

**Sexual violence in armed conflict under  
International Law:  
The interplay between International  
Humanitarian Law, Human Rights Law  
and International Criminal Law**

**Submitted in partial fulfilment of the requirements for the degree  
LLM (International Humanitarian and Human Rights Law in Military  
Operations)**

**By**

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# Declaration

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# Dedication

To God.

Para mis padres, Sergio Godoy y Marion Wilson, ya que todo lo que soy y todo lo que tengo se lo debo a ellos.

Vir my Liefie, Marthinus van der Walt, jou liefde maak my beter en sterker.

Para mi team, Manual José, Dani Jaite y Alvaro Parra.

And for all my friends, amigos and vriende.

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# List of Abbreviations and Acronyms

ACHR	American Convention on Human Rights
AI	Amnesty International
CEDAW	Committee on the Elimination of Discrimination against Women
CRC	Convention on the Rights of the Child
CRPD	Convention on the Rights of Persons with Disabilities
ECHR	European Convention on Human Rights
EoC	Elements of Crime
GA	General Assembly
GPID	Guiding Principles on Internal Displacement
HRL	Human Rights Law
HTC	Hutu Ten Commandments
ICC	International Criminal Court
ICCPR	International Covenant on Civil Human Rights
ICL	International Criminal Law
ICRC	International Committee of the Red Cross
ICTY	International Criminal Tribunal for the former Yugoslavia
IHL	International Humanitarian Law
IMT	International Military Tribunal
IMTFE	International Military Tribunal for the Far East
MICT	United Nations Mechanism for International Criminal Tribunals
NGO	Non-Government Organisation
OTP	Office of the Prosecutor
UDHR	Universal Declaration of Human Rights
UN	United Nations
UNCC	United Nations Compensation Commission

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# Chapter 1: Introduction

## 1. Foreword

This work studies the regulation of sexual violence in armed conflict, focusing on the interplay between the three main bodies that regulate it: international humanitarian law (IHL), human rights law (HRL) and international criminal law (ICL). The main questions of this research are whether the protection of women and girls is sufficient and whether the perpetrators of these crimes are persecuted and punished, and if improvement is needed in this field.

## 2. Background to the study

The World Health Organization defines sexual violence as “any sexual act, attempt to obtain a sexual act, unwanted sexual comments or advances, or acts to traffic, or otherwise directed, against a person’s sexuality using coercion, by any person regardless of their relationship to the victim, in any setting, including but not limited to home and work.”<sup>1</sup>

Sexual violence consists of several types of acts, such as rape, sexual slavery, forced marriage, forced impregnation and forced maternity, sexual mutilation, forced nudity and indecent assault (for example, touching women’s breasts or sexual organs). According to Amnesty International (2000) all acts of sexual violence are crimes of domination and aggression and may adopt different names depending on the context and circumstances; they can be referred as torture, cruel, inhuman or degrading punishment, rape, sexual abuse, gender violence, gendered violence etc.<sup>2</sup> In this study some of these terms might be used interchangeably, keeping in mind that they refer to sexual violence in general.

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<sup>1</sup> Jewkes R, Garcia-Moreno C, and Sen P, “Sexual violence” in *World report on violence and health* Geneva: World Health Organization (2002) 149.

<sup>2</sup> Callamard, Agnès, *Monitoring and investigating sexual violence/Amnesty International and Codesria* Amsterdam: Amnesty International (2000) 6.

i) *Sexual violence in armed conflict*

Sexual violence in armed conflict is very common, especially in the form of rape, and women are the main victims of it. This research does not argue that sexual violence does not affect men as well. Men can also be victims of sexual violence: nevertheless, women are more susceptible of becoming victims of sexual attacks.<sup>3</sup> According to Chinkin (1994), in wartime men and women are equally at risk of eventually becoming victims of rape. Nevertheless, in terms of quantity, rape can be considered a crime committed mainly against females, and they have to deal with different consequences than men,<sup>4</sup> for example unwanted pregnancy. It is clear that women have biologically less physical strength than men, making them more vulnerable to sexual violence. According to the United Nations Division for the Advancement of Women (1998), it is very important to recognise and rectify the suffering endured by both sexes; however it also very important to identify the dissimilar experiences of men and women regarding sexual violence.<sup>5</sup>

According to Weitsman (2008), episodes of rape “have been documented with increasing regularity in the twentieth century”, even though rape of women has always been frequent in armed conflict.<sup>6</sup> During the twenty-first century documentation of rape has increased as well, thanks to massive media presence and the irruptions of social networks that encourage the immediateness of news. Weitsman (2008) illustrates the documentation of sexual violence by using as examples the enslavement of approximately 200 000 and 400 000 “comfort women” in Japan and the numerous cases of rape and forced prostitution that took place during the Second World War, especially Soviet soldiers who raped German women.<sup>7</sup> Stephens (1993) claims that in the former Yugoslavia, estimations include a conservative approximation of 20 000 Bosnian women victims of rape and sexual violence during the war;<sup>8</sup> however, according to De

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<sup>3</sup> United Nations Division for the Advancement of Women, “Sexual Violence and Armed Conflict: United Nations Response” *Women 2000* (1998). Available at <http://www.un.org/womenwatch/daw/public/w2apr98.htm> Accessed 26.05.15.

<sup>4</sup> Chinkin, Christine, “Rape and sexual abuse of women in international law” *Eur. J. Int’l L.* Vol. 5 (1994) 326.

<sup>5</sup> United Nations Division for the Advancement of Women, *supra* n 3 at 1–2.

<sup>6</sup> Weitsman, Patricia A., “The politics of identity and sexual violence: a review of Bosnia and Rwanda” *Human Rights Quarterly* Vol.30, No.3 (2008) 563.

<sup>7</sup> *Ibid.*

<sup>8</sup> Stephens, Beth, “Women and the atrocities of war” *American Bar Association* Vol. 20, No.3 (1993) 12.

Brouwer (2005), this number could go up to 50 000 women and girls that were abused in Serb “rape/death camps”.<sup>9</sup> Weitsman (2008) explains that during the Rwandan genocide the estimations are that that between 250 000 and 500 000 women were raped. Large numbers of rapes have been documented in conflicts in Pakistan, Liberia, East Timor, Peru, Somalia, Uganda, El Salvador, Guatemala, Colombia, Kuwait, Sudan, Burundi, Sierra Leone and the Democratic Republic of Congo (DRC).<sup>10</sup> According to Chinkin (1994), “rape in war is not merely a matter of chance, of women victims being in the wrong place at the wrong time.”<sup>11</sup> In the research done by Radhika Commaraswamy (as cited by Chinkin, 1994) the causes of sexual violence against women are related to the question of power and control by male soldiers and their notion of masculine privilege over unequal women, and also to the use of rape as a tool to disgrace the community of the raped women.<sup>12</sup> Also, in some cases, like Rwanda and Yugoslavia, rape has been used as an instrument of war, because it has been systematic, massive and organised.<sup>13</sup>

ii) *Evolution of the international legislation regarding sexual violence*

Obote-Odora (2005) states that traditionally, crimes of sexual violence have been overlooked under international law, reflecting the lack of importance given to women’s lives and their wellness. For example, during the Second World War, there was proof of widespread and systematic rape and other forms of sexual violence in Asia and Europe.<sup>14</sup> Surprisingly, the trials of the ad-hoc tribunals [the International Military

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<sup>9</sup> De Brouwer, Anne-Marie, *Supranational criminal prosecution of sexual violence: the ICC and the practice of the ICTY and the ICTR* Cambridge: Intersentia (2005) 8.

<sup>10</sup> Weitsman, *supra* n 6 at 563.

<sup>11</sup> Chinkin, *supra* n 4 at 328.

<sup>12</sup> *Ibid.*

<sup>13</sup> There is case law that supports that rape was used as an instrument of war in the ICTR specially in the following cases: *The Prosecutor v. Jean-Paul Akayesu* (Trial Judgement), ICTR-96-4-T, International Criminal Tribunal for Rwanda (ICTR), 2 September 1998 (in particular par 598, 698, 706); *The Prosecutor v. Sylvestre Gacumbitsi* (Trial Judgement), ICTR-2001-64-T, International Criminal Tribunal for Rwanda (ICTR), 17 June 2004 ( par 225 and 228); and *The Prosecutor v. Pauline Nyiramasuhuko et al.*(Judgement and Sentence), ICTR-98-42-T, International Criminal Tribunal for Rwanda (ICTR), 24 June 2011 ( Count 2). This is also seen in the ICTY, particularly in *Prosecutor v. Dragoljub Kunarac, Radomir Kovac and Zoran Vukovic* (Trial Judgment), IT-96-23-T & IT-96-23/1-T, International Criminal Tribunal for the former Yugoslavia (ICTY), 22 February 2001 (par 584, counts 2 and 6 ) and *Prosecutor v. Dusko Tadic* (Judgement in Sentencing Appeals), IT-94-1-A and IT-94-1-Abis, International Criminal Tribunal for the former Yugoslavia (ICTY), 26 January 2000 (par 644, 648, 737, 730 and 744). These cases are examined further in chapter 3.

<sup>14</sup> Obote-Odora, Alex, “Rape and sexual violence in international law: ICTR contribution.” *New Eng. J. Int’l & Comp. L.* Vol. 12 (2005) 143.

Tribunal (IMT) and the International Military Tribunal for the Far East (IMTFE)] almost completely ignored the crimes of sexual violence in their judgements.<sup>15</sup>

The most important references to sexual violence in international law can be found in the following instruments:

### **I. International Humanitarian Law Instruments**

- The Hague Conventions Respecting the Laws and Customs of War on Land of 1899 and 1907: These conventions do not include any mention of sexual violence in the explicit list of war crimes. Nevertheless, the protection of women during wartime can be found in article 46 of the Hague Convention of 1907, which states that “family honour and rights, the lives of persons ... must be respected.”<sup>16</sup>
- The Geneva Conventions and Additional Protocols: According to Odio (2004), in the 429 articles that constitute the four Conventions, only article 27 of the Fourth Convention protects women against rape and forced prostitution.<sup>17</sup> There are a few references that can be interpreted as prohibitions of sexual violence. In the two Additional Protocols, there is only one reference in each of them to the prohibition of sexual violence (in Protocol I, article 76 and Protocol II, article 4).

### **II. Core Human Rights Law instruments**

There is a vast amount of both hard and soft law instruments that establish rules and standards for the protection for victims of sexual violence. According to Abbot and Snidal (2000) hard law can be defined as “legally binding obligations that are precise (or can be made precise through adjudication or the issuance of detailed regulations) and that delegate authority for interpreting and implementing the law.”<sup>18</sup> Dugard (2013) states that soft law can be defined as “imprecise standards, generated by declarations

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<sup>15</sup> *Ibid.*

<sup>16</sup> Hague Convention (IV) Respecting the Laws and Customs of War on Land and its Annex: Regulations Concerning the Laws and Customs of War on Land. 18 October 1907.

<sup>16</sup> Abbott, Kenneth W. and Snidal, Duncan, “Hard and soft law in international governance.” *International Organization* Vol. 54 No. 03 (2000) 421.

<sup>17</sup> Odio, Elizabeth, “Los derechos humanos de las mujeres, la justicia penal internacional y una perspectiva de género” *Novena Conferencia Regional sobre la Mujer de América Latina y el Caribe* Vol. 10 (2004) 2.

adopted by diplomatic conferences or resolutions of international organisations, that are intended to serve as guidelines to states in their conduct, but which lack of the status of ‘law’.”<sup>19</sup> In other words, hard law are compulsory obligations that are enforceable; states are compelled to abide by them and if they do not they may incur international responsibility; in contrast, soft law is not legally binding. However it has moral authority in the behaviour of states and can even in some cases influence the creation of customary law.<sup>20</sup> In my view, if a state infringes a hard law instrument it is illegal in terms of international law, whereas if a state infringes a soft law instrument it is “frowned upon” by the international community, hence it is not illegal but it is unethical conduct. Therefore, the protection granted by hard law instruments is much more effective than the protection granted by soft law instruments.

This research only mentions the most important HRL instruments:

- The United Nations General Assembly Declaration on the Protection of Women and Children in Emergency and Armed Conflict (1974)
- The Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) (1979)
- The World Conference to Review and Appraise the Achievements of the United Nations Decade for Women: Equality, Development and Peace and The Agenda and Nairobi Forward Looking Strategies for Advancement of Women (1985)
- The Convention against Torture (1987)
- The Convention on the Rights of the Child (1990) and Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography (2002)
- The Declaration on the Elimination of Violence against Women (1993)
- The Vienna Conference on Human Rights and the Vienna Declaration and Programme of Action (1993)
- The Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women (1994)

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<sup>19</sup> Dugard, John, *International Law: A South African Perspective* Fourth Edition. Juta Academic (2013) 33.

<sup>20</sup> *Idem* at 34.

