instree/ccno10.htm
[95] T. Meron, *supra note 75*

Crimes of rape and sexual violence are punished primarily under the Statute of the *ad hoc* International Criminal Tribunal for Rwanda (ICTR) and, the International Criminal Tribunal for former Yugoslavia as well as the Rome Statute of the International Criminal Court.

Nowadays, rape is widely recognized as a weapon of war, a military strategy to humiliate, dominate, and instil fear in civilian members of a community or group. War rape sends the message of dominance not only to the victims, but also to the men who are connected to them. It is a cultural language of male domination: a domination not simply over women, but over other men who are proud to be protectors of women. [96]

2.2 Some cases: Rwanda, Former Yugoslavia, Sierra Leone, Congo

Rwandan history has always been one of opposition between two ethnic groups: Hutu and Tutsi. Belgium colonialism promoted Tutsi supremacy until Independence Day on 1st July 1962, when Hutu started to slaughter and repress them. In 1990, the Rwandan Patriotic Front, composed of Tutsi refugees, invaded Rwanda. The civil war culminated in 1994 and during the genocide, Hutu extremists killed almost one million Tutsis and moderate Hutus.

Hutu propaganda contributed to the idea of Tutsi women as sexual objects who had to be humiliated and destroyed.[97] Between 250.000 to 500.000 women and young girls were raped, gang raped, sexually mutilated, sexually enslaved, and killed.[98] As the Special Rapporteur of the Commission on Human Rights on the Situation of Human Rights in Rwanda (1996) stated, "rape was the rule and its absence the exception". Tutsi women were raped because they were Tutsi: sexual violence was meant to dominate and destroy communities.[99]

As a consequence, the International Criminal Tribunal for Rwanda was created in 1994 by the United Nations Security Council to prosecute rape and sexual violence alongside genocide, crimes against humanity, and war crimes.[100]

The Federal Republic of Yugoslavia – established in 1946, after President Josip Broz Tito and his Communist Party had helped free the country from Germany[101] – included Bosnia and

[96] C. Card, "Rape as a Weapon of War", 1996
[97] A. Obote-Odora, "Rape and Sexual Violence in International Law: ICTR Contribution", 2005
[98] I. Powell, *supra note 76*
[99] A. Obote-Odora, *supra note 96*
[100] Ibidem.
[101] https://www.britannica.com/place/Yugoslavia-former-federated-nation-1929-2003

Herzegovina, Croatia, Macedonia, Montenegro, Serbia (including the autonomous regions of Kosovo and Vojvodina), and Slovenia.

On 25 June 1991, Slovenia and Croatia declared independence, but the ethnic Serb minority in Croatia, with the help of the Yugoslav People's Army (JNA), rebelled and declared a part of the territory an independent Serb State. Croats and non-Serbs were expelled from its territory in a campaign of ethnic cleansing. The Croatian military tried to regain authority. The war effectively ended in 1995 with the victory of Croatia.[102]

Bosnia and Herzegovina had a shared government reflecting the mixed ethnicity of Bosnian Muslims, Bosnian Serbs, and Bosnian Croats. In 1992, Bosnian citizens voted for independence in a referendum. Bosnian Serbs rebelled with the support of JNA and Serbia and quickly asserted control over the country. Bosnian Croats then rejected the authority of Bosnian Government and declared their own republic. The conflict was extremely violent and deadly.[103]

Rape was massive and systematic. Reports revealed rapes of young girls, gang rapes, rapes by neighbours, rapes in front of mothers, fathers and relatives, rapes committed to make women pregnant and hold them captive. and rapes by brothers or fathers. Women were also kept in detention centres where they were systematically raped.[104] UN agencies suggested that 60.000 women were raped between 1992 and 1995.[105]

As a result, the UN Security Council established the International Criminal Tribunal for the former Yugoslavia (ICTY) – which had jurisdiction over individual persons to prosecute war crimes from the 1st of January 1991.[106]

Sierra Leone – a West African country – was a British protectorate until 1961, when it became independent. Before the war, the country was ruled by dictators who enriched themselves through illicit deals involving diamonds, while the population had the second lowest living

[102] https://www.icty.org/en/about/what-former-yugoslavia/conflicts
[103] *Ibidem*
[104] S. Fabijanic Gagro, *supra note 72*
[105] https://www.un.org/en/preventgenocide/rwanda/assets/pdf/Backgrounder%20Sexual%20Violence%202014.pdf
[106] I. Powell, *supra note 76*

standards of any country in the world. A group of rebels, who had entered the country from Liberia, acted to break the status quo.[107]

In 1991, the juxtaposition between the Revolutionary United Front (RUF) and the government of Joseph Saidu Momoh escalated – with the attack on the east of Sierra Leone by the rebels – resulting in a civil war, which lasted 11 years.[108]

Women were raped by both sides, but mostly by the rebels. Rapes were extremely brutal and targeted young women and girls who were supposed to be virgins. Many of them did not survive. Others were subjected to sexual slavery or were forcibly conscripted into the fighting forces.[109]

The Special Court for Sierra Leone (SCSL) was established in 2002 after the civil war. It was the first international tribunal consisting of both local and international officials, which applied both national and international law. It widened the traditional scope of gender crimes, interpreting rape, sexual slavery, enforced prostitution, forced pregnancy, and other forms of sexual violence as crimes against humanity and violations of the Geneva Conventions.[110]

The conflicts in Congo have their roots in the 1994 Rwandan genocide: the Interahamwe – Rwandan Hutu militias – fled to Congo, where they used refugee camps as bases for their attacks against Rwanda, which was governed by Tutsis. As a result, the Rwandan Patriotic Army entered Congo, with the help of the Alliance des Forces Democratiques pour la Liberation du Congo-Zaire – a force led by Laurent Kabila that tried to remove dictator Mobutu Sese Seko from power. In 1997, Mobutu went to exile, and Kabila became President. Kabila cut relations with his Rwandan supporters by replacing his Rwandan chief of staff with a native Congolese and ordered all Rwandan and Ugandan forces to leave the country and that triggered another war. Despite the signature of several peace agreements and the intervention of diplomacy, the country remains unsteady.[111]

The eastern region of the Democratic Republic of Congo has been called the "rape capital of the world".[112] The United Nations estimates that 200.000 women and girls have been assaulted

[107] http://emiguel.econ.berkeley.edu/assets/assets/miguel_research/25/_Paper__War_and_Local_Collective_Action.pdf
[108] https://www.france24.com/en/tv-shows/revisited/20211008-two-decades-on-sierra-leone-still-scarred-by-civil-war
[109] https://www.hrw.org/report/2003/01/16/well-kill-you-if-you-cry/sexual-violence-sierra-leone-conflict
[110] I. Powell, *supra note 76*
[111] C. Brown, "Rape as a Weapon of War in the Democratic Republic of the Congo"
[112] BBC News, 2010

in twelve years. Armed groups were guilty of raping with objects, such as guns, and forcing people to watch

2.3 Definitions of rape according to the International Criminal Tribunal for Rwanda and the International Criminal Tribunal for the former Yugoslavia

Rape is a crime prohibited under international law: Article 27 of the IV Geneva Convention provides that women shall be protected against it and Article 3 constitutes an "umbrella rule"[113] as rape is considered an outrage against personal dignity, making an open reference to all rules of international humanitarian law. It is punishable under Article 5(g) of the ICTY Statute, according to which, "The International Tribunal shall have the power to prosecute persons responsible for the following crimes when committed in armed conflict, whether international or internal in character, and directed against any civilian population: (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."

The first case – prosecuted before the ICTR in 1998 – where the notion of rape was tackled was *Prosecutor v. Akayesu*. The accused – the mayor of the Taba commune – was he first person convicted of rape as a crime against humanity, in addition to rape as a component of genocide, and complicity in genocide. Witnesses testified about the gang rape of a six-year old girl and rapes of other girls and women.[114]

The Trial Chamber recognized that international law did not provide a definition of rape. However, the central elements of the crime should not be captured in a mechanical description of objects and body parts. As a result, the Trial Chamber defined rape as a "physical invasion of a sexual nature, committed on a person under circumstances which are coercive"[115]. It then explained that "threats, intimidation, extortion and other forms of duress which prey on fear or desperation may constitute coercion, and coercion may be inherent in certain circumstances,

[113] S. Fabijanic Gagro, *supra note 72*
[114] Akayesu Judgement, para 416
[115] Prosecutor v. Akayesu, para 686-688

such as armed conflict or the military presence of Interahamwe among refugee Tutsi women."[116]

Variations on the act may include "the insertion of objects and/or the use of bodily orifices not considered to be intrinsically sexual."[117] Thus, trusting a piece of wood into the sexual organs of a woman as she lay dying constitutes rape.

The Chamber also provided the definition of sexual violence, which is broader than that of rape and includes sexual slavery, sexual mutilation, forced marriage, forced abortion, and molestation.[118] Sexual violence is "any act of a sexual nature which is committed on a person under circumstances which are coercive. It is not limited to physical invasion of the human body and may include acts which do not involve penetration or even physical contact." An example of sexual violence without physical contact is forced nudity.[119] The act of sexual violence – which includes rape – must be committed as a part of a wide-spread or systematic attack on civilians or specific groups, such as ethnic, national, or political groups.[120]

The *Akayesu* definition does not require any act of penetration of or by a sexual organ to constitute rape; it is gender-neutral, which allows to include male victims; it extends the latitude of what constitutes coercion, but it does not address the element of lack of consent or *mens rea*. Physical force is not necessary, while pressures, such as threats or intimidation, may constitute coercion because they may inspire fear. These pressures may be also inherent in armed conflicts.[121]

This definition can be read in conjunction with the Rules of Procedure and Evidence of the ICTR.[122] Rule 96 provides that the corroboration of the testimony of a victim of sexual violence is not needed; it excludes justification for rape based on the sexual conduct prior to the act of rape; and it provides that consent cannot be given if the victim had experienced or had reason to fear violence, duress, detention, or psychological aggression. The defendant can show relevant and credible evidence of consent, but the tribunal places a burden of proof which the

[116] https://unictr.irmct.org/sites/unictr.org/files/case-documents/ictr-96-4/trial-judgements/en/980902.pdf para 598 and 688
[117] Akayesu Judgement, para 596
[118] S. Fabijanic Gagro, *supra note 72*
[119] Akayesu judgement, para 688
[120] Akayesu judgement, para 598
[121] P. Weiner, "The Evolving Jurisprudence of the Crime of Rape in International Criminal Law", 2013
[122] https://unictr.irmct.org/sites/unictr.org/files/legal-library/001103-rpe-en.pdf

defendant must overcome to prove how and why the intercourse was consensual in that war situation.[123]

The *Akayesu* definition of rape has not been adopted *per se* in all subsequent case law. For example, in the *Semanza*, *Kajelijeli* and *Kamuhanda* cases, the Court focused on the physical components of the act and did not take into consideration its conceptual definition. In *Semanza*[124], the Chamber held that the material element of rape as a crime against humanity is the non-consensual 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 again the penetration of the mouth of the victim by the penis of the perpetrator. Other acts of sexual violence that do not satisfy this narrow definition may be prosecuted as other crimes against humanity such as torture, persecution, enslavement, or other inhumane acts.[125]

In *Kajelijeli*[126], the ICTR Trial Chamber dismissed rape as a crime against humanity, since the Prosecution had failed to prove beyond a reasonable doubt that the accused was present during the rape or that he knew that rapes were being committed in Mukingo and Kinigi communes.[127] In *Kamuhanda*, the accused – the Minister of Higher Education and Scientific Research in the Interim Government of Rwanda – was found guilty of genocide and extermination as a crime against humanity. He had supervised the killings in Gikomero commune and had distributed firearms, grenades, and machetes to the Interahamwe militia.[128] In both cases, the ICTR referred to the *Furundzija-Kunarac* definition of rape[129], which will be discussed below.

In *Prosecutor v. Furundžija*, the accused – the commander of a special unit of the Croatian Defence Council, the "Jokers" – was found guilty of outrages upon personal dignity, including rape. During the interrogations of Bosnian Muslims at the headquarters of the "Jokers", the detainees were subjected to sexual assaults, rape, and other physical and mental suffering. The ICTY convicted Furundzija on all counts against him. Furundzija appealed the judgment arguing that he was denied the right to a fair trial - as the evidence against him was insufficient.

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[123] R. J. Goldstone, "Prosecuting rape as a war crime", 2002

[124] Semanza was the mayor of Bicumbi commune before becoming President of the greater Kigali branch of the *Mouvement Révolutionnaire National pour la Démocratie er le Développement* (MRND). The ICTR Chamber found him guilty of complicity in genocide, extermination, torture, and murder as crimes against humanity. The Appeals Chamber convicted Semanza for ordering the massacre of Tustis at Musha church.

[125] Prosecutor v. Semanza, para 344-346

[126] Kajelijeli was the mayor of Mukingo. The Tribunal convicted him for genocide, direct and public incitement to commit genocide, and extermination as a crime against humanity.

[127] https://www.internationalcrimesdatabase.org/Case/102/Kajelijeli/

[128] https://www.internationalcrimesdatabase.org/Case/103/Kamuhanda/

[129] The Prosecutor v. Kajelijeli, paras 910-915 and Prosecutor v. Kamuhanda, paras 705-710

The Appeals Chamber dismissed all grounds of appeal and confirmed his sentence to 10 years of imprisonment.[130]

The ICTY held that, in order to find a proper definition of the crime in international law, it was necessary to take into consideration the basic principles deriving from national laws. Most legal systems recognize rape as 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 by coercion or force or threat of force to the victim or a third party. The sexual intercourse occurs without the consent of the victim, since consent must be given voluntarily with the victim's free will, assessed in the context of the surroundings circumstances.[131]

Therefore, the actus reus of rape is:

(i) The sexual penetration, however slight:
  (a) of the vagina or anus of the victim by the penis of the perpetrator or any other object used by the perpetrator; or
  (b) of the mouth of the victim by the penis of the perpetrator;
(ii) by coercion or force or threat of force against the victim or a third person.[132]

The Court held that forced oral penetration should be classified as rape on the basis that such penetration "constitutes a most humiliating and degrading attack upon dignity".[133]

Coercion – clearly a key feature of the crime – can be directed toward the victim or third parties: this is because the victim could agree to a sexual intercourse only to avoid repercussions against others. Significantly, the Court acknowledged that captivity circumstances vitiate consent.[134]

In the light of the above, one may say that *Akayesu* and *Furundzija* provide two legal definitions of rape. More specifically, *Akayesu* provides a broader definition that focuses on the reality of wartime violence, where coercive factors are presumed. As a consequence, the focus on consent may be misleading. Instead, *Furundzija* provides a narrow definition, based on national legislations, where the absence of consent plays a key role.[135]

[130] https://www.internationalcrimesdatabase.org/Case/89
[131] S. Fabijanic Gagro, *supra note 72*
[132] Prosecutor v. Furundzija (https://www.icty.org/x/cases/furundzija/tjug/en/), para 185
[133] Furundzija Judgement, para 183
[134] M. Karagiannakis, "The Definition of Rape and Its Characterization as an Act of Genocide – A Review of the Jurisprudence of the International Criminal Tribunals for Rwanda and the Former Yugoslavia", 1999
[135] J. Crowe, "Coercion, Consent and Sexual Violence in Wartime"

In *Prosecutor v. Kunarac, Kovac and Vukovic*[136] the Tribunal condemned individuals responsible for various forms of sexual violence as instruments of terror and persecution. Two of the accused took women and girls, mostly Muslims, from detention centres throughout the Foca region, and kept them as their slaves. In fact, Judge Florence Mumba called this the "rape camp case", since rape was systematic and used as a weapon of war.[137] The Chamber defined rape as:

(i) the sexual penetration, however slight:
  (a) of the vagina or anus of the victim by the penis of the perpetrator or any other object used by the perpetrator; or
  (b) of the mouth of the victim by the penis of the perpetrator;
(ii) where such sexual penetration occurs without the consent of the victim.[138]

The *mens rea* was identified in the intent to penetrate the victim with the knowledge that the victim had not consented to that. Consent – which must be given voluntarily, as a result of the victim's free will – shall not be allowed as a defence if the victim was subjected to or threatened with or had reason to fear violence, duress detention, or psychological oppression, or reasonably believed that if they did not submit, another might be so subjected, threatened, or put in fear.[139] Coercive circumstances without the threat or use of force may be sufficient to demonstrate the absence of consent and, in those circumstances, implied consent becomes irrelevant: resistance of the victim is not required, because it would be "absurd on the facts."[140] The appeals panel further explained that force or threat of it provides clear evidence of non-consent, but force is not an element *per se* of rape, because voluntary consent relates to the mental state of the victim, while force focuses on the acts of the accused. [141]

In *Prosecutor v. Muhimana* (2005),[142]it was noted that some courts relied upon *Akayesu*, whereas others recalled *Kunarac*. However, the two definitions are compatible: the former refers to a "physical invasion of a sexual nature", while the latter describes the parameters of

[136] The accused were found guilty of crimes against humanity and violations of laws or customs of war. He was guilty of murdering a pregnant Tutsi whom he had disembowelled to see what the foetus looked like. He was found criminally liable for committing and abetting rapes as part of a widespread and systematic attack against the Tutsi civilians. He also raped a girl, and later apologized when he found out she was Hutu, and not Tutsi.
[137] I. Powell, *supra note 76*
[138] Prosecutor v. Kunarac, para 460
[139] ICTY Rules of Procedure and Evidence, Rule 96
[140] M. Ellis, *supra note 77*
[141] P. Weiner, *supra note 120*
[142] Muhimana, former conseiller of Gishyta Sector in Kibuye prefecture, was found guilty of genocide, rape, and murder as crimes against humanity.

what constitutes a physical invasion:[143] this means that *Kunarac* set out the elements which are contained in the conceptual definition of rape provided in *Akayesu*.[144]

In *Gacumbitsi v. Prosecutor* (2006), Sylvestre Gacumbitsi – a mayor of the Commune of Rusomo in Rwanda – was indicted individually and as a superior with rape as a crime against humanity. He was responsible for the acts of his subordinates as well as for facilitating and tolerating rape and sexual degradation of Tutsi women.