- The Special Rapporteur on the situation of systematic rape, sexual slavery and slavery-like practices during armed conflict (1993) and the Special Rapporteur on Violence against Women (1994)
- The Fourth World Conference on Women and the Beijing Declaration of Action (1995)
- The Guiding Principles on Internal Displacement (1998)
- The Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (2003)
- The Nairobi Declaration on Women's and Girls' Rights to Remedy and Reparation (2007)
- The European Convention on Preventing and Combating Violence against Women and Domestic Violence (2011)

### **III United Nations Security Council Resolutions**

- 1325 (2000) Women and peace and security
- 1612 (2005) Children and armed conflict
- 1674 (2006) Protection of civilians in armed conflict
- 1820 (2009) Women and peace and security
- 1882 (2009) Children and armed conflict
- 1888 (2009) Women and peace and security
- 1889 (2009) Women and peace and security
- 1960 (2010) Women and peace and security
- 1998 (2011) Children and armed conflict
- 2106 (2013) Accountability for sexual violence
- 2122 (2013) Women, peace and security

### **IV International Criminal Law instruments**

Both the Statutes of the International Criminal Tribunal for the Former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR) include rape as a crime against humanity (articles 5 and 3) but only the ICTR includes rape as a war

crime.<sup>21</sup> The ICTY made a big contribution by identifying rape as a violation of the laws and customs of war.<sup>22</sup> Poli (2013) affirms that the ICTR classified rape as a crime against humanity and as an act of genocide.<sup>23</sup> According to Koenig, Lincoln and Groth (2011), the tribunals are the two main engines driving the contemporary development of an international jurisprudence prohibiting rape and sexual violence.<sup>24</sup> The landmark cases of the ICTR are *Prosecutor v. Akayesu* (the first case in which a decision from a tribunal directly included rape and sexual violence),<sup>25</sup> *Prosecutor v. Musema*, *Prosecutor v. Semanza*, *Prosecutor v. Gacumbitsi* and *Prosecutor v. Nyiramasuhuko*. In the jurisprudence of the ICTY the most important cases of sexual violence are *Prosecutor v. Dusko Tadić*, *Prosecutor v. Delalić et al.*, *Prosecutor v. Anto Furundžija* and *Prosecutor v. Dragoljub Kunarac et al.*

The Rome Statute is definitely one of the biggest improvements in international treaty law, because it recognises a broad range of crimes of sexual violence of the most serious nature; it includes procedural mechanisms for investigation and prosecution of sexual violence; and it encourages ways of incorporating women and experts in sexual abuse into the staff of the International Criminal Court (ICC).<sup>26</sup>

### 3. Description of the research problem

*i) The interplay of laws in the regulation of sexual violence in armed conflict*

In the traditional approach, the main branch of international law that regulates armed conflict is IHL; therefore HRL would only apply to times of peace.

Nevertheless, according to Dugard (2013) the jurisprudence of several tribunals, such as the ICTY, the ICTR and the International Court of Justice, has changed this traditional

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<sup>21</sup> Statute of the International Criminal Tribunal for the Former Yugoslavia (as amended on 17 May 2002), 25 May 1993, and Statute of the International Criminal Tribunal for Rwanda (as last amended on 13 October 2006), 8 November 1994.

<sup>22</sup> See the case law of the ICTY in chapter 3 (*Foča*, *Tadić*, *Čelebići* and *Furundžija* cases, among others).

<sup>23</sup> Poli, Ludovica, “Criminalizing rape and sexual violence as methods of warfare” in *War crimes and the conduct of hostilities: challenges to adjudication and investigation* Pocar, Pedrazzi and Frulli (eds) Edward Elgar Publishing (2013) 143–144.

<sup>24</sup> Koenig, K. Alexa, Lincoln, Ryan, and Groth, Lauren, “The jurisprudence of sexual violence” *Berkeley Human Rights Center* (2011) 2.

<sup>25</sup> *The Prosecutor v. Jean-Paul Akayesu* (Trial Judgement), *supra* n 13.

<sup>26</sup> Rome Statute of the International Criminal Court (last amended 2010), 17 July 1998 (arts 16, 21, 27, 28).



approach.<sup>27</sup> Dugard states that “Humanitarian law and human rights law have different sources and rules but they are both premised on respect for human dignity and therefore are separate parts of a single order committed to respect for human rights in armed conflicts.”<sup>28</sup> After reading the case law used for this work, I agree with this vision. It is clear that these two bodies of law apply to times of both peace and war, and doing so, the protection to the victims is expanded.

Furthermore, customary international law<sup>29</sup> includes certain human rights norms that cannot be derogated and are recognised as mandatory by all countries.<sup>30</sup> Stephens (1993) affirms that these human rights apply during wartime and also during peacetime, prohibiting grave violations of these rights.<sup>31</sup>

Schabas and McDermott (2010) explain that ICL is the branch of public international law that places responsibility on individuals and proscribes and punishes acts that are defined as crimes by international law.<sup>32</sup> Consequently, in many cases, international criminal courts and tribunals, apart from enforcing the provisions of their own statutes, also apply both humanitarian law and HRL. In the field of this work, based in the statutes and the case law of the ICTY and ICTR, sexual violence may be included in the scope of international crimes<sup>33</sup> such as crimes against humanity, war crimes, torture and genocide.<sup>34</sup>

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<sup>27</sup> Dugard, *supra* n 19 at 532. This is further examined in chapter 3.

<sup>28</sup> *Ibid.*

<sup>29</sup> According to article 38(b), if the ICJ Statute international custom is “a general practice accepted as law”. United Nations, Statute of the International Court of Justice, 18 April 1946.

<sup>30</sup> This is in reference to peremptory norms or *Jus Cogens*. According to article 53 of the Vienna Convention of the Law of the Treaties: “peremptory norm of general international law is a norm accepted and recognised 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.” United Nations, Vienna Convention on the Law of Treaties, 23 May 1969. There is no clarity in international law which norms constitute *Jus Cogens*; nevertheless par 5 of the Commentary to Draft Article 26 of the ILC states that “peremptory norms that are clearly accepted and recognised include the prohibition of aggression, genocide, slavery, racial discrimination, crimes against humanity and torture, and the right to self-determination”. International Law Commission, Draft Articles on Responsibility of States for Internationally Wrongful Acts, November 2001, Supplement No. 10 (A/56/10), chp.IV.E.1.

<sup>31</sup> Stephens, *supra* n 8 at 13.

<sup>32</sup> Schabas, William, and Yvonne McDermott, *International criminal courts* John Wiley & Sons (2010) 52.

<sup>33</sup> Dugard defines international crimes as “crimes which threaten the good order not only of particular states but of the international community as a whole. They are crimes in whose suppression all states have an interest as they violate values that constitute de foundation of the world public order”. Dugard, *supra* n 19 at 157.

<sup>34</sup> See the case law of the ICTY and ICTR in more detail in chapter 3. Dugard, *idem* at 157–160.

ii) *Is the protection granted by international law sufficient?*

First, according to Inder (2013), IHL has failed to regulate a long history of sexual violence against women during armed conflicts.<sup>35</sup> De Brouwer (2005) affirms that very often women have been seen as property to be plundered by the victors.<sup>36</sup> If IHL is analysed, there have been very few references to rape or sexual violence in the Hague Conventions, the Geneva Conventions and the Additional Protocols. In these instruments, sexual violence is listed as an offence against honour and decency. Dyani (2006) explains that women's rights activists are critical of the link between honour and rape.<sup>37</sup> According to Copelon (as cited by Dyani, 2006), the concept of rape as a crime against dignity and honour, instead of a crime of violence, is a problem because it establishes virginity or chastity as a precondition.<sup>38</sup> It also encourages the common social prejudice that a raped woman is dishonourable.<sup>39</sup>

Secondly, many of the instruments of HRL condemn sexual violence in armed conflict.<sup>40</sup> However, most of these documents are soft law guidelines<sup>41</sup> that do not impose real legal obligations on the states to protect women and forbid sexual violence. In cases where the instruments are in fact hard law, not all countries necessarily ratify the treaties or implement the conventions in their national legislations. For example, the United States – considered by many the most important leader of the international community and a permanent member of the Security Council – has not ratified several human rights treaties, such as the CEDAW, the Convention on the Rights of the Child (CRC), the Convention for the Protection of all Persons from Enforced Disappearance, the Convention on the Rights of Persons with Disabilities (CRPD) and Optional Protocol to the Convention against Torture (CAT).<sup>42</sup> In my opinion, HRL seems to have

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<sup>35</sup> Inder, Beigid, "Partners for gender justice" in *Sexual violence as an international crime: interdisciplinary approaches* De Brouwer *et al.* (eds) Antwerp: Intersentia (2013) 316.

<sup>36</sup> De Brouwer, *supra* n 9 at 4.

<sup>37</sup> Dyani, Ntombizozuko, "Protocol on the rights of women in Africa: protection of women from sexual violence during armed conflict" *African Human Rights Law Journal* Vol.6, No.1 (2006) 171.

<sup>38</sup> *Ibid.*

<sup>39</sup> *Ibid.*

<sup>40</sup> These instruments are examined in detail in chapter 3.

<sup>41</sup> For example: the Vienna Conference on Human Rights (1994); the Fourth World Conference on Women (1995) and the Nairobi Declaration on Women's and Girls' Right to Remedy and Reparation (2007). See Chapter 3. iii.

<sup>42</sup> See <https://www.hrw.org/news/2009/07/24/united-states-ratification-international-human-rights-treaties> Accessed 04.02.16.

become a system of mere declarations of good principles, but with no real enforceability in practice.

Third, Stephens (1993) affirms that the prosecution of sexual criminals has been paltry, with the exception of the landmark cases of ICTY and the ICTR. As a result, sexual offences have gone unpunished in the majority of cases, regardless of the large number of sexually violent crimes that occur during armed conflicts.<sup>43</sup> Park (2007) notes that there is no doubt that the ICTY and the ICTR made ground-breaking developments in the prosecution of sexual violence in armed conflict, but before the case law of these tribunals there was a lack of definition and few procedural processes in this field.<sup>44</sup>

According to De Brouwer (2005), the Rome Statute is considered by many women's rights organisations as a sign of a new norm of accountability for sexual violence under international law.<sup>45</sup> Nevertheless, according to Grey (2013), the lack of sexual violence charges in the ICC's first case against Congolese warlord Thomas Lubanga Dyilo was broadly regarded as a step backwards.<sup>46</sup> Also, in the Katanga case, the prosecutor raised charges of sexual violence against rebel commander Germain Katanga for an attack on the village of Bogoro in eastern DRC. However, despite being convicted of war crimes, he was acquitted on all charges relating to sexual violence.<sup>47</sup> It seems that all the progress made by the Rome Statute regarding sexual violence is not translating into practice, creating a very alarming situation.

Regardless of all the progress made in international law concerning sexual violence, apparently the current law is not yet adequate to grant sufficient protection for women and girls against sexual violence during armed conflict. There continue to be gaps in several issues, such as providing security warranties for witnesses in sexual violence trials. The purpose of this research is to determine if the protection granted by all the existing international law instruments is sufficient to redress gender-based crimes.

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<sup>43</sup> Stephens, *supra* n 8 at 13.

<sup>44</sup> Park, Jennifer, "Sexual violence as a weapon of war in international humanitarian law" *International Public Policy Review* Vol. 3 No.1 (2007) 13.

<sup>45</sup> De Brouwer, *supra* n 9 at 453.

<sup>46</sup> Grey, Rosemary, "Beyond Rape – The evolving concept of 'sexual violence' under international criminal law" Available at <http://asiapacific.anu.edu.au/regarding-rights/2013/09/20/beyond-rape-evolving-understandings-of-sexual-violence-in-international-criminal-law/> Accessed 26.05.15.

<sup>47</sup> *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, ICC-01/04-01/07 OA 8, International Criminal Court (ICC) 25 September 2009.

iii) *The importance of researching the problem*

Sexual violence in armed conflict, either international or non-international, is a terrifying reality. Lawry (2013) argues that the history of armed conflicts has left us with alarming numbers of innocent victims of rape and other forms of sexual violence.<sup>48</sup> The conflicts in Rwanda, Yugoslavia and the Second World War provide the most dreadful examples of this generalised practice. If the victims are not murdered after being targets of sexual violence, the results leave them scarred for life. According to Chinkin (1994), in many cases victims are discriminated against in their communities for being raped; they are forced to have children as a result of the rapes during the conflict; and they become infected with HIV or other sexually-transmitted diseases, among other consequences.<sup>49</sup>

There are no words that can actually describe the horror of sexual violence in armed conflict. Therefore, the importance of researching this particular problem is almost self-explanatory; this research is an opportunity to contribute, even in a very small way, to ameliorating this problem. By doing extensive research of this problem and trying to analyse the causes and find potential solutions one might contribute to improving the current system. Also, the more one writes about a particular problem (it does not matter in which form: academic papers, law reviews, books, press articles, etc.) the more awareness and consciousness are created and the issue becomes more relevant for the policy makers, judges, jurists, members of parliament, politicians and other members of society who can make a difference in order to advance and, step by step, create a better international law system and by doing so, a better world.

Finally, after going through all the literature that was used for this work, I believe there is no document that combines almost all the instruments that regulate sexual violence in armed conflict, including all three different bodies of law that deal with it: IHL, HRL and ICL. Therefore, this work can be relevant considering the extensive research done that concentrates all the existing regulations on sexual violence in international law in

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<sup>48</sup> Lawry, Lynn, Johnson, Kirsten and Asher, Jana, "Evidence-based documentation of gender-based violence" in *Sexual violence as an international crime: interdisciplinary approaches* De Brouwer *et al.*, (eds) Antwerp: Intersentia (2013) 243–6. See also Neill, Kevin Gerard, "Duty, honor, rape: Sexual assault against women during war" *Journal of International Women's Studies* Vol. 2 No.1 (2013) 44–45.

<sup>49</sup> Chinkin, *supra* n 4 at 329–330.

one document, in the same way as the glossators contributed to Medieval Roman Law by compiling the existing laws in the *Corpus Iuris Civilis*.

#### **4. Objective of the study**

The objective of the research is to examine and analyse the different bodies of international law that apply to sexual violence and the interplay among them. This is done in order to conclude whether these norms are sufficient to adequately protect the victims. If the protection is not sufficient, it is necessary to look for ways to improve the regulatory frameworks.

A large part of the research looks at the existing regulatory frameworks, including the IHL instruments, human rights treaties, ICL bodies and the most relevant case law, in order to determine the difficulties they have encountered and the successes they have achieved. This is done with the aim of elaborating proposals for the improvement of international law in the field of sexual violence in armed conflict.

#### **5. Approach and research methods**

The approach used in this study is the comparative method. To achieve the objective of this research, primary and secondary sources were consulted. Primary sources include treaties, decisions of courts and tribunals, statutes and regulations. Secondary sources like books, articles and law reviews were consulted as well.

#### **6. Overview of the chapters**

Chapter 2 examines the crime of sexual violence in armed conflict in order to give a historical background of this current reality that affects specially women and girls. The most significant examples are discussed.

In Chapter 3 the focus is on the current law that regulates sexual violence in international law. The three main branches that contain norms regarding sexual violence (IHL, HRL and ICL) are examined. The specific provisions of sexual violence in these bodies of law are analysed in order to get a general overview of the protection of victims in the system. In the end, the interplay between the branches is studied.

Finally, Chapter 4 explores the benefits and shortcomings of the current legal order regarding sexual violence in order to conclude if improvements can be made. Concrete proposals, based in the ideas of the authors consulted in this work, are presented with the purpose of improving the legal system.

# Chapter 2: General background of sexual violence in armed conflict

## I. Definition of sexual violence

The World Health Organization defines sexual violence as “any sexual act, attempt to obtain a sexual act, unwanted sexual comments or advances, or acts to traffic, or otherwise directed, against a person’s sexuality using coercion, by any person regardless of their relationship to the victim, in any setting, including but not limited to home and work.”<sup>1</sup>

According to United Nations Division for the Advancement of Women (1998), the term “sexual violence” refers to several crimes of a sexual nature such as rape, sexual slavery, forced prostitution, sexual humiliation, forced marriage, forced impregnation and forced maternity, sexual mutilation, forced nudity and indecent assault (for example, touching women’s breasts or sexual organs).<sup>2</sup>

Amnesty International (2000) explains that there is no international definition of what sexual violence comprises – every national jurisdiction has created its own definition of criminal law.<sup>3</sup>

This chapter includes some definitions of the most relevant sex crimes included in the Rome Statute and the Elements of Crime (EoC) of the ICC. Even though the EoC of the ICC are not binding, they assist judges in their interpretation of the crimes and application of the laws. Furthermore, they provide definitions proposed by human rights

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<sup>1</sup> Jewkes R, Garcia-Moreno C, and Sen P, “Sexual violence” in *World Report on Violence and Health* Geneva: World Health Organization (2002) 149.

<sup>2</sup> United Nations Division for the Advancement of Women, “Sexual Violence and Armed Conflict: United Nations Response” *Women 2000* (1998) Available at <http://www.un.org/womenwatch/daw/public/w2apr98.htm>. Accessed 26.05.15.

<sup>3</sup> Callamard, Agnès, *Monitoring and investigating sexual violence/Amnesty International and Codesria* Amsterdam: Amnesty International (2000) 6.

organisations. Spees (2014) explains that even though these definitions do not have a legally binding status, they are important because human rights organisations sometimes participate in the negotiation processes of important legal instruments, as the Women’s Caucus for Gender Justice did in the elaboration of the Rome Statute.<sup>4</sup> Also, there is a possibility that at an international human rights conference these definitions are considered and incorporated into the final declaration or agenda. In this way, “no law” becomes “soft law” and therefore has persuasive authority for judges, and may eventually become part of customary international law.<sup>5</sup>

## 1. Rape:

According to article 7 (1) (g)-1 of the EoC of the ICC, the elements of rape are:

- “1. The perpetrator invaded the body of a person by conduct resulting in penetration, however slight, of any part of the body of the victim or of the perpetrator with a sexual organ, or of the anal or genital opening of the victim with any object or any other part of the body.
2. The invasion was committed by force, or by threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power, against such person or another person, or by taking advantage of a coercive environment, or the invasion was committed against a person incapable of giving genuine consent”.<sup>6</sup>

De Brouwer (2005) is very critical of this definition: she affirms that the wording is unclear, poorly drafted and might induce confusion. For example, in the sentence “the perpetrator invaded the body of a person by conduct resulting in penetration ... of any part of the body of the victim or of the perpetrator with a sexual organ”, is hard to understand the meaning of the reference to a second perpetrator. She concludes it seems to refer to cases when one individual is forced to rape another individual, but the wording is not ideal.<sup>7</sup> De Brouwer also points out that this definition excludes other

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<sup>4</sup> Spees, Pam, “Women’s advocacy in the creation of the International Criminal Court: changing the landscapes of justice and power” *Signs* Vol. 40 No.1 (2014) 1237.

<sup>5</sup> See *supra* chapter 1.3.ii.

<sup>6</sup> International Criminal Court (ICC), *Elements of Crimes* (2011) ISBN No. 92-9227-232-2 article 7 (1) (g)-1.

<sup>7</sup> De Brouwer, Anne-Marie, *Supranational criminal prosecution of sexual violence: the ICC and the practice of the ICTY and the ICTR* Cambridge: Intersentia (2005) 132.



types of sexual violence that do not involve penetration, like forced masturbation or sexual mutilation, and also rules out the possibility of forcing the victim into zoophilia.<sup>8</sup>

I do agree with De Brouwer regarding her first criticism – the wording could have been clearer – but I disagree with the second criticism. I think that article 7 (1) (g) of the Rome Statute that includes “any other form of sexual violence of comparable gravity”, would have no point if the examples she mentions (forced masturbation, sexual mutilation and forced bestiality) could be incorporated in the definition of rape. Bedont (1999/2000) correctly concludes that subsuming other crimes of sexual violence under rape “denies the particular harm suffered by the victim.”<sup>9</sup>

Amnesty International (2000) states that “rape consists in the forced or non-consensual penetration of the human body with the penis, or with an object, such as a truncheon, stick or bottle.”<sup>10</sup>

I think that the definition of the EoC is more complete than the one by AI for several reasons:

- First, the EoC includes the term “however slight”, which gives more protection to the victim; without this qualifier of intensity it could be inferred that the penetration has to be considerable in order to constitute rape.
- Second, the EoC includes the possibility that rape can be executed with another part of the body besides the penis, and AI does not, ruling out the possibility of rape by penetration with the tongue or fist for example. Even though a fist or a tongue can be considered an object, I believe that the more precise the terms concerning the regulation of sexual violence are the better.
- Finally, the EoC uses the element of consent as only one alternative of the context in which rape can take place, including other options like “coercion” created by circumstances such as duress, detention or the surrounding environment. The wording of AI’s definition refers only to “forced or non-consensual” penetration, creating a problem: it is very likely that in the context

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<sup>8</sup> *Ibid.*

<sup>9</sup> Bedont, Barbar C., “En-gendering justice: The statute of the international criminal court in a gender perspective” in *Human Rights in Development: Yearbook 1999/2000 millennium edition* Stokke and Tostensen (eds) Leiden: Kluwer Law International (1999/2000)151–152.

<sup>10</sup> Callamard, *supra* n 3 at 6.

of war women do not resist to the attacker or even express their consent to have intercourse; nevertheless, in their minds and souls, they are refusing.

The discussion surrounding the concept of rape is examined in chapter 3, taking into consideration the case law of the ICTY and the ICTR. According to De Brouwer (2005), from this case law it is clear that there are three lines of thinking regarding the definition of rape. The first proposes a broad conceptual definition of rape (*Akayesu*, upheld in *Čelebići, Musema, Niyitegeka* and *Muhimana*). The second presents a more restrictive, mechanical approach (*Furundžija*). The third puts forward, in addition to the mechanical description of the body parts involved in the crime, the element of consent (*Kunarac, Kovač* and *Vuković* upheld in *Kvočka et al., Semanza* and *Kajelijeli*).<sup>11</sup>

## 2. Sexual Slavery:

In article 7 (1) (g)-2 of the EoC of the ICC the elements of sexual slavery are:

1. The perpetrator exercised any or all of the powers attaching to the right of ownership over one or more persons, such as by purchasing, selling, lending or bartering such a person or persons, or by imposing on them a similar deprivation of liberty.
2. The perpetrator caused such person or persons to engage in one or more acts of a sexual nature.<sup>12</sup>

De Brouwer (2005) criticises this definition, stating that the wording induces one to think that there has to be a commercial element for the crime to exist, especially because all the examples given to illustrate the right of ownership involve a pecuniary benefit (to purchase, to sell, to lend or to barter, or any similar deprivation of liberty).<sup>13</sup> However, the footnote to element 1 clarifies that the term “other deprivation of liberty” should not be interpreted restrictively, and explains that there can be deprivation of liberty that does not involve an economic benefit.<sup>14</sup>

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<sup>11</sup> De Brouwer, *supra* n 7 at 124.

<sup>12</sup> ICC, *supra* n 6 Article 7 (1) (g)-2.

<sup>13</sup> De Brouwer, *supra* n 7 at 87.

<sup>14</sup> *Idem* at 87–88, Footnote 18 states “It is understood that such deprivation of liberty may, in some circumstances, include exacting forced labour or otherwise reducing a person to a servile status as defined in the Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and

Bedont (1999/2000) praises this definition of sexual slavery because it is not the same as the crime of enslavement, therefore the sexual connotation of the first crime is acknowledged.<sup>15</sup> Furthermore, Bedont celebrates the inclusion of sexual slavery as a completely different crime than forced prostitution, stressing the exceptional coercive context of sexual slavery, which is not present in the case of forced prostitution.<sup>16</sup> This distinction is very relevant because it elucidates that the “comfort women” in Asia during the Second World War were inaccurately categorised as forced prostitutes when in reality they were sexual slaves.<sup>17</sup>

According to Amnesty International (2000): “Sexual slavery consists in women and girl children being held against their will and owned by one or several persons in order to provide sexual services to their owner or owners, as well, as quite often, other forms of domestic services.”<sup>18</sup>

It should be noted that in both definitions the key in the crime of sexual slavery is the privation of liberty against someone’s will and the provision of sexual services. Regarding the differences, the definition proposed by AI refers specifically to women, while the ICC’s definition is gender-neutral. I think the EoC view is more accurate because men can also become sexual slaves.

Furthermore, the EoC is more comprehensive because it includes examples of the powers of the right of ownership, like the possibility to purchase, sell, lend or barter another human being or beings; while the AI definition only uses the term, “own”. As I said before, the more complete the definition, the more effective the protection for the victims.

Finally, the AI definition presents a very curious element: “other forms of domestic services”. I had no idea that sex could ever be considered as a form of domestic service. This would transform maids who voluntarily have intercourse with their employers into

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Practices Similar to Slavery of 1956. It is also understood that the conduct described in this element includes trafficking in persons, in particular women and children.”

<sup>15</sup> Bedont, *supra* n 9 at 153.

<sup>16</sup> *Ibid.*

<sup>17</sup> *Ibid.*

<sup>18</sup> Callamard, *supra* n 3 at 6.

prostitutes. I also think that this example is redundant, because within the term “slavery” it is implicit that the obligation to perform domestic services can be included.

The crime of sexual slavery can commonly coincide with other crimes such as enforced prostitution and forced marriage.<sup>19</sup> For example, it is possible that the “owner” will force the “slave” to have sex with other people in exchange for money. Also, in my view, in the case of forced marriage the “wife” is always a sexual slave until the moment she voluntarily decides to stay in the conjugal union.

### 3. Enforced prostitution

Article 8 (2) (b) (xxii)-3 of the EoC contains the following elements for the crime of enforced prostitution:

1. The perpetrator caused one or more persons to engage in one or more acts of a sexual nature by force, or by threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power, against such person or persons or another person, or by taking advantage of a coercive environment or such person’s or persons’ incapacity to give genuine consent.
2. The perpetrator or another person obtained or expected to obtain pecuniary or other advantage in exchange for or in connection with the acts of a sexual nature.<sup>20</sup>

The first element copies the definition of rape concerning the circumstances of rape of article 7 (1) (g)-1. This makes sense, because during armed conflict women might be driven to forced prostitution due to harsh circumstances; however their consent is not genuine.

According to special rapporteur McDougal (1998):

Sexual slavery also encompasses most, if not all, forms of forced prostitution. The terms ‘forced prostitution’ or ‘enforced prostitution’ appear in international and humanitarian conventions but have been insufficiently understood and

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<sup>19</sup> *Ibid.*

<sup>20</sup> ICC, *supra* n 6 at article 8 (2) (b) (xxii) 3.

inconsistently applied. ‘Forced prostitution’ generally refers to conditions of control over a person who is coerced by another to engage in sexual activity.<sup>21</sup>

Following McDougal’s reasoning, enforced prostitution can be considered a type of sexual slavery when the elements of this crime are met. Forced prostitution necessarily involves acts of a sexual nature that include coercing women to perform these acts. If the “forced prostitute” is also purchased, sold, lent or bartered or in any other way deprived of liberty, she becomes a sex slave as well.