The ICTR appeals chamber defined rape in a more traditional way than the one in *Akayesu*; therefore, it adopted the *Kunarac* definition and held that non-consent and knowledge of it are elements of rape. It then concluded that the fact that victims were raped by those they were running away from, confirms the lack of consent. [145]

In *Delalic and others*, the ITCY Chamber found that the commander of the Celebici prison camp was liable under the principle of command responsibility for acts of torture and ill treatment. Two other accused were guilty of serious breaches of the Geneva Conventions and violations of the laws and customs of war for their actions at the camp.[146] It was held that rape constitutes torture and a violation of the laws or customs of war, and the Court agreed with the approach adopted in *Akayesu*. The Chamber held that acts of vaginal and anal penetration by the penis under coercive circumstances clearly constitute rape; while acts of *fellatio* could constitute rape[147]- if pleaded in the appropriate manner, but certainly constitute a fundamental attack on human dignity, inhumane, and cruel treatment.[148] The Trial Chamber added that coercive conditions are inherent in armed conflicts.[149]

2.3.1 The contribution of the International Criminal Court to the definition of rape

The International Criminal Court is the first permanent international criminal court, which prosecutes individuals charged with international crimes, including genocide, war crimes, and crimes against humanity. Its establishment draws from the experience of the *ad hoc* tribunals

[143] *Ibidem.*
[144] Muhimana Judgment
[145] A. Obote-Odora, *supra note 96*
[146] O. Swaak-Goldman, "Prosecutor v. Delalic No. IT-96-21-T", in The American Journal of International Law, Vol. 93, No. 2, 1999, 514 ss.
[147] M. Karagiannakis, *supra note 133*
[148] Prosecutor v. Delalic, para 1066
[149] S. Fabijanic Gagro, *supra note 72*

for Rwanda and Former Yugoslavia, which addressed the atrocities committed in those territories.[150] It aims at implementing international humanitarian law and ending impunity.

It has jurisdiction over the 123 States that have accepted the jurisdiction of the Court. States have the primary duty to prosecute alleged criminals, while the Court prosecutes them only when the State is unable to or unwilling to do so.[151]

The Rome Statute – adopted in 1998 – is the Court's founding treaty, and it entered into force in 2002.[152]

Rape is codified as a crime in the ICC Statute: according to Article 7, rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity constitute crimes against humanity. The reference to "any other form of sexual violence" leaves open the possibility to include other sexual offences. Under Article 8, the same offences also constitute violations of the laws and costumes of war.[153]

The elements of rape are the following:

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
3. 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.[154]

This definition derives from the *Akayesu*, *Furundzija*, and *Kunarac* cases.[155] The reference to sexual penetration by "any part of the body" allows to include finger or tongue penetration. The definition is gender neutral as to both the perpetrator and victim.

[150] https://www.hrw.org/topic/international-justice/international-criminal-court
[151] https://ihl-databases.icrc.org/ihl/INTRO/585?OpenDocument
[152] https://www.icc-cpi.int/sites/default/files/RS-Eng.pdf
[153] ICC Statute, Article 7 and 8
[154] *The Prosecutor v. Jean-Pierre Bemba Gombo*, para 99-101, 2016
[155] M. Ellis, *supra note 77*

The perpetrator must (1) intend to invade the body of a person in a way resulting in penetration, and (2) know that the invasion was committed using force, threats, coercion, or by taking advantage of a coercive environment. Coercion and force have a broad latitude, which allows to anticipate the circumstances in wartime. By referring to "a person incapable of voluntarily consenting", it confirms that age, mental or physical condition, or infirmity affect consent to sexual activity.[156]

2.3.2 The contribution of the Special Court of Sierra Leone to the definition of rape

Initially, in *Prosecutor v. Brima, Kanara and Kanu* (2007)[157], the Special Court opted for a definition similar to the one provided in *Kunarac*:

1. The non-consensual penetration, however slight, of the vagina or anus of the victim by the penis of the perpetrator or by any object used by the perpetrator, or of the mouth of the victim by the penis of the perpetrator; and
2. The intent to perform this sexual penetration, and the knowledge that it occurs without the consent of the victim.[158]

The Chamber explained that the use of "force or threat of force" proves the lack of consent, but they are not elements *per se* of rape and there are factors – which must be assessed by the context – other than force that make a sexual act non-consensual, such as abuse of power, fear, and detention. However, coercion is inherent in armed conflicts or detention contexts.[159]

The Chamber also found that forced marriage is a crime against humanity distinct from sexual slavery: forced marriage involves a perpetrator compelling a person by force or threat of force into a forced conjugal association with another person resulting in a great suffering, or serious physical or mental injury. Sexual violence was an element of forced marriage, but it was not predominantly a sexual crime, unlike sexual slavery. Therefore, forced marriage is a separate crime against humanity.[160]

Two years later, the Trial Chamber of the SCSL adopted a different definition in *Prosecutor v. Sesay et al.*:[161]

(i) 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

[156] P. Weiner, *supra note 120*

[157] Brima, Kamara and Kanu were high-ranking members of the Armed Forces Revolutionary Council. They ordered, committed planned or were responsible as superiors for the murders, beatings, mutilations, rapes, forced marriages, abductions, looting, collective punishments, and recruitment of child soldiers.

[158] Prosecutor v. Brima, para 693

[159] Prosecutor v. Brima, para 694

[160] https://blogs.lse.ac.uk/vaw/landmark-cases/a-z-of-cases/brima-et-al-case/

[161] Sesay, Kallon, and Gbao were all high-ranking members of the Revolutionary United Front. They were convicted for war crimes and crimes against humanity as individuals and as superiors.

organ, or of the anal or genital opening of the victim with any object or any other part of the body

(ii) 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

(iii) The accused intended to perform the sexual penetration or acted in the reasonable knowledge that this was likely to occur; and

(iv) The accused knew or had reason to know that the victim did not consent.[162]

The first two paragraphs derive from the ICC's definition: the former includes genital, anal or oral penetration, while the latter refers to the penetration with something other than a sexual organ. It is a gender-neutral definition.[163]

The third and fourth paragraphs derive from the *Kunarac* judgment. It is held that genuine consent cannot be given under the use or threat of force, but it is not required, as the circumstances that prevail are almost intrinsically coercive; and a person is not capable of consenting if they are too young, under the influence of some substance, or suffering from an illness or disability.[164]

2.4 Rape as a war crime

War crimes are crimes committed during armed conflicts. They are violations of laws or customs of war. In 1943, the Allied Forces founded the United Nations War Crimes Commission to investigate war crimes committed by Nazi Germany. Initially, individuals were not held liable for those crimes. However, as pointed out by some authors, crimes against international law are committed by men and therefore they should be punished. The 1949 Geneva Conventions did not explicitly use the term "war crime", but obligated States to "enact any legislation necessary to provide effective penal sanctions for persons committing, or ordering to be committed, any of the grave breaches of the present Convention."[165] In 1977, the Additional Protocol I clarified that "grave breaches" shall be regarded as war crimes.[166]

Rape and sexual assault were included in the Geneva Conventions in 1949, allowing to prosecute them as war crimes. Rape as a violation of laws or customs of war amounts to a violation of Article 3 of the Geneva Conventions, which prohibits "violence to life and person, in particular mutilation, cruel treatment and torture; outrages upon personal dignity, in particular humiliating and degrading treatment."

[162] *Prosecutor v. Sesay, Kallon and Gbao, para* 145

[163] P. Weiner, *supra note 120*

[164] *Ibidem.*

[165] First Geneva Convention, article 49

[166] O. A. Hathaway, P. K. Strauch, B. A. Walton, Z. A. Y. Weinberg, "What is a War Crime?", in 44 YALE J. INT'l L: 53, 2019, 53 ss.

As provided for under Article 27 of the Fourth Geneva Convention on the Protection of Civilian Persons in Time of War, "women shall be especially protected against any attack on their honour, in particular against rape, enforced prostitution, or any form of indecent assault."