According to De Brouwer (2005), the main difference between sexual slavery and forced prostitution is the monetary benefit. However in the context of armed conflict or crimes against humanity, almost every situation of forced prostitution would fit into the category of sexual slavery, because the sexual services that forced prostitutes have to provide are the same sexual services that sexual slaves are forced to give, and in both contexts women are obliged to comply if they do not want to die.<sup>22</sup> However, there are some extreme cases like women becoming prostitutes in order to survive because of the economic disruption caused by war; nevertheless, De Brouwer affirms that is important to prosecute the cases as sexual slavery as such, and not as forced prostitution, discarding the pecuniary benefit.<sup>23</sup> Bedont (1999/2000) provides an excellent example of this logic: during the Second World War the “comfort women” in Asia were incorrectly classified as forced prostitutes when they really were sexual slaves.<sup>24</sup>

#### **4. Forced marriage**

Forced marriage is not defined in the Rome Statute or the EoC. It would be an important advance in the future to also incorporate this crime as a sex offence in these instruments.

According to AI “forced (or servile) marriage refers to:

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<sup>21</sup> UN Sub-Commission on the Promotion and Protection of Human Rights, *Systematic rape, sexual slavery and slavery-like practices during armed conflict: final report* submitted by Gay J. McDougall, Special Rapporteur (1998) 9.

<sup>22</sup> De Brouwer, *supra* n 7 at 142–3.

<sup>23</sup> *Idem* at 143.

<sup>24</sup> Bedont, *supra* n 9 at 153.

- a woman or girl child being given in marriage, without the right to refuse, by her parents, guardians, the community, etc.;
- or the husband of a woman, his family, or his clan, transferring her to another person;
- or a widow who, on the death of her husband, is inherited by another person.”<sup>25</sup>

This definition is similar to the one in article 7 (1) (g)-2 of the EoC of sexual slavery. It clearly involves a sense of ownership as it includes the verbs “give”, “transfer” and “inherit”. Furthermore, the definition is not gender-neutral, despite the existence of cases in history, like Cambodia,<sup>26</sup> where men were also coerced into forced marriage.

Regarding the concept of forced marriage, I would like to make some comments about arranged marriages. Arranged marriages<sup>27</sup> are still a common cultural practice in many regions of the world like Asia, Africa and the Middle East.<sup>28</sup> I think that in some cases, there is a very fine line between forced marriage and arranged marriage; they are two branches of the same tree. If someone is being pressured by their family and community into marriage, how genuine can their consent be? In some cases, very young girls have to marry much older men: how can a little girl consent if she does not even have legal capacity? This might be my prejudiced Western view, and perhaps many brides do consent to arranged marriages and are happy with this situation. However, many arranged marriages might also be forced and is important for the international community to be aware of this issue. There is certain hypocrisy: we live in a world where prohibiting a white person marrying a black person is a “crime against humanity” (apartheid), but compelling a young girl to marry a much older man is completely acceptable to many people, because is considered a cultural practice.

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<sup>25</sup> Callamard, *supra* n 3 at 6.

<sup>26</sup> Studzinsky, Silke, “Victims of sexual and gender-based crimes before the Extraordinary Chambers in the Courts of Cambodia: Challenges of rights to participation and protection” in *Sexual violence as an international crime: interdisciplinary approaches* De Brouwer *et al.* (eds) Antwerp: Intersentia (2013) 180.

<sup>27</sup> “Forced marriage is different to arranged marriage where families are involved in selecting a partner but it is up to the individuals to decide whether or not to enter the marriage.” See <http://rightsofwomen.org.uk/get-information/family-law/forced-marriage-law/>, Accessed 15.03.16.

<sup>28</sup> Batabyal, A. A. “On the likelihood of finding the right partner in an arranged marriage” *Journal of Socio-Economics* (2001) 273.

McDougal affirms that sexual slavery also encompasses situations where women and girls are forced into “marriage”.<sup>29</sup> I agree with this view and believe that it can also include rape and forced pregnancy. Until the moment a woman (who has been a victim of forced marriage) freely and without coercion consents to remain in the marriage, she is raped every time her “husband” exercises his “conjugal rights”. In many cases, she has to do house duties and she cannot leave her home, apart from providing sexual services, and therefore becomes a sexual slave. Finally, when she falls pregnant, if her consent is not genuine, she becomes a victim of forced pregnancy. Considering this, forced marriage can be regarded as one of the most heinous sex crimes. Therefore it is imperative that it is included in the Rome Statute and the EoC.

## 5. Forced pregnancy

The Rome Statute defines forced pregnancy in article 7 (f):

“‘Forced pregnancy’ means the unlawful confinement of a woman forcibly made pregnant, with the intent of affecting the ethnic composition of any population or carrying out other grave violations of international law. This definition shall not in any way be interpreted as affecting national laws relating to pregnancy.”<sup>30</sup>

Article 7 (1) (g)-4 of the EoC states the following elements:

“1. The perpetrator confined one or more women forcibly made pregnant, with the intent of affecting the ethnic composition of any population or carrying out other grave violations of international law.”<sup>31</sup>

Arsanjani (1999) explains that the incorporation of forced pregnancy in the ICC Statute was fervently discussed, because states did not want this provision to interfere with their domestic laws that either prohibited or allowed abortion.<sup>32</sup> Finally, consensus was reached in terms that the crime would be labelled “forced pregnancy” instead of “enforced pregnancy” and paragraph two was added to clarify that this provision does

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<sup>29</sup> UN Sub-Commission on the Promotion and Protection of Human Rights, *supra* n 21 at 9.

<sup>30</sup> Rome Statute of the International Criminal Court (last amended 2010), 17 July 1998, article 7(f).

<sup>31</sup> ICC, *supra* n 6 at article 7 (1) (g)-4.

<sup>32</sup> Arsanjani, Mahnoush H., “The Rome statute of the international criminal court” *American Journal of International Law* Vol. 93 No. 1 (1999) 31.

not imply that the legalisation of abortion is encouraged.<sup>33</sup> Nevertheless, Copelon (2000) thinks that this compromise was not ideal, because the final result “is not an appropriate definition for purposes of reproductive health care policy or of respecting and ensuring the human rights of women.”<sup>34</sup>

AI states that “Forced pregnancy refers to all acts of sexual violence whose objective is to impregnate women”.<sup>35</sup>

In my analysis, the Rome Statute and EoC definitions include the fact that women have to be raped in order to be impregnated; the use of the term “forcibly” implies this. I am critical of the phrase “with intent of affecting the ethnic composition of any population” because it might rule out when forced pregnancy is done with other motives like shaming the community or in the context of forced marriage. The inclusion of the phrase “or carrying out other grave violations of international law” is not sufficient because it is too general and imprecise.

The definition proposed by AI is broader and it could be interpreted as not necessarily involving rape. There might be a very rare case in which a woman consents to intercourse, but does not want to get pregnant. In this hypothesis this woman could be deceived regarding the use of contraception. Nevertheless, “sexual violence” always implies a sense of coercion or force. The AI definition is better than those of the Statute and EOC in one respect; because it does not specify concrete motives, “forced pregnancy” can constitute any act of sexual violence with the purpose of impregnating a woman. In my opinion, this crime is likely to take place in the context of a forced marriage for the reasons explained above, in the sense that if women do not consent to the marriage and eventually become pregnant unwillingly, they are victims of forced pregnancy.

## 6. Enforced sterilisation

The EoC establishes the following elements for enforced sterilisation:

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<sup>33</sup> *Ibid.*

<sup>34</sup> Copelon, Rhonda, “Gender crimes as war crimes: Integrating crimes against women into international criminal law.” *McGill LJ* Vol. 46 (2000)234.

<sup>35</sup> Callamard, *supra* n 3 at 6.



1. The perpetrator deprived one or more persons of biological reproductive capacity. The deprivation is not intended to include birth-control measures which have a non-permanent effect in practice.
2. The conduct was neither justified by the medical or hospital treatment of the person or persons concerned nor carried out with their genuine consent. It is understood that ‘genuine consent’ does not include consent obtained through deception.<sup>36</sup>

According to De Brouwer (2005) this definition includes cases of genital mutilation or complete removal of reproductive organs and also situations in which women’s reproductive capacity has been completely destroyed as the consequence of savage rapes.<sup>37</sup>

According to Human Rights Watch, sterilisation can be defined as “a process or act that renders an individual incapable of sexual reproduction.”<sup>38</sup> Enforced sterilisation takes place “when a person is sterilized after expressly refusing the procedure, without her knowledge, or is not given an opportunity to provide consent.”<sup>39</sup>

Both definitions are very similar and state that enforced sterilisation involves the process of making a person infertile without their consent. The definition of the EoC is better in my opinion, because it provides examples of circumstances where the crime can be ruled out, like contraceptive measures that are temporary or when the sterilisation is done as part of a medical procedure, for example in order to save somebody’s life.

## 7. Persecution on the grounds of gender

Article 7 (1) (h) of the Statute of the ICC states: “persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender as

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<sup>36</sup> ICC, *supra* n 6 at article 7 (1) (h).

<sup>37</sup> De Brouwer, *supra* n 7 at 147.

<sup>38</sup> See <https://www.hrw.org/news/2011/11/10/sterilization-women-and-girls-disabilities> Accessed 24.07.15.

<sup>39</sup> *Ibid.*

defined in paragraph 3”.<sup>40</sup> The Statute later defines “gender” in article 7 (2) 3 as “the two sexes, male and female, within the context of society”.<sup>41</sup>

Article 7 (1) (h) of the EoC defines persecution on the grounds of gender as the severe deprivation of human rights targeting an individual or individuals based on gender.<sup>42</sup>

According to Oosterveld (2013) there was a heated debate in the negotiations of the ICC concerning the inclusion of the term “gender” in the Statute.<sup>43</sup> The Arab countries joined forces with the Catholic countries, especially the Holy See (Copelon refers to them as the “Unholy Alliance”)<sup>44</sup> with the purpose of avoiding the use of the term “gender” in the Statute.<sup>45</sup> Their alleged motivations were the following: first, they wanted to prevent the inclusion of more expansive rights to certain groups of people, specifically to exclude the possibility of criminalisation of persecution based on sexual orientation or gender identity.<sup>46</sup> In simple words, it was done with the purpose of discriminating against sexual minorities. Second, according to Copelon (2000), the “Unholy Alliance” wanted to eliminate the social construction of gender roles that recognises that women and men have different roles, rights and status in society.<sup>47</sup> Finally, Oosterveld (2013) affirms that they offered – in my opinion – a shameless excuse: that the term “gender” was impossible to translate in the six official languages of the UN.<sup>48</sup> On the other hand, Copelon (2000) explains that the majority of the other countries, supported strongly by the Women’s Caucus, wanted to include a progressive definition of gender in order to maintain all the advancements achieved in the international system to avoid discrimination based on gender grounds.<sup>49</sup>

According to Copelon (2000), in the end a general definition of gender was drafted in order to satisfy the interests of both groups. It specifies that “gender is a contextual and

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<sup>40</sup> Rome Statute, *supra* n 30 article 7 (1) (h).

<sup>41</sup> *Idem* at article 7 (2) 3.

<sup>42</sup> ICC, *supra* n 6 at Art 7 (1) h.

<sup>43</sup> Oosterveld, Valerie, “Prosecuting gender-based persecution as an international crime” in *Sexual violence as an international crime: interdisciplinary approaches* De Brouwer *et al.* (eds) Antwerp: Intersentia (2013) 66.

<sup>44</sup> Copelon, *supra* n 34 at 236.

<sup>45</sup> Oosterveld, *supra* n 43 at 66.

<sup>46</sup> *Ibid.*

<sup>47</sup> Copelon, *supra* n 34 at 236.

<sup>48</sup> Oosterveld, *supra* n 43 at 66.

<sup>49</sup> Copelon, *supra* n 34 at 236.

socially-constructed norm of maleness and femaleness”. The idea was to leave the term as broad as possible for the interpretation of the ICC judges.<sup>50</sup>

According to some authors, the “Unholy Alliance” managed to achieve its objective. For example, Charlesworth (1999) thinks the gender definition “elides the notion of gender and sex” and that “it does not recognize that gender is a constructed and contingent assumption about female and male roles”<sup>51</sup> Chinkin (2008) shares this opinion.<sup>52</sup>

However, some other authors disagree with this point of view. Oosterveld (2013) believes this definition uses biological sex as a basis, but goes further from the biological standpoint and incorporates the notion that gender originates in the “context of society”; therefore, the criminalisation of persecution based on sexual orientation cannot be ruled out. According to Spees (2014), by the use of the wording “within the context of society”, the ICC will be capable of prosecuting persecution of sexual minorities.<sup>53</sup> Finally, Copelon (2000) argues that the gender definition will not allow discrimination grounded in gender identity or sexual minorities, because the definition “necessarily embraces discrimination based upon a decision not to behave according to a prescribed gender role, whether it be in the realm of housekeeping, work, or sexuality” and because it is very unlikely that in case of any vagueness the court will choose to discriminate in its ruling.<sup>54</sup>

## 8. Other forms of sexual violence

The last phrase of article 7 (1) (g) of the Rome Statute is “any other form of sexual violence of comparable gravity”, serving as a residual category which expressly specifies the issue of sexual violence. According to De Brouwer (2005), sexual violence

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<sup>50</sup> *Ibid.*

<sup>51</sup> Charlesworth, Hilary, “Feminist methods in international law” *American Journal of International Law* Vol. 93 No. 2 (1999) 394.

<sup>52</sup> Chinkin, Christine, “Gender-Based Crimes” in *Max Planck Encyclopedia of Public International Law*, Rudiger Wolfrun (ed) Oxford University Press, online edition (2008) par 13. See <http://opil.ouplaw.com/home/EPIL> Accessed 25.03.16

<sup>53</sup> Spees, *supra* n 4 at 1244.

<sup>54</sup> Copelon, *supra* n 34 at 237.

“has been laid down for the first time in an international instrument.”<sup>55</sup> The statutes of the ICTY and the ICTR only use the expression “other inhumane acts” as the basis for the prosecution of crimes, including crimes of sexual violence.<sup>56</sup>

The EoC for sexual violence are included in article 7 (1) (g)-6 and state that:

1. The perpetrator committed an act of a sexual nature against one or more persons or caused such person or persons to engage in an act of a sexual nature by force, or by threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power, against such person or persons or another person, or by taking advantage of a coercive environment or such person’s or persons’ incapacity to give genuine consent.
2. Such conduct was of a gravity comparable to the other offences in article 7, paragraph 1 (g), of the Statute.
3. The perpetrator was aware of the factual circumstances that established the gravity of the conduct.<sup>57</sup>

According to Viseur (2008), this residual category has expanded the list of particular crimes and permits “a larger coverage of all serious sexually abusive conduct.”<sup>58</sup>

In this residual category is possible to include sexual humiliation,<sup>59</sup> sexual mutilation,<sup>60</sup> forced nudity,<sup>61</sup> indecent assault<sup>62</sup> and other forms of crimes not explicitly enumerated in the Rome Statute.<sup>63</sup>

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<sup>55</sup> De Brouwer, *supra* n 7 at 147.

<sup>56</sup> *Ibid.*

<sup>57</sup> ICC, *supra* n 6 at article 7 (1) (g)-6.

<sup>58</sup> Viseur-Sellers, Patricia, “The prosecution of sexual violence in conflict: The importance of human rights as means of interpretation” Available at [www2.ohchr.org/english/issues/women/docs](http://www2.ohchr.org/english/issues/women/docs) Accessed 22.03.16 (2008) 13.

<sup>59</sup> Sexual humiliation involves a degrading treatment without necessarily touching the victim, for example in the *Akayesu Case*: “the Accused ordered the *Interahamwe* to undress a student and force her to do gymnastics naked in the public courtyard of the bureau communal, in front of a crowd, constitutes sexual violence”. Also a woman “testified to the humiliation she felt as a mother, by the public nudity and being raped in the presence of children by young men”. *The Prosecutor v. Jean-Paul Akayesu*, Trial Judgment Case No. Ictr-96-4-T, 2 September 1998, par 688 and 423.

<sup>60</sup> Sexual mutilation can be inflicted on women and men: “Female genital mutilation (FGM) comprises all procedures that involve partial or total removal of the external female genitalia, or other injury to the female genital organs for non-medical reasons.” See <http://www.who.int/mediacentre/factsheets/fs241/en/> Accessed 09.02.15. For the purposes of this research, male genital mutilation does not involve circumcision, which is a common cultural practice, but refers specifically to cutting off or injuring the male sexual organs. For example, in the *Tadić* case at the Omarska camp two prisoners were forced “to commit oral sexual acts” and one of them was forced to “sexually mutilate” the other. *Prosecutor v.*

In my opinion, sexual mutilation is so terrible that is not enough to include it in a residual category catalogued as a sexual offence as grave as the ones enumerated in article 7 of the statute. Sexual mutilation deserves a category its own in the Rome Statute, since sexual mutilation can definitely be more painful than rape. Also, the majority of physical wounds from rape will heal with time, but in the case of sexual mutilation these wounds will never heal. In addition, sexual mutilation can cause infertility. If sexual mutilation is classified “as other form of sexual violence” this denies the specific physical pain inflicted on the victim.<sup>64</sup>

## II. Context of sexual violence in armed conflict

According to the United Nations Division for the Advancement of Women (1998), sexual violence in armed conflict is motivated by a series of different factors:

- First, women are traditionally considered spoils of war who combatants are permitted to sexually abuse. This profoundly rooted view regards women as trophies fairly granted to the victors.<sup>65</sup>
- Second, sexual violence can also be seen as a means of providing sexual satisfaction to the troops, especially when women are compelled into sexual slavery.<sup>66</sup>
- Third, sexual violence takes place when is aimed to destroy men, and consequently community honour: males who have failed to protect their “females” are looked upon as weak and disgraced.<sup>67</sup>

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*Dusko Tadic* (Judgement in Sentencing Appeals), IT-94-1-A and IT-94-1-Abis, International Criminal Tribunal for the former Yugoslavia (ICTY), 26 January 2000, par 6.

<sup>61</sup> Forced nudity involves forcing the victim to be naked against their will, in some cases in public, amounting to sexual humiliation. See the example at *supra* n 59. In the *Akayesu* case the trial chamber recognised forced nudity as an inhumane act constituting a crime against humanity. See the *Akayesu* Trial, *supra* n 59 at par 10A and 692.

<sup>62</sup> The expression “any form of indecent assault” can refer to any form of sexual violence. See [https://www.icrc.org/customary-ihl/eng/docs/v1\\_rul\\_rule93#Fn\\_17\\_10](https://www.icrc.org/customary-ihl/eng/docs/v1_rul_rule93#Fn_17_10) Accessed 09.02.15. For example, touching a woman’s breast. See Callamard, *supra* n 3 at 5.

<sup>63</sup> There can be other forms of sexual violence besides the ones expressly enumerated in article 7, for example forced fellatio: “in the *Furundzija* Judgement, the Trial Chamber considered forced penetration of the mouth as a humiliating and degrading attack on human dignity and largely for this reason included such conduct in its definition of rape even though State jurisdictions are divided as to whether such conduct constitutes rape”. *The Prosecutor v. Alfred Musema* (Judgement and Sentence), ICTR-96-13-T, International Criminal Tribunal for Rwanda (ICTR), 27 January 2000, par 223.

<sup>64</sup> Bedont, *supra* n 9 at 151.

<sup>65</sup> United Nations Division for the Advancement of Women, *supra* n 2 at 2.

<sup>66</sup> *Ibid.*

<sup>67</sup> *Ibid.*

- Fourth, it can also be used to punish women who are involved in politics or related to people that are politically active.<sup>68</sup>
- Fifth, sexual violence can take place as means of inflicting terror and fear on the population, destroying communities and removing people from their homes.<sup>69</sup>
- Sixth, sexual violence can be a genocidal strategy that causes lethal bodily and mental harm with the ultimate purpose of the annihilation of a group.<sup>70</sup>

Finally, Bedont (1999/2000) explains that tales of mass rape by enemy armies have been spread in order to amplify the hostility against the adversary. However, these horrible crimes have been largely ignored in terms of making the offender responsible.<sup>71</sup> Gender crimes were considered “to be less serious crimes than other crimes and were therefore not investigated and prosecuted to the same extent.”<sup>72</sup>

According to Weitsman (2008), rape and sexual violence during armed conflict are not recent; they have been a constant in the history of war.<sup>73</sup> Neill (2013) explains that the origin of the ideology of rape in war can be extracted from the research done by historian Gerda Lerner. In her book *The Origins of Patriarchy* (as cited by Neill, 2013) she states that the relationship between militarism and sexual aggression against women goes back to the creation of agricultural societies, in which women were essential for providing food and bearing children. Hence, based in the importance of this reproductive ability, tribes started to value gaining more women from rival tribes for the purpose of maintaining internal growth. Therefore, in order to reach this goal, the male warrior class was born.<sup>74</sup>

Neill (2013) states that there are testimonies of women being raped during wars that extend as far back as Ancient Greece.<sup>75</sup> Brownmiller (as cited by De Brouwer, 2005) affirms that in Ancient Greece “rape was sociably accepted behaviour within the

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<sup>68</sup> *Ibid.*

<sup>69</sup> *Ibid.*

<sup>70</sup> *Ibid.*

<sup>71</sup> Bedont, *supra* n 9 at 139.

<sup>72</sup> *Ibid.*

<sup>73</sup> Weitsman, Patricia A., “The politics of identity and sexual violence: a review of Bosnia and Rwanda” *Human Rights Quarterly* Vol.30 No. 3 (2008) 563.

<sup>74</sup> Neill, Kevin Gerard, “Duty, honor, rape: Sexual assault against women during war.” *Journal of International Women’s Studies* Vol. 2 No.1 (2013) 44.

<sup>75</sup> *Idem* at 44–45.

rules of warfare, an act without stigma for warriors who viewed the women they conquered as legitimate booty, useful as wives, concubines, slave labour or battle-camp trophy.”<sup>76</sup> De Brouwer (2005) concludes that rape was seen as a prize for the conquerors and not as a wrongful act to be prosecuted as a crime.<sup>77</sup>

Hynes (2004) notes that “military” rape and sexual abuse have been largely overlooked or merely mentioned anecdotally in the records of war.<sup>78</sup> Recently, some information has surfaced about the frequency of rape and other forms of sexual violence in armed conflict and its devastating consequences for the wellbeing of women.<sup>79</sup> In the past 30 years, several lawyers, physicians, journalists, judges and women’s rights activists have investigated, exposed, denounced and prosecuted these heinous crimes of sexual violence.<sup>80</sup>

According to Schomburg and Peterson (2007), “sexual violence has long formed part of armed conflict and has empirically been shown not to be an incidental by-product, but a frequently used “weapon of war”.<sup>81</sup> When sexual violence achieves the scale of genocide, crimes against humanity and war crimes, it “takes a form rarely seen in times of peace.”<sup>82</sup> Not only does it tamper with the sexual freedom of the victim, it also commonly causes severe physical pain in order to hurt the victim and her community.<sup>83</sup>

This chapter examines several examples of sexual violence in various armed conflicts. The extent of this research does not permit inclusion of all of the episodes of sexual violence that have occurred or that are currently taking place around the globe in detail. However, is important to keep in mind that also large numbers of rapes have been

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<sup>76</sup> De Brouwer, *supra* n 7 at 4.

<sup>77</sup> *Ibid.*

<sup>78</sup> Hynes, H. Patricia, “On the battlefield of women’s bodies: An overview of the harm of war to women” *Women’s Studies International Forum* Vol. 27 No. 5 (2004) 437.

<sup>79</sup> *Ibid.*

<sup>80</sup> *Ibid.*

<sup>81</sup> Schomburg, Wolfgang, and Peterson, Ines, “Genuine consent to sexual violence under international criminal law” *American Journal of International Law* Vol. 101 No.1 (2007) 121.

<sup>82</sup> *Idem* at 138.

<sup>83</sup> *Ibid.*

documented in conflicts in Pakistan, Liberia, East Timor, Somalia, El Salvador, Guatemala, Burundi and Central African Republic, just to mention a few.<sup>84</sup>

## 1. The First World War

Askin (2013) explains that during the First World War invading soldiers from all sides raped women by the thousands. This was the first time that wartime sexual violence was so well documented.<sup>85</sup> According to Brownmiller (as cited by Askin, 2013), when Germany invaded Belgium, sexual assault was used as a weapon to humiliate the Belgians and rape was so rampant that it was impossible not to assume that it was pardoned and even encouraged by German superiors.<sup>86</sup>

## 2. The Second World War

According to Askin (2013), “Throughout the war, sexual violence was committed with vengeance.”<sup>87</sup> The transcript of the Nuremberg Trials and Tokyo Trials prove that documentation was submitted with evidence of rape, sexual slavery, sexual torture, forced prostitution, forced sterilisation, sexual mutilation, forced nudity, pornography and sexual sadism committed by the Axis troops.<sup>88</sup> Despite this evidence, the IMT believed that sex crimes were not as relevant as other crimes and did not expressly prosecute them.<sup>89</sup> Nevertheless, several forms of sexual violence were documented at the Nuremberg Trials and may be considered to be included in the judgment.<sup>90</sup> The author Geoffrey Robertson (as cited by Askin, 2013) believes that the Allies refused to convict the Nazi criminals for sexual violence because they themselves were guilty of the same atrocities: “The worst example of tolerated and systematic rape was during the Russian army advance on Germany through eastern Europe, during which an estimated

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<sup>84</sup> Lawry, Lynn, Johnson, Kirsten and Asher, Jana, “Evidence-based documentation of gender-based violence” in *Sexual violence as an international crime: interdisciplinary approaches* De Brouwer *et al.* (eds) Antwerp: Intersentia (2013) 244.

<sup>85</sup> Askin, Kelly, “Treatment of sexual violence in armed conflicts: A historical perspective and the way forward” in *Sexual violence as an international crime: interdisciplinary approaches* De Brouwer *et al.* (eds) Antwerp: Intersentia (2013) 28.

<sup>86</sup> *Ibid.*

<sup>87</sup> *Idem* at 33

<sup>88</sup> *Ibid.*

<sup>89</sup> *Ibid.*

<sup>90</sup> Lawry, *supra* n 84 at 244.



two millions of women were sexually abused, with Stalin's blessing that 'boys were entitled to their fun'."<sup>91</sup>

According to the United Nations Division for the Advancement of Women (1998), the main reason for the silence about the occurrence of sexual violence and failure to prosecute it during the Second World War was that it was perpetrated by all sides in the conflict, making it very difficult to make allegations against each other at the end of the war.<sup>92</sup> Another aspect that caused this silence was that in the late 1940s sexual matters were not openly discussed, almost a taboo, and there were no strong, mobilised women's organisations to fight for and put pressure in this matter.<sup>93</sup>

The evidence submitted during the Nuremberg Trials gave compelling proof that rape, sexual slavery, sexual torture, forced prostitution, sexual mutilation, forced nudity and pornography were committed by the Axis troops in several villages. According to witnesses:

In the village of Berezovka ... drunken German soldiers assaulted and carried off all the women and girls between the ages of 16 and 30. Everywhere the lust-maddened German gangsters break into the houses, they rape the women and girls under the very eyes of their kinfolk and children, jeer at the women they have violated, and then brutally murder their victims. Among the women raped, several were 14- or 15-year-old girls. Many women and girls in their teens ... were subjected to particularly outrageous forms of torture. They were raped, their breasts cut off, their stomachs ripped open, their feet and hands cut off, and their eyes gouged out. Scenes of mutilation, infanticide, rape, hangings, murder—exactly what the Nazi movement brought to Europe!<sup>94</sup>

Thousands of women were forced into sexual slavery during the Second World War. At concentration camps like Auschwitz and Ravensbruck, enslaved women were forced into brothels to supply sexual services to officers or male workers. To determine which

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<sup>91</sup> Askin, *supra* n 85 at 33.