Protocol I of the Geneva Conventions expands the protected rights, since Article 76 provides that "women shall be the object of special respect and shall be protected in particular against rape, forced prostitution and any form of indecent assault."

Article 3 of the ICTY Statute generally prohibits violations of the laws or customs of war. In *Prosecutor v. Furundzija*, the Chamber addressed the war crime of "outrages upon personal dignity including rape" as resulting from the case of a woman that was forced to stand naked on a table before a group of laughing soldiers, while one of the accused stuck a knife against the woman's thigh and threatened her with sexual mutilation. Later, she was raped, vaginally, orally, and anally. These acts caused severe physical and psychological pain, but also public humiliation, which permitted to prosecute the crimes as outrages upon personal dignity and sexual integrity.[167]

Kunarac also addressed the war crime of outrages upon personal dignity. Rape was not punished as an outrage upon personal dignity, but as a separate war crime and crime against humanity. It provided a new definition of "outrages upon personal dignity", which may be useful in future judgements. The main features are:

(i) that the accused intentionally committed or participated in an act or omission which would be generally considered to cause serious humiliation, degradation or otherwise be a serious attack on human dignity, and
(ii) that they knew that the act or omission could have that effect.[168]

In this definition, "real or lasting suffering" was not an element of the offence.[169]

In the *Celebici* case (*Delalic and others*), the Chamber found three men guilty of both grave breaches and violations of the laws of war for sexual offences – as they were serious attacks on personal dignity – committed against male detainees in the Celebici prison camp in Bosnia and Herzegovina. The judgment expanded the definition of sexual violence to include men victims and also stated the importance of superior responsibility, which is not limited to military commanders, but also covers civilians who have a position of power.[170]

Article 4 of the ICTR Statute – which deals with violations of the Geneva Conventions – enumerates "rape, enforced prostitution, and any form of indecent assault" as war crimes.

Article 8 of the ICC Statute enumerates rape, sexual slavery, forced pregnancy, forced sterilization, and other forms of sexual violence as war crimes relating to international and non-international armed conflicts.[171]

[167] Prosecutor v. Furundzija, para 82-272
[168] Prosecutor v. Kunarac, para 514
[169] M. Ellis, *supra note 77*
[170] I. Powell, *supra note 76*
[171] R. J. Goldstone, *supra note 122*

2.5 Rape as genocide

Traditionally, genocide was a "crime without name."[172] The Armenian case[173] was dismissed as a crime against humanity and civilization. In 1944, the Polish jurist Raphael Lemkin coined the term genocide, and included cultural genocide as a way of destruction of the cultural prerequisites of life as a group; however, it was not taken into account in the Statutes of Nuremberg and Tokyo. Genocide as a distinct crime derives from Resolution 96 (I) of the UN General Assembly, which categorized genocide as a crime under international law. In 1996, the International Court of Justice acknowledged that the prohibition of genocide is *erga omnes* in nature and in 2006 that it amounts to *jus cogens*.[174]

The Convention on the Prevention and Punishment of the Crime of Genocide (1948) defines genocide as an act committed with intent to destroy, in whole or in part, a national, ethnical, racial, or religious group. Examples of genocidal acts include:

(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.[175]

The Convention limits its scope to the protection of four types of groups, namely, national, ethnical, racial, and religious ones. As for national and ethnical groups, it is required at least one denominator, such as common culture, history, way of living, language, or religion. It is necessary that the group is large in number and continuously lives in the territory of the State. Racial groups consist of individuals who share some hereditary physical traits or features. A religious group is a stable group where individuals share a form of belief.[176] The Convention excludes groups based on political affiliation, gender, or sexual orientation.[177]

The element that makes genocide "the worst of all crimes" is *dolus specialis*, the special intention to destroy, in whole or in part, a defined group.[178] The perpetrator must act with the aim, goal, purpose, or desire to destroy the group or a part of it. The word "destroy" is intended to the physical and biological destruction of the members of the group[179], as extended to all possible results of campaigns, which are characterized by one or more of the prohibited acts. In this sense, the biological destruction includes the forcible transfer of children on a mass scale.

[172] Winston Churchill, 1941, broadcast speech
[173] In 1915, the Ottoman Empire guided by the "Young Turks" approved the so-called Tehcir law, which permitted the deportation of Armenian leaders and later of the entire Armenian population to Anatolia, where they were massacred. The intent was to destroy the Armenian Cristian community (that sympathized for Russia) and establish a nationalist State based on ethnic and religious homogeneity. It is estimated that at least a million and a half Armenians were killed.
[174] C. Kreb, "The Crime of Genocide under International Law", 6 INT'l CRIM. L. Review, 2006, 461 ss.
[175] Article 2, the Convention on the Prevention and Punishment of the Crime of Genocide
[176] C. Kreb, supra note 173
[177] Z. A. Karazsia, "An Unfulfilled Promise: The Genocide Convention and the Obligation of Prevention", in Journal of Strategic Security, Vol. 11, No. 4, 2018, 20 ss.
[178] S. Fabijanic Gagro, *supra note 72*
[179] Prosecutor v. Krstic, para 580

The international consensus gave a qualitative interpretation of the term "in part", which reflects the numeric size of the targeted group, the overall size of the entire group, and its prominence.[180]

Genocide could be committed not only during wartime, but even in times of peace[181], as confirmed by Article 1 of the Convention itself.

Rape does not apparently fall within this definition, but in the *Furundzija case*, the ICTY held that rape may amount to an act of genocide – under Article 4 of the ICTY Statute – if the requisite elements of genocide are met.[182]

The first category of acts of genocide is (a) killing members of a group. In the *Akayesu* judgement, the chamber highlighted that the rapes of Tutsi women in the Taba Commune were preliminary to murder and amounted to a strategy to destroy the group itself.[183]

The second category is (b) causing serious bodily or mental harm to members of the group. In *Akayesu*, the Court stated that rape and sexual violence certainly inflict serious physical and psychological suffering on the victims, but harm does not have to be necessarily permanent and irremediable.[184]

The third category is (c) deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part. According to the *Akayesu* judgement, this means methods which ultimately cause the physical destruction of the group. Examples are subjecting a group of people to a subsistence diet, systematic expulsion from their homes, and the reduction of essential medical services.[185]

The fourth category is (d) imposing measures intended to prevent births within a group. These may be physical measures, such as sexual mutilation, sterilization, forced birth control, but also psychological measures, so that rape constitutes that measure when the victim refuses to procreate.[186]

The last category is (e) forcibly transferring children of the group to another group. In patriarchal societies, if a woman is raped by a man from another group, becomes pregnant and bears the child, that child belongs to the father's group.[187]

In *Karadzic and Mladic*[188], the Tribunal concluded that in some cases, forced impregnation had the intent to transmit a new ethnic identity to the child and therefore it could constitute genocide.[189]

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[180] C. Kreb, supra note 173
[181] Article 1
[182] M. Karagiannakis, *supra note 133*
[183] *Akayesu* judgement, para 733
[184] *Akayesu* judgement, para 502-504
[185] *Akayesu* judgement, para 506
[186] *Ibidem*. para 507-508
[187] M. Karagiannakis, *supra note 133*
[188] Karadzic was the President of the Serbian Democratic Party and the President of the National Security Council of Serbian Republic of Bosnia and Herzegovina. General Mladic was Karadzic's military counterpart. They were charged of murder, violations of the laws or customs of war, acts of violence aimed at spreading terror, attacks on civilians, and taking hostages.
[189] M. Ellis, *supra note 77*

These categories must be directed at an individual or individuals because they are member of a group, therefore the victim of the crime of genocide is not only the individual, but also the group itself.[190]

Finally, the intent to commit genocide – in absence of a confession – can be inferred from a certain number of presumptions of fact, such as acts systematically directed towards the same group, which violate that group, their scale of atrocities, their general nature, and the exclusion of other groups.[191]

2.6 Rape as a crime against humanity

After the end of World War II, the international community deemed necessary to prosecute political and military leaders for crimes committed against their citizens, whom they were supposed to protect.[192]

A crime against humanity was defined in the Nuremberg Charter as: "murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population 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."

Crimes against humanity were then recognized as offences under international law by the UN General Assembly and the International Law Commission (ILC), but no specific convention was ever adopted.[193]

Crimes against humanity must be committed against a civilian population, not against individual civilians. Therefore, they target the members of a group; they violate the dignity of victims; and they concern the international community. They are committed, instigated, or tolerated by a State, an authority, or a politically organized group. It is the instigation or direction of either a government or an organization or a group that gives the act its scale and makes it a crime against humanity imputable to private persons or agents of a State.[194] Those crimes can be committed by individuals, but only to the extent that they are part of a widespread or systematic attack. Crimes against humanity simultaneously target individuals and their group.[195]

The act must have been committed systematically or on a large scale. "Systematically" means that the acts have occurred with a predetermined plan or policy.[196]

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[190] *Akayesu* judgement, para 521

[191] *Akayesu* judgement, para 523-524

[192] M. Renzo, "Crimes Against Humanity and the Limits of International Criminal Law", Law and Philosophy, Vol. 31, No. 4, 2012, 443 ss.

[193] L. N. Sadat, "Crimes Against Humanity in the Modern Age", in The American Journal of International Law, Vol. 107, No. 2, 2013, 334 ss.

[194] C. Chernor Jalloh, "What Makes a Crime Against Humanity a Crime Against Humanity", 28 Am. U. Int' L. Rev. 381, 2012, 381 ss.

[195] M. Renzo*, supra note* 191

[196] C. Chernor Jalloh, *supra note* 193

When Control Council Law No. 10 was adopted, rape was listed as a crime against humanity.[197] Article 3 of the ICTR Statute addresses Crimes Against Humanity and explicitly lists "rape" as a punishable act when it is "committed as part of a widespread or systematic attack against any civilian population on national, political, ethnic, racial or religious grounds."

Akayesu was also responsible under Article 3(g) of the ICTR Statute: the rapes were part of a widespread and systematic attack on the civilian population; therefore, they were punishable as crimes against humanity.[198]

Sylvestre Gacumbitsi – a mayor of the Commune of Rusomo in Rwanda – was indicted individually and as a superior with rape as a crime against humanity. He was responsible for the acts of his subordinates, for facilitating and tolerating rape and sexual degradation of Tutsi women.[199] The Appeals Chamber held that non-consent and the accused's knowledge of it are elements of rape as a crime against humanity. The Tribunal convicted the accused of genocide and crimes against humanity, and he was sentences to 30 years' imprisonment.[200]

Under Article 5 of the ICTY Statute, rape is a crime against humanity "when committed in armed conflict, whether international or internal in character, and directed against any civilian population."

Prosecutor v. Kunarac and others first convicted enslavement and rape as crimes against humanity. The ICTY condemned various forms of sexual violence as instruments of terror and persecution. The accused were members of the Serbian forces that overtook the Foča region of Bosnia and Herzegovina and that kept women and girls as their personal slaves. They forced them to cook and clean, and then raped them. Rape, torture, and enslavement were prosecuted as crimes against humanity and war crimes.[201]

Article 2 of the SCSL Statute defines crimes against humanity, in which are included not only rape, but also sexual slavery, enforced prostitution, forced pregnancy, and any other form of sexual violence.

In *Prosecutor v. Brima et al.* (2004), the indictment listed the crimes of rape, sexual slavery, and outrages upon personal dignity, but the Prosecutor wanted to add forced marriage as a crime against humanity. The Trial Chamber interpreted forced marriage as sexual slavery; but the Appeals Chamber reversed the lower court's judgment and held that forced marriage in that context satisfied the requirements of "other inhumane acts", since it compels a person by force or threat to serve as a conjugal partner. That results in severe suffering, meaning forced marriage can be regarded as s a crime against humanity. [202]

The Rome Statute confirms the general definition of crimes against humanity, expanding the elements of crimes against women: other than rape, it codifies sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, and sexual violence.[203]

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[197] C. Chinkin, "Symposium. The Yugoslav Crisis: New International Law Issues. Rape and Sexual Abuse of Women in International Law", in European Journal of International Law, 1994, 326 ss.
[198] M. Ellis, *supra note 77*
[199] A. Obote-Odora, *supra note* 96
[200] https://www.internationalcrimesdatabase.org/Case/218/Gacumbitsi/
[201] I. Powell, *supra note 76*
[202] *Ibidem.*
[203] Rome Statute, Article 7(g)

2.7 Rape and torture

Torture in times of armed conflicts is specifically prohibited under the Geneva Conventions (1949) and the two Additional Protocols (1977).

According to the UN Convention against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment (1984), torture is any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on 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. It does not include pain or suffering arising only from, inherent in, or incidental to lawful sanctions.[204]

In 1950, the European Convention on Human Rights was adopted in the framework of the Council of Europe. Article 3 prohibits torture by stating that "no one shall be subjected to torture or to inhuman or degrading treatment or punishment." There is a large range of types of behaviour that may fall under the scope of this provision. In *Ireland v. the United Kingdom*, the European Court of Human Rights held that the minimum level of severity depends on all the circumstances of the case, such as the duration, the methods, its physical and psychological effects, sex, age, and state of health of the victim. In *Aksoy v. Turkey*, the Court held that torture is deliberately inflicted and has the purpose of causing pain, obtaining information, inflicting punishment or intimidating.

In *Aydin v. Turkey*, the Court held that rape amounted to torture since a detainee was assaulted by an official of the State, who took advantage of the vulnerability and weakness of the victim; it also left deep psychological and physical scars. It is also acknowledged that during detention, detainees live in a situation, therefore they must be protected.[205]

Inhuman or degrading acts differ from torture as they have neither the level of intensity nor the same purpose. Many instances of inhuman treatment are found in the context of detention, where victims are exposed to deliberate cruel acts, which may cause feelings of anguish and fear. Degrading treatment causes feelings of fear, anguish, inferiority, and humiliation on the victim. In order to assess whether a treatment amounts to a degrading one, it must be taken into whether its object is to debase the person and whether it affected his or her personality.

Article 3 of the Convention does not set out the circumstances when it is permissible to engage in torture, inhuman or degrading treatment or punishment. Therefore, there can never be a justification for acts which violate the article. The victim's conduct, the fight against terrorism and organised crimes cannot be considered as a justification. This absolute prohibition is extended also in times of war.[206]

The ICTR's Chamber, in *Akayesu*, compared rape to torture and held that, "like torture, rape is used for intimidation, degradation, humiliation, discrimination, punishment, and control or

[204] The Convention against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment, Article 1

[205] https://rm.coe.int/168007ff4c

[206] Ibidem.

destruction of a person. It is a violation of personal dignity and rape in fact constitutes torture when all the elements of torture are met."[207] These elements are the already cited purposes of intimidation and degradation, and the infliction by or of or the consent or acquiescence of a public official or other person acting in an official capacity.[208]

Kvocka and others[209] confirmed that beating, sexual violence, prolonged denial of sleep, food, hygiene, and medical assistance, body parts mutilation, as well as threats to torture, rape, or killing relatives constitute torture.[210]

In *Furundzija* it was held that Article 3 of the Statute covers torture and outrages upon personal dignity, including rape. Moreover, torture by means of rape is a particular grave form of torture. For rape to be considered torture, both the elements of rape and the elements of torture must be present.[211]

In the *Delalic and others* case, the Trial Chamber held that the main feature of torture is the severity of pain and suffering; therefore, rape may be placed in this category. The suffering in rape should be put along with social, religious and cultural background.[212]

2.8 The prohibition of rape as a norm of *jus cogens*

Article 53 of the Vienna Convention on the Law of Treaties formally defines *jus cogens* as follows:

"[…] For the purposes of the present Convention, 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."

They are a set of peremptory norms accepted and recognised by the international community, which are non-derogable. A norm is peremptory when (1) a large number of States recognize it as being essential to the international public order; (2) it is embodied in multilateral agreements prohibiting derogation from the particular norm; and (3) it has been applied by international tribunals. As a result, rules of *jus cogens* create responsibility *erga omnes*: they impose obligations of not to allow impunity for their violations and evoke an international duty to act against those who do not respect them. In this case, States' action is not restricted neither by territory, nor nationality, meaning States enjoy universal jurisdiction.

[207] A. Obote-Odora, *supra note 96*
[208] M. Karagiannakis, *supra note 133*
[209] Kvocka, a professional police officer of Omarska police station, and others were prosecuted for having instigated, committed or aided and abetted the persecution of Bosnian Muslims, Bosnian Croats, and other non-Serbs. They were criminally liable as individuals or superiors for inhumane acts, persecution, murder, and torture as crimes against humanity and outrages upon personal dignity as a violation of the laws or customs of war.
[210] *Kvocka and others Trial Judgement*, para 144
[211] A. Obote-Odora, *supra note* 96
[212] S. Fabijanic Gagro, *supra note 72*

Although *jus cogens* norms have developed over time through the general consensus of the international community, the prohibition of genocide, crimes against humanity, war crimes, torture, aggression, and slavery are surely included in the list.