<sup>92</sup> United Nations Division for the Advancement of Women, *supra* n 2 at 3.

<sup>93</sup> *Ibid.*

<sup>94</sup> Trial of the Major War Criminals before the International Military Tribunal, 14 November 1945–1 October 1946 (41 Vols. 1947) henceforth IMT Docs Vol. V II, transcript, par 456, 467, 494, 20, 549.

women would become prostitutes, men would look at naked women during disinfection and make their selection.<sup>95</sup>

Pornography also occurred during the war. Some women were photographed naked before being murdered: as they were raped by soldiers, nude photos were taken of them in forced positions.<sup>96</sup>

Forced sterilisation was used by the Nazis with the objective of exterminating the Jews. Witnesses from concentration camps testified that pregnant Jewish women were forced to abort, but if the pregnancy was close to term the new-born babies were drowned.<sup>97</sup> The IMT documents also confirm that the Nazis wanted to sterilise all Jews and all half-Jews.<sup>98</sup> According to Askin (2013), Jewish and other women and girls were victims of various forms of reproductive crime like forced abortion, forced sterilisation and infanticide and were prevented from reproducing.

The records of the IMT give evidence that forced abortion was acknowledged as an official Nazi policy:

[E]very case of pregnancy of non-German women was to be reported, and in all such cases these women were to be obliged to have their child ‘removed by operation in a hospital’. The announcement itself explains that in cases when non-German women give birth to their children this ‘creates difficulties for their use in work,’ and besides, it is also ‘a danger for the population policy’.<sup>99</sup>

Askin (2013) states that “[s]terilisation experiments at the Auschwitz camp were barbaric, resulting in the loss of the ability to reproduce, while also causing extreme physical pain, emotional trauma or death.”<sup>100</sup> For example a witness declared that “(t)hey sterilized women either by injections or by operation or with rays. I saw and

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<sup>95</sup> *Idem* at Vol. VII transcript, par 213–14.

<sup>96</sup> *Idem* at Vol. VII transcript, par 488.

<sup>97</sup> “The Jewish women, if in the first months of pregnancy when they arrived, were subjected to abortion. If their pregnancy was near term, after confinement the babies were drowned in a bucket of water. After a while another doctor arrived and for two months they did not kill the Jewish babies. But one day an order came from Berlin saying that again they had to be done away with. Then the mothers and their babies were called to the infirmary. They were put in a lorry and taken away to the gas chamber.” *Idem* at Vol. VII transcript, par 211.

<sup>98</sup> *Idem* at Vol. XX transcript, par 273.

<sup>99</sup> *Idem* at Vol. XVIII transcript, par 133.

<sup>100</sup> Askin, *supra* n 85 at 36.

knew several women who had been sterilized. There was a very high mortality rate among those operated upon.”<sup>101</sup>

In the Nuremberg Trials held by the Allies under Control Council Law No.10, rape is specifically listed as a crime against humanity.<sup>102</sup> According to Meron (1993), the confirmation of this principle “is, both morally and legally, of ground-breaking importance.”<sup>103</sup> However, Askin (2013) points out that while rape was recognised explicitly as a crime, other gendered crimes were only given superficial treatment in the trials; only forced sterilisation, forced abortion and sexual mutilation were mentioned in the context of prosecuting unethical conduct of doctors.<sup>104</sup> Kuo (2002) explains a very important fact: during the Nuremberg trials women were barely present. When examining photos from the time it is clear that all the participants were men. Nowadays things have changed; there are many women judges, prosecutors and lawyers.<sup>105</sup>

According to De Brouwer (2005), during the Second World War rape, forced prostitution, sexual slavery and other forms of sexual violence were out of control in Asia.<sup>106</sup> Approximately 200 000 women, mostly Chinese and Korean, but also Indonesian, Filipino, and Dutch, were forced to become sexual slaves for the Japanese Army.<sup>107</sup> These were the infamously called “comfort women”. Estimations indicate that only 25% of the comfort women survived and the majority of them were incapable of conceiving children as a result of the several rapes they were subjected to or from the diseases they caught after these rapes.<sup>108</sup>

Furthermore, during the Second World War, in Asia one of the most horrendous tales of rape and sexual violence ever occurred. According to Neill (2013), China “established a dark milestone” in the history of large-scale wartime sexual abuse of women.<sup>109</sup> During

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<sup>101</sup> IMT Docs, *supra* n 94 at Vol. VI transcript, par 211.

<sup>102</sup> Control Council Law No. 10, Punishment of Persons Guilty of War Crimes, Crimes against Peace and Against Humanity, December 20, 1945. 3 Official Gazette Control Council for Germany 50–55 (1946).

<sup>103</sup> Meron, Theodor, “Rape as a crime under international humanitarian law” *American Journal of International Law* Vol. 87, No. 3 (1993) 428.

<sup>104</sup> Askin, *supra* n 85 at 37.

<sup>105</sup> Kuo, Peggy, “Prosecuting crimes of sexual violence in an international tribunal” *Case W. Res. J. Int’l L.* 34 (2002) 308.

<sup>106</sup> De Brouwer, *supra* n 7 at 8.

<sup>107</sup> United Nations for the Advancement of Women *supra* n 2 at 3.

<sup>108</sup> De Brouwer, *supra* n 7 at 8.

<sup>109</sup> Neill, *supra* n 74 at 45.

the three months of the Japanese occupation of the Chinese city of Nanking, rape and sexual violence were rampant and more than 20 000 women and girls were raped by the Japanese soldiers:<sup>110</sup>

Chinese soldiers had evacuated the city or had abandoned their arms and uniforms and sought refuge in the International Safety Zone and all resistance had ceased as the Japanese Army entered the city on the morning of 13 December 1937. The Japanese soldiers swarmed over the city and committed various atrocities. Individual soldiers and small groups of two or three roamed over the city murdering, raping, looting and burning. There was no discipline whatever. There were many cases of rape. Death was a frequent penalty for the slightest resistance on the part of a victim or the members of her family who sought to protect her. Even girls of tender years and old women were raped in large numbers throughout the city, and many cases of abnormal and sadistic behavior in connection with these rapings occurred. Approximately 20,000 cases of rape occurred within the city during the first month of the occupation. Japanese soldiers took from the people everything they desired.<sup>111</sup>

Kuo (2002) affirms that the cases of rape were so many that soon the “Rape of Nanking” became a common expression world-wide, not only a metaphor for the invasion of the city, but also a reference to the large number of rapes perpetrated.<sup>112</sup> Not only was the city itself “raped” by the Japanese soldiers, but also thousands of its citizens.

Kuo (2002) believes that the IMTFE received evidence of the high incidence of rape. However they decided to focus on what they considered bigger crimes, such as murder and mass enslavement, and avoided addressing the crime of rape explicitly.<sup>113</sup>

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<sup>110</sup> Askin, *supra* n 85 at 38.

<sup>111</sup> The Tokyo War Crimes Trial: The Complete Transcripts of the Proceedings of the International Military Tribunal for the Far East. R. Pritchard/S. Zaide (eds) New York: Garland Publishing, 22 vols, (1981) Vol. 2 transcript, at 49,605 and 49,606.

<sup>112</sup> Kuo, *supra* n 105 at 305.

<sup>113</sup> *Ibid.*

Koenig, Lincoln and Groth (2011) stress that despite all the evidence, rape and any reference to sexual violence were not specifically enumerated in the Tokyo Charter.<sup>114</sup> Nevertheless, in the Tokyo Trials rape was included as a serious war crime in the indictment, and successfully charged, among the other atrocities perpetrated, under “inhumane treatment” and “ill treatment and failure to respect family honor and rights” (counts 1, 5 and 12 of the Tokyo Indictment).<sup>115</sup>

### 3. Vietnam

From 1955 to 1975 while the American troops fought in Vietnam, sexual violence and sexual exploitation of Asian women by American soldiers occurred widely. According to Neill (2013) there is no doubt that the American forces raped women, either in an occasional way by raping saloon girls in the city of Saigon, or in a massively organised way by raping and killing dozens of women in My Lai, a village in the south of Vietnam.<sup>116</sup> Neill also indicates that there is a very striking feature of this conflict: the association of the American army with the sex business. The army supported and endorsed the establishment of brothels in campsites all over Vietnam and arranged “sex tours” for troops in other countries of Asia.<sup>117</sup> All of this was based on the sexist logic that it will “maintain the soldiers’ morale in fighting an unpopular war”.<sup>118</sup>

### 4. Bangladesh

In 1971 Bangladesh and Pakistan were at war. Neill (2013) states that during this conflict Pakistani soldiers raped Bengali women by the thousands: estimations are that between 200 000 and 400 000 women were raped (around 80% were Muslim women, and the rest were Hindu and Christian).<sup>119</sup> The motivation for rape was mainly racial because, despite having the same religion (Islam) Punjabi Pakistanis are taller and have a lighter complexion than Bengalis, who are shorter and have darker skin.<sup>120</sup> This is very similar to what happened in Rwanda; even though the cultures are very similar,

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<sup>114</sup> Koenig, K. Alexa, Lincoln Ryan, and Groth, Lauren, “The jurisprudence of sexual violence” *Berkeley Human Rights Center* (2011) 6.

<sup>115</sup> The Tokyo War Crimes Trial, *supra* n 111 at Vol. 22; De Brouwer, *supra* n x at 8.

<sup>116</sup> Neill, *supra* n 74 at 46.

<sup>117</sup> *Idem* at 46–7.

<sup>118</sup> *Idem* at 46.

<sup>119</sup> *Ibid.*

<sup>120</sup> *Ibid.*

racial differences encouraged men to savage women.<sup>121</sup> The social consequences of this mass rape were appalling: Bengali communities – especially men – rejected raped women who became pregnant, because of the Punjabi features of the new-born babies, driving women to commit large numbers of abortions, infanticides and suicides.<sup>122</sup>

## 5. Cambodia

During the conflict in Cambodia, between 17 April 1975 and 6 January 1979, sexual violence against women was of common occurrence. According to Studinsky (2013), in Democratic Kampuchea forced marriage was a frequent crime and a policy designed to increase the population by conceiving more people who would enhance the agricultural labour force of Cambodia. The Communist Party desired a population growth of 20 million in 10 to 15 years and wanted total control of all relations between citizens. To reach these two objectives, people were only authorised to wed and have sexual intercourse following the directives of the Party, which arranged collective forced marriages from 2 to 300 couples at a time.<sup>123</sup> The newly-wed couples – who frequently had not met prior the ceremony – were obliged have sex monitored by soldiers for numerous nights, risking extreme punishments (such as beatings, imprisonment and even death) in case of disobedience. These forced marriages led many people to suicide.<sup>124</sup> I want to stress, as I did in chapter 1, that in my opinion, forced marriage is one of the most dreadful sexual crimes: at least during rape the immediate physical suffering ends after a time, but during a forced marriage the suffering can go on for years and the torture seems to never end. The same happens with sexual slavery.

## 6. Kuwait

In 1990 Iraq invaded Kuwait. According to Chinkin (1994), during the invasion “it is estimated that at least 5 000 Kuwaiti women were raped by Iraqi soldiers. After the liberation, large numbers of foreign domestic working women in Kuwait were attacked and subjected to sexual violence from subsequently returning Kuwaitis.”<sup>125</sup>

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<sup>121</sup> See Rwanda, *infra* number 9.

<sup>122</sup> Neill, *supra* n 74 at 46.

<sup>123</sup> Studzinsky, *supra* n 26 at 180.

<sup>124</sup> *Idem* at 180–1.

<sup>125</sup> Chinkin, *Supra* n 52 at 327.

The United Nations Division for the Advancement of Women (1998) states that during the confrontations in Kuwait sexual violence was very common.<sup>126</sup> The UN Security Council established the United Nations Compensation Commission (UNCC) to “process claims and pay compensation for losses and damage suffered as a direct result of Iraq’s unlawful invasion and occupation of Kuwait in 1990–91.”<sup>127</sup> The commission decided that “serious personal injury” would be a matter for compensation, including physical and mental injury caused by sexual violence. This led to claims denouncing rapes by Iraqi soldiers. The commission set guidelines to help get evidence for these claims and consequently simplify the compensation process for women.<sup>128</sup>

## 7. Sierra Leone

According to Jefferson (2004), in Sierra Leone’s armed conflict from 1991 to 2002, sexual violence was perpetrated on a large scale.<sup>129</sup> During the confrontation, different sides of the conflict [the Revolutionary United Front (RUF), the Armed Forces Revolutionary Council (AFRC) and a splinter group of AFRC named the West Side Boys] committed large numbers of rapes.<sup>130</sup> Jefferson describes that “thousands of women and girls of all ages, ethnic groups and socioeconomic classes were subjected to widespread and systematic sexual violence, including gang rape.”<sup>131</sup> Women were abducted by fighters regularly to make them “wives” by force, whose duties were doing domestic errands and having intercourse, which in many cases meant getting pregnant and bearing babies.<sup>132</sup>

Doherty (2013) explains that the abducted women who were not chosen as “wives” were offered to all soldiers to use as sexual objects and were often raped and gang-raped without a chance of refusing or escaping.<sup>133</sup> When the “wives” tried to escape, they

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<sup>126</sup> United Nations Division for the Advancement of Women, *supra* n 2 at 4.