Rape is prohibited in most legal systems; however, this prohibition is binding only at the national level. Rape is then prohibited by several international agreements and by the already cited *ad hoc* tribunals statutes. The entire Geneva Conventions and the ICC Statute can be regarded as customary international laws[213]; thus, since rape is prosecuted as a grave breach of the Geneva Conventions, it can amount to *jus cogens*.[214]

However, widespread rape is not specifically recognized as a *jus cogens* norm itself. Sellers states that since rape has been interpreted as a component of torture, slavery, genocide, this suggests that acts of sexual violence fit in the prism of peremptory norms. However, the prohibition of rape can reach the glory of *jus cogens* only if "piggybacked" with other crimes.[215]

Classifying rape as a *per se* norm of *jus cogens* offers many advantages. The prohibition might lead to the establishment of international and independent tribunals with the aim to prosecute that crime – like the ones established for Rwanda and former Yugoslavia. Furthermore, it would bind States to face their responsibilities as to fight against this heinous crime. This could lead to a much higher sensibilization and public disdain, which could reduce the crime's incidence rate.[216]

[213] https://guide-humanitarian-law.org/content/article/3/customary-international-law/#:~:text=Today%2C%20the%20four%201949%20Geneva,must%20abide%20by%20their%20rules.
[214] D. S. Mitchell, "The Prohibition of Rape in International Humanitarian Law as a norm of Jus Cogens: Clarifying the Doctrine", 2005
[215] N. Henry, *supra note 73*
[216] D. Adams, "The Prohibition of Widespread Rape as a Jus Cogens", 2004

Chapter 3

Consequences of rape, safeguard of victims, the limits of the existing case law and recommendations

3.1 The consequences of rape

Rape is a traumatic experience that affects the victim both in the short- and in the long-term. It is traumatic regardless of its context, but during wartime, it tends to be worse in terms of magnitude, frequency, and intention.[217]

Even though individuals could cope with it in different ways, there are normally physical, psychological, and social consequences.

3.1.1 Physical effects

Rape often occurs with brutality and violence, resulting in bleeding, infection, inflammation, nausea, headache, sweating and pain.[218] There are also medium-long term effects, such as pregnancy and sexual-transmitted diseases.[219]

Women could face the possibility of having the child of the rapist or looking for an abortion during a time where medical supplies lack and/or are destined primarily to the military. Abortion is also illegal or restricted in several societies, mostly religious ones, which increases the difficulty of having access to it[220], or causes self-induced unsafe abortions.

Most women who got pregnant said that the unwanted pregnancy made their recovery more difficult.[221]

In *Prosecutor v. Vukovic* (2008), a victim testified that she got pregnant after being raped by the accused. She gave birth to the child, but she refused to see him. The ICTY believed that her failure to abort was a negative factor in relation to her credibility. The court recognized that there could have been several reasons for not aborting, such as moral or religious. However, she should have explained the reasons for that decision. As the choice of recurring to abortion is highly sensitive and strictly personal, the Court should have not considered it as an element of unreliability.[222]

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[217] K. T. Hagen, "The Nature and Psychosocial Consequences of War Rape for Individuals and Communities", International Journal of Psychological Studies, Vol. 2, No. 2, 2010
[218] https://www.joyfulheartfoundation.org/learn/sexual-assault-rape/effects-sexual-assault-and-rape
[219] A. Obote-Odora, *supra note* 96
[220] C. Chinkin, *supra note* 196
[221] M. Loncar, V. Medved, N. Jovanovic, L. Hotujac, "Psychological Consequences of Rape on Women in 1991-1995 War in Croatia and Bosnia and Herzegovina", in Croatian Medical Journal Vol. 47, N. 1, 2006
[222] P. Weiner, *supra note* 120

The New York Times reported that more than 15700 women and girls were raped in Rwanda and more than 1100 gave birth, while 5200 had abortions. More than 10000 other pregnancies were untraceable.[223]

Other women were so injured that they were not able to carry a child or could be infertile and could even commit suicide.[224]

Rape also carries the risk of sexually transmitted diseases, including AIDS.[225] The probability a woman will become infected depends on whether the rapist has the illness. Data show that mass rape could cause five new HIV infection per 100000 women per year in the Democratic Republic of Congo, Sudan, Sierra Leone, and Somalia. HIV incidence has also increased when some survivors are infected with another sexually transmitted infection (STI), which increases their susceptibility to HIV, and when mothers transmit this infection to their children or when women have other sexual partners.[226]

3.1.2 Psychological effects

Rape causes humiliation, shame, fear, anxiety, terror, which remain long after the event. Victims could blame themselves, suffer from depression, anxiety, sexual dysfunctions, loss of trust, security, and even commit suicide.[227] It sends the message that women do not have control over their own bodies[228] and they tend to consider rape worse than death, because it brings shame on them.[229]

The victims of abuse in the detention centres in Foca lived in constant fear, without knowing if they would survive. Some committed suicide, others became indifferent to what happened to them.[230]

Humiliation is generally considered when assessing the gravity of a crime, along with the vulnerability of the victims.

A witness in *Akayesu* testified about the humiliation she felt from being raped in front of her children; another witness said that her mother begged the man to kill her daughter instead of raping her, but the man replied that he wanted to make them suffer.[231] In the

[223] https://www.nytimes.com/1995/05/15/world/wave-of-rape-adds-new-horror-to-rwanda-s-trail-of-brutality.html
[224] C. Chinkin, *supra note* 196
[225] A. Obote-Odora, *supra note* 96
[226] https://journals.lww.com/aidsonline/Fulltext/2010/11270/Assessing_the_impact_of_mass_rape_on_the_incidence.11.aspx
[227] S. Fabijanic Gagro, *supra note* 72
[228] C. Card, *supra note* 95
[229] *Ibidem.*
[230] *Ibidem*.
[231] Prosecutor v. Akayesu, para 423 - 430

Cesic and the *Delalic and others* judgments, it is confirmed that rapes committed in public or in front of relatives make the humiliation stronger.[232]

Victims who suffer from post-traumatic stress disorder (PTSD) – a disorder characterized by a continuous re-experience of the trauma[233] – could be considered as unreliable. In *Prosecutor v. Furundzija*, the panel discussed about the credibility of a victim who suffered from PTSD and experienced false memory syndrome, but it concluded that her testimony was not "necessarily inaccurate"[234], because a person with that disorder is still able to be a reliable witness.

Similarly, during the *Kunarac* appeal proceedings, the defence attorney argued that the young age and the traumatic experience of the victim discredited them as a reliable witness; but the chamber rejected that claim.[235] Likewise, in the Foca trial, the defence tried to demonstrate that the victims could not be reliable because they did not seem traumatized by their experiences of rape.[236]

The *Kadic* case allowed women to speak about their feelings, perception, and suffering.[237] It is necessary to understand that, since victims struggle with shame, fear of isolation and rejection, they must be treated with dignity.[238]

3.1.3 Social effects

Mass rape terrorizes and traumatizes civilians.[239] The entire community is affected. In fact, men feel ashamed for failing to protect their women.[240] When women are raped in public, the message sent by soldiers is that they have defeated their enemy physically, but also psychologically.[241]

Women fear they have become unacceptable to their families and societies, since some cultures ostracize rape victims for having become unmarriable if they were single.[242] Men reject their wives, mothers, and daughters. In Muslim culture, rape is also an attack on the woman's family, since it is considered a forced adultery and a violation of the woman and her family's dignity if she loses her virginity.[243] In Bosnia, many raped women were beaten and rejected by their fathers and husbands, they were forced to carry an unwanted

[232] S. Fabijanic Gagro, *supra note* 72
[233] *Ibidem*.
[234] Prosecutor v. Furundzija, para 109
[235] Prosecutor v. Kunarac, para 279-281
[236] N. Henry, "Witness to Rape: The Limits and Potential of International War Crimes Trials for Victims of Wartime Sexual Violence", in The International Journal of Transitional Justice, Vol.3, 2009, 114 ss.

[237] *Ibidem.*
[238] https://press.un.org/en/2021/sc14493.doc.htm
[239] C. Chinkin, *supra note* 196
[240] S. Fabijanic Gagro, *supra note* 49
[241] K. T. Hagen, *supra note* 149
[242] *Ibidem*.
[243] C. Card, *supra note* 95

child, and denied any right to have a connection with that child[244] as the ethnicity of children is determined by the ethnicity of the father.[245]

Sexual violence does not necessarily end with the end of war. Sexual exploiters can take advantage of the extreme poverty of women and make them enter sex trade.[246]

Rejection, depression, destitution, and prostitution constitute the so-called secondary victimization. There is no opportunity for women to speak about these consequences, which should instead be contemplated by tribunals in order to allow these stories to be heard and acknowledged.[247] Victim-blaming further traumatize victims and wards off a true justice fulfilment.