<sup>127</sup> See <http://www.uncc.ch/> Accessed 11.02.16.

<sup>128</sup> United Nations Division for the Advancement of Women, *supra* n 2 at 7.

<sup>129</sup> Jefferson, L. R., “In war as in peace: Sexual violence and women’s status” *Human Rights Watch World Report* (2004) Available at <http://www.refworld.org/pdfid/402bac094.pdf>. Accessed 26.05.15.

<sup>130</sup> *Ibid.*

<sup>131</sup> *Ibid.*

<sup>132</sup> *Idem* at 5.

<sup>133</sup> Doherty, Teresa, “Jurisprudential developments relating to sexual violence: The legacy of the special court for Sierra Leone” in *Sexual violence as an international crime: interdisciplinary approaches* De Brouwer *et al.* (eds) Antwerp: Intersentia (2013) 166.

were given harsh penalties such as whippings, beatings, being confined in large boxes or in some cases death.<sup>134</sup>

## 8. Former Yugoslavia

According to Weitsman (2008), during the conflict in the former Yugoslavia, from 1991 to 2001, sexual violence was inflicted by the Serbian militias mainly on Bosnian Muslim women.<sup>135</sup> Women were separated from men in different torture camps in which they were victims of repeated gang rapes (in some cases by more than 40 men in one day) until they became pregnant.<sup>136</sup> These camps became known as “rape camps”, where women were victims of gender-based policies of mass rape, forced impregnation and forced maternity. These gender-based policies were planned and implemented by the Serbian authorities.<sup>137</sup>

Weitsman (2008) affirms that women were constantly raped and held captive until abortion was not possible.<sup>138</sup> Fisher (as cited by Weitsman, 2008) claims that soldiers told women that they were raped in order to “plant the seed of Serbs in Bosnia” and to bear little “*Chetniks*”.<sup>139</sup> Weitsman further explains the Serbs’ logic behind the implementation of forced impregnation and maternity strategies: Serbs believed that paternity was essential in the constitution the child’s identity, taking priority over the mother’s identity.<sup>140</sup> There are two elements that make this reasoning quite illogical: first, the child will have 50% of the DNA of the mother and if the child is brought up by her, he or she will be culturally 100% hers; second, Bosnian Muslims and Serbians are all Slavs, which means that there are not many ethnic or biological distinctions between them.<sup>141</sup> In my opinion, in the Balkans case, the cause of the hatred is not based on racist grounds – as in the cases of Rwanda and Bangladesh, in which there were actual physical differences – but originated from a psychological conviction that one ethnic

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<sup>134</sup> *Ibid.*

<sup>135</sup> Weitsman, *supra* n 73 at 569.

<sup>136</sup> *Ibid.*

<sup>137</sup> *Ibid.*

<sup>138</sup> *Idem* at 571.

<sup>139</sup> *Ibid.* A Chetnik can be defined as “a Serbian nationalist belonging to a group that fought against the Turks before World War I and engaged in guerrilla warfare during both World Wars”. See <http://www.collinsdictionary.com/dictionary/english/chetnik> Accessed 12.02.16.

<sup>140</sup> Weitsman, *supra* n 73 at 571.

<sup>141</sup> *Ibid.*



group is better than the other, being blind to the fact that they are pretty much the same race.

According to the Security Council, rape in the former Yugoslavia was “massive, organised and systematic.”<sup>142</sup> According to the Special Rapporteur designated by the United Nations Commission on Human Rights, Tadeusz Mazowiecki (as cited by Chinkin, 1994) rape, apart from being used as an instrument of war, was also used as a method of ethnic cleansing “intended to humiliate, shame, degrade and terrify an entire ethnic group.”<sup>143</sup> Based on the literature studied for this research, a conservative estimate is that 20 000 Bosnian women were victims of rape and sexual violence during the war;<sup>144</sup> however, according to De Brouwer (2005), this number could go up to 50 000.<sup>145</sup>

## 9. Rwanda

According to Obote-Odora (2005), in the 1994 genocide in Rwanda sexual violence was not incidental or a by-product of war; quite the opposite, it was used as a weapon of war.<sup>146</sup> Tutsi women were continuously raped, tortured, and many times murdered by members of the Rwanda Armed Forces (FAR), the *Interhamwe*,<sup>147</sup> the communal police and the militia.<sup>148</sup> The motivations behind the brutality against Tutsi women were several: because they were considered collaborators with the enemy, to destroy their reproductive capacity, because they were politically active or associated with politically active people, or just because of their ethnicity.<sup>149</sup> Obote-Odora explains that these motives, along with the fact that Tutsi women were separated from Hutu women before they were sexually attacked, are evidence of a genocidal intent that was part of a

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<sup>142</sup> According to United Nations Security Council Resolution S/RES/820 (1993) par 6: “[c]ondemns once again all violations of international humanitarian law, including ... the massive, organized and systematic detention and rape of women, and reaffirms that those who commit or have committed or order or have ordered the commission of such acts will be held individually responsible in respect of such acts”.

<sup>143</sup> Chinkin, *supra* n 52 at 329.

<sup>144</sup> Stephens, Beth, “Women and the atrocities of war” *American Bar Association* Vol.20, No.3 (1993)12.

<sup>145</sup> De Brouwer, *supra* n 7 at 8.

<sup>146</sup> Obote-Odora, Alex, “Rape and sexual violence in International Law: ICTR Contribution” *New Eng. J. Int’l & Comp. L.* Vol. 2 (2005) 135.

<sup>147</sup> *Interahamwe* literally means “those who attack together”. See

<http://www.britannica.com/topic/Interahamwe> Accessed 12.02.16. According to Obote-Odora (2005) the *Interahamwe* is the youth wing of the National Revolutionary Movement for Development; however during the genocide the term was used to refer to all young armed Hutu people, without taking into consideration to which political party they belonged. See Obote-Odora, *Ibid.*

<sup>148</sup> Obote-Odora, *supra* n 146 at 136.

<sup>149</sup> *Idem* at 135.

genocidal policy directed towards Tutsi women with the purpose of destroying the Tutsi group.<sup>150</sup>

According to Kaitesi (2014), even in some cases, Hutu women were also victims of sexual violence, because they were either mistaken as Tutsi women by their perpetrators; because they were believed to be sympathiser of the Tutsi; or because they were married to Tutsi men, and therefore considered traitors to the Hutu cause.<sup>151</sup> The genocide in Rwanda stands out for the massive use of sexual violence.<sup>152</sup> According to the *Akayesu* Judgement, “Sexual violence was a step in the process of the destruction of the Tutsi group, destruction of the spirit, of the will to live and of life itself.”<sup>153</sup>

Weitsman (2008) gives examples of the countless atrocities that witnesses saw, like the impaling of babies as they came out of their mothers’ bodies; numerous rapes with different objects like machetes, spears, sticks, gun barrels, bottles or the stamens from banana trees; the burning of pubic hair; pregnant women being sliced open and fetuses removed from their wombs; women’s sexual organs mutilated by machetes, or burned with boiling water or acid and their breasts cut off.<sup>154</sup> Also, some Hutu militias abducted women and kept them as sex slaves for years, and by doing so, surpassed the objective of instrumental killing and transformed the Rwandan conflict into something more than only genocide: it also signified that possibly more than 10 000 “rape babies” came into this world.<sup>155</sup>

In a striking and shocking feature of the Rwandan genocide, even women were guilty of these monstrosities against their own gender. A woman, Pauline Nyiramasuhuko, the National Minister of Family and Women’s Affairs, ordered the militias to ensure that they raped women before murdering them and awarded rapes for soldiers as prizes for their killings.<sup>156</sup> Weitsman (2008) affirms that “Nyiramasuhuko’s commands generated

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<sup>150</sup> *Idem* at 135–6.

<sup>151</sup> Kaitesi, Usta, *Genocidal gender and sexual violence: the legacy of the ICTR, Rwanda’s ordinary courts and Gacaca court* Cambridge: Intersentia (2014) 5.

<sup>152</sup> *Ibid.*

<sup>153</sup> *The Prosecutor v. Jean-Paul Akayesu* (Trial Judgement) *supra* n 59 at par 732.

<sup>154</sup> Weitsman, *supra* n 73 at 573.

<sup>155</sup> *Idem*, at 574.

<sup>156</sup> *The Prosecutor v. Pauline Nyiramasuhuko et al.* (Judgement and Sentence), ICTR-98-42-T, International Criminal Tribunal for Rwanda (ICTR), 24 June 2011. For example par 491: “The Nyiramasuhuko and Ntahobali Indictment alleges that ... soldiers, militiamen and gendarmes, among

collective sadism in Butare.”<sup>157</sup> De Brouwer (2005) claims that other evidence gives account that also other Hutu women – from all social classes, including nuns – perpetrated rape (by using objects) or by instructing men to execute acts of sexual violence against Tutsi women.<sup>158</sup>

According to Obote-Odora (2005), the Rwandan genocide had catastrophic consequences for the female population of Rwanda “due to the systematic rape and sexual violence that the Rwandan senior military and government officials planned, instigated, committed, or otherwise aided or abetted.”<sup>159</sup> The “Hutu Power” propaganda machine broadcast gender and ethnic stereotypes.<sup>160</sup> The Hutu Power magazine *Kangura* published the “Hutu Ten Commandments” (HTC), which demonised Tutsi women; considered them accomplices of the enemy; prohibited marriage with Tutsi women or taking a Tutsi as a concubine; warned Hutu women to be vigilant of their men; and affirmed that Hutu women made better wives and mothers and were more honest.<sup>161</sup> According to Obote-Odora (2005) the HTC characterised Tutsi women as “sexual temptresses”, turning them into “sexual objects” that had to be subjugated, disgraced and annihilated.<sup>162</sup>

Kaitesi (2014) cites a witness who describes the heart-breaking suffering inflicted by rape: “Rape was a more painful weapon used by the Hutu to subject us to a tortuous nature of death. The men who were taken were killed once but we were killed several

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others, widely and notoriously committed rapes, sexual assaults and other crimes of a sexual nature perpetrated .... against Tutsi women and girls ... these assaults were the result of a strategy adopted and elaborated by Pauline Nyiramasuhuko ... to exterminate the Tutsi population ... Pauline Nyiramasuhuko participated in the planning, preparation or execution of a common scheme, strategy or plan to commit the atrocities set forth. The crimes were committed by her personally, by persons she assisted or by her subordinates, and with her knowledge or consent.”

<sup>157</sup> Weitsman, *supra* n 73 at 375–6.

<sup>158</sup> De Brouwer, *supra* n 7 at 13.

<sup>159</sup> Obote-Odora, *supra* n 146 at 136.

<sup>160</sup> *Idem* at 140.

<sup>161</sup> HTC Nos. 1, 2, 3 state: “1. Every Hutu must know that the Tutsi woman, wherever she may be, is working for the Tutsi ethnic cause. In consequence, any Hutu is a traitor who: Acquires a Tutsi wife; Acquires a Tutsi concubine; Acquires a Tutsi secretary or protégée. 2. Every Hutu must know that our Hutu daughters are more worthy and more conscientious as women, as wives and as mothers ... Aren’t they lovely, excellent secretaries, and more honest! 3. Hutu women, be vigilant and make sure that your husbands, brothers and sons see reason. 7. ... No soldier may marry a Tutsi woman.”

See the “Hutu Ten Commandments” published in *Kangura*, No. 6 (December 1990). Available at <https://mrqgenocide.wikispaces.com/file/view/maps+and+questions.doc> Accessed 12.02.16.

<sup>162</sup> Obote-Odora, *supra* n 146 at 140.

times through rape. Rape never leaves a scar; it is a continuous wound which is deeply hidden.”<sup>163</sup>

It is a very hard task to determine the exact number of women who were victims of sexual violence in Rwanda, since these crimes were very under-reported because of fear of retaliation.<sup>164</sup> The United Nations Report on the situation of human rights in Rwanda gives an estimation of the number of women and girls who were raped by calculating the number of pregnancies that corresponded with the three months of genocide, projecting a number ranging from 250 000 to 500 000 women that were raped.<sup>165</sup> Nevertheless, these numbers do not consider women whose injuries prevented them from conceiving, or women who were victims of multiple rapes or gang rapes.<sup>166</sup> Neither does this projection include women who aborted or committed infanticide,<sup>167</sup> or women who were mutilated by having their breasts cut off, while farm instruments were introduced into their genitals.<sup>168</sup> In addition, many of the victims died without being able to report crimes of sexual violence.<sup>169</sup> In Rwanda, victims firmly believed that they lost their value after being raped; one victim even said “we are the living dead”,<sup>170</sup> and for them it was worse than death. Many of them would soon die from HIV/AIDS: almost 70% of the raped women in Rwanda contracted this disease.<sup>171</sup> According to the UN special rapporteur, “rape was the rule and its absence the exception.”<sup>172</sup>

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<sup>163</sup> Kaitesi, *supra* n 151 at 172.

<sup>164</sup> UN Commission on Human Rights, *Report on the situation of human rights in Rwanda*, under paragraph 20 of resolution S-3/1 of 25 May 1994. 20 January 1997, E/CN.4/1997/61, par 16.