The Centre for Women War Victims in Zagreb expressed its fear that the rapes of women could be used as a political propaganda tool in order to spread messages of revenge and hate.[248] In former Yugoslavia, rapes were shown on news broadcasts in order to retaliate and even though rape was used by all parties, the focus of the international community was primarily on the ones committed by Serbs, because it encouraged support for the cause of ethnic minorities.[249] In the US, a group of anti-nationalist women's groups from Croatia and Serbia did not receive media coverage as victims, but when they did, they were charged as traitors. The media was more empathic to nationalist Croatian women who reported they had been raped by Serbs nationalists.[250]

3.2 Safeguarding the victims and the "right" to reparation

Victims do not share the same needs, so responses should consider both individual preferences and the needs of society.[251]

It is necessary to acknowledge the serious physical and psychological impacts rape may have. International tribunals should be helped by governments, in such matter as medical care, shelter, support, and counselling, in order to let survivors regain control over their lives and avoid inflicting more trauma.[252] Protective measures also may take the form of preventive relocation, anonymity, and closed sessions.[253]

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[244] R. Dixon, "Rape as a Crime in International Humanitarian Law: Where to from Here?", EJIL, 2002
[245] S. Fabijanic Gagro, *supra note* 72
[246] J. Ward, M. Marsh, Sexual Violence Against Women and Girls in War and its Aftermath: Realities, Responses and Required Resources, Briefing Paper, United Nations Population Fund, 2006, 1 ss.
[247] R. Dixon, *supra note* 243
[248] C. Chinkin, *supra note* 196
[249] K. C. Richey, "Several Steps Sideways: International Legal Developments Concerning War Rape and the Human Rights of Women", in Texas Journal of Women and the Law, Vol.17, 2007-2008, 109 ss.
[250] J. Ala, "Enriching the Critical Discourse of Feminist Studies in International Relations: New Discussions of the Roles of Women in Conflict, Peace Making and Government", in Politikon, 33(2), 2006, 239 ss.
[251] C. Chinkin, *supra note* 196
[252] S. Fabijanic Gagro, *supra note 72*
[253] E. Dewolf, *A Gender-Sensitive Reflection on the Jurisprudence of the International Criminal Court*, in Ghent University Library, 2021, 1 ss.

Women look for civil damages for sexual violence at the domestic level. A report from the UN highlighted that victims' right to reparation should be guaranteed through reparation programmes.[254]

Reparation – individual or collective – consists of monetary compensations, psychological help, the erection of monuments, symbolic events, education assistance; however, not everyone can claim them.[255]

Rule 106 of the ICTY Rules of Procedure and Evidence provides that the Tribunal shall transmit its findings that the accused caused injury to the victim to the competent national authorities. Then, the victim can bring an action before a national court or other competent bodies to obtain compensation.[256]

On the contrary, under the Rome Statute, victims do not have to appeal to a national court, or body, because the Statute empowers the ICC to issue a reparations order against the accused or compensate the victims through the Trust Fund. However, the Statute does not give victims a "right" to reparations, since this power belongs to the Court and may be exercised by it, after a finding of guilt.[257]

The Appeal Chamber in the *Lubanga* case held that in order to get reparations, the victim must provide identification and sufficient proof of the harm and the causal link between crime and harm.[258]

This provision can be strengthened if read in conjunction with the United Nations Voluntary Fund for Victims of Torture (UNVFVT), which provides medical, psychological, economic, and legal assistance to victims and members of their families,[259] the UNVFVT receives voluntary contributions mostly from Member States and delivers grants to civil society organizations, providing direct services to torture survivors. One may also want to the Trust Fund for Victims (TFV), an autonomous entity, which deals with the harm resulting from the crimes under the jurisdiction of the ICC.[260] The TFV provides reparations to the victims and their families, but it also delivers mental health, physical rehabilitation programmes, and material support.[261]

The ICC's Victim and Witness Unit must inform victims of their rights and ensure that they are aware of the decisions of the Court. A Gender and Child Unit assists the Prosecutor in dealing with issues concerning victims and witnesses of sexual abuse.[262]

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[254] M. Ellis, *supra note* 77
[255] E. Dewolf *supra note* 252
[256] *Ibidem.*
[257] Article 75, Rome Statute
[258] E. Dewolf, *supra note* 252
[259] R. Dixon, *supra note* 243
[260] Dewolf, *supra note* 252
[261] https://www.trustfundforvictims.org/en/about/vision
[262] M. Ellis, *supra note* 77

The ICC, the ICTY, and the ICTR provide security protection to endangered testimonies; the relevant measures include ensuring confidentiality through proceedings and testifying by electronic or other means.[263]

The ICTR created a Rape and Sexual Violence Unit, headed by a female lawyer, which coordinates all investigations, leading to the implementation of more appropriate and effective procedures for evidence gathering[264]. Furthermore, it was set up an Information and Evidence Support Section, which makes it possible to lead more methodical investigations.[265]

Another important feature in terms of victims' protection is that corroboration is not required. In the past, the requirement of corroboration was based upon the idea that false rape charges were more frequent than false charges of other crimes. The ICC, the ICTR, and the ICTY have rejected this idea, holding that the testimony of a victim of sexual assault is as reliable as the testimony of the victim of any other crime.[266]

3.3 The existing case law's limits

The tribunals have played an important role in prosecuting rape and other sexual crimes in armed conflicts. Nonetheless, they should overcome some limits.

(A) Interpretation

The first problem concerns interpretation. Rape itself – as discussed before – has been defined in various ways. *Akayesu* provided a broader definition in terms of force or coercion and the use of the word "invasion" refers more to the victim's view of the act. In *Furundzija*, it was stated that the act of sexual penetration constitutes rape if accompanied by coercion or force or threat and does not refer to other factors on the part of the victims, which would render the act non-consensual.[267]

Rape has been charged as a crime against humanity, war crime, genocide, which allows to focus on the gravity of it and to apply the most severe penalties, in particular when it is prosecuted as a component of genocide, which is viewed as the most horrible crime. However, it is not prosecuted as a stand-alone crime, which could draw attention to the vulnerable situation in which women live during conflicts. Including the prohibition of rape among the norms of *jus cogens* could allow its subjection to universal jurisdiction under customary international law.[268] Therefore, the perpetrator would be prosecuted

[263] *Ibidem.*
[264] https://www.hrw.org/reports/1996/Rwanda.htm
[265] A. Obote-Odora, *supra note* 96
[266] P. Weiner, *supra note* 120
[267] S. F. Gagro, *supra note 72*
[268] M. Ellis, supra note *77*

regardless of the location of the crime and the nationality of the perpetrator or the victim.[269]

Buss also argues that by interpreting rape as an instrument of genocide, this could hide a wider narrative, for example why the rape happened, how women expressed resistance, and the ways in which sexual violence is linked to structural conditions.[270] This is why it is also important to interpret international conventions with a specific reference to women's lives and gendered violence.[271]

Article 7 of the Rome Statute defines "gender" as "the two sexes, male and female, within the context of society". This derives from a compromise between the Vatican together with Arab States and the group of North American States: the terms "two sexes" seem to contradict the reference to the social context, because the definition of gender in the sociological sense is wider. The ambiguity of the term can give the judges a broader space in interpretation.[272]

Some argues that this definition focuses on the biological differences between men and women, and it excludes persecution based on sexual orientation: this could make it difficult to prosecute sexual violence against victims who do not perceive themselves in the hetero-normative way.[273]

(B) Consent

Another issue relates to consent. Rule 96 of the ICTY's Rules of Procedure and Evidence provides victims' protection against offensive allegations regarding complicity. However, this rule has not always been followed. In the *Foca* Trial, the defence suggested that the victim was in love and jealous with the accused and therefore she had given consent to the sexual intercourse.[274] In *Kunarac*, the trial court held that the prosecutor had to prove that the accused knew that the sexual intercourse was not consensual.[275]

The ICC does not require corroboration: the Court agree that one testimony is sufficient to establish the crime. However, it relies on additional evidence to demonstrate the credibility of the witness.[276]

The judgment should focus more on the acts of the accused rather than on the conduct of the victim, because in an armed conflict context, victims fear intimidation or death and therefore they are not able to resist the assault.[277] By focusing on consent, victims could be juxtaposed between the "authentic" one, meaning a young, chaste girl not complicit in

[269] https://www.icrc.org/en/doc/assets/files/other/irrc_862_philippe.pdf
[270] N. Henry, supra note73
[271] C. Chinkin, *supra note* 196
[272] E. Dewolf, *supra note* 252
[273] I. Powell, *supra note* 76
[274] N. Henry, *supra note* 235
[275] P. Weiner, *supra note* 120
[276] Dewolf, *supra note* 252
[277] A. Obote-Odora, *supra note* 96

her subjugation, who will receive public sympathy and a just verdict, and other victims who do not fit that stereotype, who could have agreed to the sexual intercourse because they feared repercussions, who would risk to be viewed as non-credible. Therefore, tribunals should always adopt a broader approach to coercive circumstances. [278]

(C) Procedures

Procedural reforms must be passed, regarding investigation and evaluation of evidence. These crimes are difficult to investigate, so prosecutors must understand that they should consider the effects and outcomes on the victims, which are often invisible.

Once the indictment is confirmed, the defence can submit a series of motions disputing flaws and the prosecutor must respond to all of these. The issue is that these motions may be frivolous, pointless, and vexatious, not addressing important legal issues, resulting in a waste of time for the prosecution.[279]

When several forms of sexual violence are charged together, courts tend to reject some charges as cumulative or redundant: this is a problem, because it does not consider the particularly complex context in which victims had to live in.[280]

(D) Testimony and gender sensitivity

The Tribunal's Victim and Witness Section (VWS) of the ICTY listed four reasons why victims choose to testify: to speak for those who did not survive, giving them recognition and ensuring memory; to tell the world the truth; to seek justice; to help prevent future war crimes.[281]

The percentage of women who actually testified before the ICTY was very low: 18% of 3700 witnesses were female, and the majority of them were between the age of 41 and 81.[282] The limited role they played was due to restricted mobility, death of witnesses, impossibility to track them, and unwillingness to testify.

There are many reasons for that reluctance: shame, fear, threats, and lack of trust in the justice system.[283]

Rwandan women were unwilling to testify in front of male investigators. That is why the Office of the Prosecutor of the ICTR now employs female workers[284]; but the goal of 50% female judges in the International Court of Justice is still far from being achieved.[285] In the framework of the Women's International War Crimes Tribunal in Tokyo (2000),

[278] N. Henry, *supra note* 73
[279] A. Obote-Odora, *supra note* 96
[280] I. Powell, *supra note* 76
[281] https://static.mpicc.de/shared/data/pdf/ewald2_lobweinicty.pdf
[282] N. Henry, *supra note* 73
[283] A. Obote-Odora, *supra note* 96
[284] A. Obote-Odora, *supra note* 96
[285] C. Chinkin, *supra note* 196

victims told their experiences to a court composed largely of women, who heard many stories, giving priority to the survivors' needs.[286]

To overcome the difficulties in testifying, those involved in judicial, investigatory, or prosecutorial work should receive gendered training in order to understand the specific cultural pattern in which women live.[287]

Victims are also often viewed as "passive" and objects, rather than as key subjects in the trials.[288] Support services should make witnesses understand that their contribution is essential: judges and lawyers should make them understand that they are valuable and cared for. When testimonies' needs are taken into account, witnesses generally feel better about talking about their experience before the court.[289]

Testimony has a series of benefits: victims are helped in the overcoming – or at least in the integration of – that traumatic experience. However, while some feel relieved, comforted, and even powerful, others consider it a waste of time, useless, and disappointing: this confirms that victims do not share the same feelings and they go through very different experiences.[290]

Feminist scholars criticize the male-oriented nature of international criminal law, which may silence and underestimate women's experiences, failing to catch the reality and complexity of sexual violence.[291]

Former Prosecutor Bensouda of the ICC adopted a gender sensitive approach when performing their duties, in particular during investigation. The measures include the support of gender advisors and local women's groups, the preliminary psychosocial and security assessments and screenings of survivors, face-to-face meetings as well as the collection of different types of evidence, such as clinical examinations, video footage, and notices to perpetrators.[292] Evidence is given by witnesses and although truth must be established "beyond any reasonable doubt", judges should be flexible in terms of testimonies considering the nature of the crimes.[293]

3.4 Recommendations

Rosalind Dixon (2002) suggests that the creation of an international victims' compensation tribunal (IVCT) could advance recognition of rape victims in international law. This would allow the compensation proceedings to be activated even if the perpetrator is not arrested; defendants will not be required to be present during the

[286] R. Dixon, *supra note* 243
[287] C. Chinkin, *supra note* 196
[288] N. Henry, *supra note* 73
[289] N. Henry, *supra note* 235
[290] *Ibidem.*
[291] *Ibidem.*
[292] https://www.icc-cpi.int/sites/default/files/iccdocs/otp/OTP-Policy-Paper-on-Sexual-and-Gender-Based-Crimes--June-2014.pdf
[293] E. Dewolf, *supra note* 252

proceedings as the reparations would be provided by the IVCT fund. The IVCT could increase the number of victims who are willing to testify, since the entire procedure would be confidential.

The focus on recognition would permit a woman to have psychological and medical support, thus avoiding secondary victimization and rejection. By creating this type of tribunal, the prosecution of international crimes would also have a more clearly deterrence function.[294]

In a Special Report (2010) of the US Institute of Peace, Jocelyn Kelly discussed about the tragic situation of the conflicts in DRC, where a large number of women were raped. She argued that some actions could be done at every level. There should be a multimessage approach to strengthen a no-rape policy by sensitizing soldiers about human rights, the protection of civilians, and the consequences of rape. Soldiers should be made aware that all forms of gender-based violence are unacceptable, be held accountable for their actions, and be punished if they perpetrate the crime, and if they support it.

Lastly, the author suggests that the international community should convey the idea that rape is a security issue that affects health and effectiveness of armed groups, provide mental health and other services to citizens, and create sustainable alternatives of employment to demobilized soldiers and community members.[295]

[294] R. Dixon, *supra note* 243

[295] J. Kelly, "Rape in War: Motives of Militia in DRC", US Institute of Peace, 2010

Conclusion

Rape has nothing to do with sexual desire. It is a matter of power. In this regard, Susan Brownmiller holds that it is nothing more or less than a conscious process of intimidation, by which all men keep all women in a state of fear.

It concerns women's and girls' right to sexual autonomy and integrity, since it occurs under coercion or the threat of it: women are not able to decide whether and when to become sexually intimate with someone. It has also to do with reproductive health and can be regarded as public health issue, since its incidence rate is very high, and it causes physical and psychological consequences that may last for the entire life.

Wartime rape is not an isolated phenomenon: rather, it is one of the consequences spreading from discriminating during peacetime. McDougall thinks that it is a deliberate and strategic decision on the part of combatants to intimidate and destroy the enemy. Indeed, when one thinks of the Tutsi genocide, it must be said that rape in that context had the purpose of humiliating, instilling fear, and destroying a targeted group. Thus, one may say that women represent true war victims.

In 2008, the UN Security Council adopted Resolution 1820, which recognizes sexual violence – which particularly targets women and girls – as a weapon and tactic of war. The Resolution reaffirms the essential role women have in the prevention and resolution of conflicts and the importance of equal participation for the promotion of peace, security, and development.[296]

However, cases of rape by UN peacekeepers in conflict zones shocked the public opinion: women cannot feel safe even from people who are supposed to protect them and bring peace.

Unfortunately, rape is still used as a war tool. That is what emerges from the conflict between Russia and Ukraine. Kateryna Busol had already documented sexual violence in Donbass and Crimea since the beginning of the conflicts in 2014. As for the ongoing conflict between Russia and Ukraine, both Russian and – although on a lower scale – Ukrainian soldiers have been accused of rape. According to Busol, these cases are particularly brutal, involving the killing of family members or raping in front of them. Some NGO's operating in the territory try to inform women on how to protect themselves, to get help, and to find emergency contraceptives. Feminist Workshop, for example, provides information, medical, legal and psychological help to victims and safe shelter.[297]

It is not hard to believe that – since rapes continue to happen – international courts will have to face new charges.

I do believe international courts have come to acknowledge the gravity of the violations of women's rights. They have played an important role in condemning rape as a weapon and as a breach of humanitarian law.

[296] https://www.peacewomen.org/SCR-1820
[297] https://www.ilpost.it/2022/04/10/ucraina-stupri-esercito-russo/

However, by focusing on the harm of the entire communities that those crimes caused, they failed to acknowledge that rape is first a personal violation of autonomy and integrity. Victims should not be forced to repeat many times their testimonies during trials, and they should be accompanied by experts in the field of gender-based violence and trauma. The trials, while prosecuting war criminals, should also focus on the needs and feelings of the victims, in order to let them know that they are heard and protected and their testimony is considered vital. Stigmas on rape should be overcome because they bring further shame, humiliation, and victim blaming. It is the accused who should be questioned, not the survivor.

The empowerment of women should also lead to the provision of shelter, assistance services, financial support, reparations, and compensation.

Leaving aside the justice system, it is fundamental to let women join decision-making, conflict resolution, peacebuilding and peace-keeping processes as they go through different experiences and conditions from men. Their voices must be heard in order to raise awareness on the discrimination they face in every context of life. A higher sensibilization at every level, starting from language and education, is needed to apply a policy that tolerates neither rape nor any other forms of assault and harassment, as well as to stop gender-based violence.

Until women do not enjoy the same rights as men, true security, peace, and development cannot be achieved.

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