<sup>165</sup> *Ibid.*

<sup>166</sup> Human Rights Watch, *Shattered lives: Sexual violence during the Rwandan genocide and its aftermath*, 1 September 1996, 2084, at 2.

<sup>167</sup> *Idem* at 4.

<sup>168</sup> *Idem* at 2.

<sup>169</sup> *Idem* at 3.

<sup>170</sup> *Idem* at 44.

<sup>171</sup> Amnesty International, Rwanda, “*Marked for death*”: *Rape survivors living with HIV/AIDS in Rwanda*, 6 April 2004, AFR 47/007/2004, 3.

<sup>172</sup> UN Commission on Human Rights, *Report on the situation of human rights in Rwanda*, *supra* n 164 at par 16: Rape was systematic and was used as a “weapon” by the perpetrators of the massacres. This can be estimated from the number and nature of the victims as well as from the forms of rape. According to consistent and reliable testimony, a great many women were raped; **rape was the rule and its absence the exception**” [emphasis added].

We will never know the truth regarding the number of women and girls that were victims of sexual violence in general in Rwanda;<sup>173</sup> but considering the factors mentioned above, there were over 1 000 000 cases/victims.

## 10. Uganda

According to Sooma (2006), in northern Uganda, due to the conflict that began in 1986, thousands of women and girls were forced to seek refuge in camps for internally displaced people, with “devastating effects on their lives and dignity”.<sup>174</sup> These women were victims of widespread discrimination and gender-based sexual violence.<sup>175</sup> The offenders include a wide range of individuals, from male family members to NGO personnel.<sup>176</sup>

Sooma (2006) affirms the women in Uganda are constant targets of rape in multiple situations, especially when females are the head of the household.<sup>177</sup> For example: women are at risk of rape when they collect water, food and wood near the camps, or inside the camps; when they travel on the pathways between their homes and the towns; when they sleep at night in unprotected zones; and when they are apprehended and held captive by the enemy militias.<sup>178</sup> Therefore, they are almost all the time at risk of rape. Peace of mind is a rare commodity.

In addition to the large scale of rape, sexual slavery is another crime of common occurrence in Uganda. According to Jefferson (2004), the Lord’s Resistance Army (LRA) abducts young girls in order to coerce them into sexual slavery by becoming wives of the LRA leaders. The girls are victims of rape and other forms of sexual violence and fall pregnant without their consent; they are also sometimes infected by sexually transmitted diseases such as HIV.<sup>179</sup>

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<sup>173</sup> Human Rights Watch, *supra* n 166 at 2.

<sup>174</sup> Sooma, Patrick, “Despair and disdain: A tale of sexual abuse against internally displaced women in Northern Uganda” *East African Journal of Peace and Human Rights* Vol.12, No.1 (2006) 92.

<sup>175</sup> *Ibid.*

<sup>176</sup> *Idem* at 93.

<sup>177</sup> *Idem* at 103.

<sup>178</sup> *Ibid.*

<sup>179</sup> Jefferson, *supra* n 129 at 6.

## 11. Democratic Republic of Congo

Jefferson (2004) explains that sexual violence has been a persistent aspect of the conflict in the eastern DRC since it began in 1996.<sup>180</sup> Women are raped by members from all sides of the conflict: fighters of the *Rassemblement Congolais pour la Démocratie* (RCD); the Mai Mai; Rwandan combatants; armed forces of the Rwandan Hutu; Burundian rebels of the Forces of Defence of Democracy (*Forces pour la Defense de la Démocratie*, FDD) and the Front for National Liberation (*Front pour la liberation nationale*, FNL).<sup>181</sup> According to Jefferson, rape and sexual violence against women have been “frequent” and sometimes “systematic.”<sup>182</sup>

Most shocking, according to Miller (2006), members of the Peacekeeping Mission in the Democratic Republic of Congo (MONUC) have been accused of taking sexual advantage of local women.<sup>183</sup> The investigation by the Office of Internal Oversight Services of the allegations of sexual exploitation and abuse by the MONUC revealed a pattern of widespread sexual abuse.<sup>184</sup> In this report witnesses testified that there was sexual contact with local women and girls on a regular basis, normally in exchange for small amounts of money or food.<sup>185</sup> Most of the victims were between 12 and 16 years old; many of them had already been raped during the conflict and were not able to identify the perpetrators.<sup>186</sup> Unfortunately, of the 72 original allegations reported to the MONUC in 2004, only six cases involving military personnel were fully substantiated because the victims were able to successfully identify the perpetrators; in the rest of the cases it was not possible to do so.<sup>187</sup> It is unbelievable that the peacekeepers, who are supposed to enforce human rights and protect the civilian population, are committing

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<sup>180</sup> *Idem* at 4.

<sup>181</sup> *Ibid.*

<sup>182</sup> *Ibid.*

<sup>183</sup> Miller, Sandra Katrin, “Accountability for the conduct of UN-Mandated forces under International Human Rights Law: a case of study concerning sexual abuse of the UN Mission in the Democratic Republic of Congo (MONUC)” in *Practice and policies of modern peace support operations under international law* Arnold and Knoops (eds) Ardsley: Transnational (2006) 267.

<sup>184</sup> Investigation by the Office of Internal Oversight Services into allegations of sexual exploitation and abuse in the United Nations Organization Mission in the Democratic Republic of the Congo (A/59/661) January 5, 2005, par 11: “In addition to the corroborated cases reported in the next section, interviews with other girls and women indicated the widespread nature of the sexual activity occurring in Bunia between peacekeepers and the local population.”

<sup>185</sup> *Idem* at par 11 and par 25.

<sup>186</sup> *Idem* at par 11.

<sup>187</sup> *Idem* at par 40.

these deplorable crimes. Irwin (2013) affirms that “Since the war began to rage in 1996, it is estimated that hundreds of thousands of Congolese women have been raped and often viciously brutalised.”<sup>188</sup>

## 12. Sudan

According to Hagan (2013), the internal armed conflict between the Sudanese government and rebel groups has devastated Darfur, the western region of Sudan, since 2003.<sup>189</sup> Among the several atrocities in general, sexual violence in particular has been egregious.<sup>190</sup> Thousands of women have been raped by the *Janjawid*, the government-supported armed militia, including women being gang-raped, women taken from their homes with the intention of making them sex slaves and women being victims of sexual torture, among other atrocities of a sexual nature.<sup>191</sup>

Hagan (2013) believes that the sequence of atrocities in Darfur has gone unquestionably and foreseeably up the line of authority to the top leaders of the government of Sudan, finishing at President Al-Bashir. It is his duty to defend the people of Darfur from the assaults,<sup>192</sup> and when the national judicial system fails or does not want to take legal action against Al-Bashir, the ICC has jurisdiction to prosecute him for the crimes he committed.<sup>193</sup> Even so, President Al-Bashir continues to unambiguously deny the perpetration of sexual violence in Darfur.<sup>194</sup> Al-Bashir maintained in an internationally broadcast interview that rape never takes place in Darfur: “it is not in the Sudanese culture or people of Darfur to rape, it does not exist. We don’t have it.”<sup>195</sup>

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<sup>188</sup> Irwin, Rachel, “How can you meet your rapist and shake his hand?: The role of documentarians in creating awareness about sexual violence” in *Sexual violence as an international crime: interdisciplinary approaches* De Brouwer *et al.* (eds) Cambridge: Intersentia (2013) 340.

<sup>189</sup> Hagan, John, Brooks, Richards and Haugh, Todd, “Reasonable grounds: evidence involving sexual violence in Darfur” in *Sexual violence as an international crime: interdisciplinary approaches* De Brouwer *et al.* (eds) Antwerp: Intersentia (2013) 280.

<sup>190</sup> *Idem* at 310.

<sup>191</sup> Amnesty International, Sudan Darfur: *Rape as a weapon of war: sexual violence and its consequences*, 14 July 2004.

<sup>192</sup> Articles 7, 15 and 40 of the Constitution of the Republic of Sudan (1998).

<sup>193</sup> Hagan, *supra* n 189 at 310.

<sup>194</sup> *Idem* at 283.

<sup>195</sup> See the video at

[http://www.nbcnews.com/id/17691868/ns/nbc\\_nightly\\_news\\_with\\_brian\\_williams/t/sudans-al-bashir-denies-role-darfur-violence/#.VrDexe196M8](http://www.nbcnews.com/id/17691868/ns/nbc_nightly_news_with_brian_williams/t/sudans-al-bashir-denies-role-darfur-violence/#.VrDexe196M8) updated 3/20/2007 10:13:05 PM ET, Minute 02:44 Accessed 15.02.16.

Estimations are that over two million people have been displaced by the violence in Darfur.<sup>196</sup> The majority of the refugees are women and girls, and many of them claim they have been subjected to sexual violence.<sup>197</sup> Even recently, on 2 November 2014, Radio Dabanga, a radio station in the Netherlands that exclusively broadcasts the conflict in Darfur, reported that members of the Sudanese army perpetrated the mass rape of over 200 women in Tabit. As usual, the Sudanese government instantly denied the story, blocked off the town, and started a campaign to prevent information about the mass rape episode becoming public.<sup>198</sup>

Kaitesi (2014) affirms that sexual violence consisting of rape, genital mutilation, sexual torture, enforced prostitution and gang rape continues to occur in Darfur today.<sup>199</sup>

### 13. Other countries

According to Jefferson (2004), in Algeria's civil war women were abducted from small towns by Islamist groups. They were raped, murdered and taken prisoner to force them to cook and do other domestic tasks.<sup>200</sup>

Jefferson (2004) states that the Revolutionary Armed Forces of Colombia (FARC) have enlisted female child soldiers; many of these girls are forced have sexual intercourse with high officials of the FARC, who force them to use birth-control methods.<sup>201</sup>

Chinkin (1994) explains that in Peru, during the 12-year internal conflict, women were raped and killed by government security forces and by the Communist Party of Peru – the Shining Path.<sup>202</sup>

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<sup>196</sup> See <http://news.bbc.co.uk/2/hi/africa/4349063.stm> Accessed 15.02.16.

<sup>197</sup> Amnesty International, Sudan Darfur, *supra* n 191: “According to testimonies by refugees as well as information Amnesty International received from several and cross-checked sources in Darfur, the local authorities do not intervene and thereby are complicit with the *Janjawid* who rape and torture, kill and physically assault the displaced population.”

<sup>198</sup> See [https://www.hrw.org/report/2015/02/11/mass-rape-north-darfur/sudanese-army-attacks-against-civilians-tabit?\\_ga=1.76451027.774251151.1437149825](https://www.hrw.org/report/2015/02/11/mass-rape-north-darfur/sudanese-army-attacks-against-civilians-tabit?_ga=1.76451027.774251151.1437149825) Accessed 26.07.15.

<sup>199</sup> Kaitesi, *supra* n 157 at 16.

<sup>200</sup> Jefferson, *supra* n 129 at 6.

<sup>201</sup> *Ibid.*

<sup>202</sup> Chinkin, *supra* n 52 at 327.



AI claims that thousands of women from Liberia have been victims of rape and other forms of sexual violence, in the context of the ethnic violence occurring during the country's civil war.<sup>203</sup>

According to Human Rights Watch, in Indonesia, women and children from East Timor have been constantly raped and have become victims of other forms of sexual violence.<sup>204</sup>

AI affirms that in the CAR there is evidence of mass rape and other forms of sexual violence, including accusations against international military forces of sexual abuses against children.<sup>205</sup>

### III. Consequences of sexual violence in armed conflict

According to Neill (2004), sexual violence in conflict has direct consequences for the community and an emotional impact on women by damaging their social environment.<sup>206</sup> In my opinion, in the places where conflict rages on, sexual violence against women is an individual and social wound with no comparison.

Inger (2013) states that rape is a very effective tactic of war. It depends on pre-existing social rules, values and principles concerning social inequity to produce a collapse inside the society by breaking personal and family relations; by disintegrating communal and cultural bonds; and by imposing political and ethnic hegemony using sexual violence, mainly against women, as a tool to manifest supremacy.<sup>207</sup> This sexual violence perpetrated against women during wars is “multi-faceted and systematic, multi-purposed and gendered.”<sup>208</sup>

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<sup>203</sup> See <https://www.amnesty.org/download/Documents/.../afr340192004en.pdf> Accessed 15.03.15.

<sup>204</sup> See <https://www.hrw.org/legacy/backgrounder/asia/timor/etimor1202bg.htm> Accessed 15.03.15.

<sup>205</sup> See <https://www.amnesty.org/en/latest/news/2015/08/car-un-troops-implicated-in-rape-of-girl-and-indiscriminate-killings-must-be-investigated/> Accessed 15.03.15.

<sup>206</sup> Neill, *supra* n 74 at 43.

<sup>207</sup> Inder, Brigid, “Partners for gender justice” in *Sexual violence as an international crime: interdisciplinary approaches* De Brouwer *et al.* (eds) Antwerp: Intersentia (2013) 316.

<sup>208</sup> *Ibid.*

Public health experts<sup>209</sup> have researched the shattering physical, mental and socio-economic consequences of large-scale sexual violence in conflict areas; these experts regard this sexual violence as “complex humanitarian emergencies”.<sup>210</sup> The most palpable short-term health consequences involve physical injury, reproductive distress and harm, the spread of sexually transmitted diseases including HIV, and unwanted pregnancies.<sup>211</sup> The long-term consequences of sexual violence include traumatic fistula, which is a medical condition resulting from sexual violence that produces continuing urinary incontinence, causing trauma and severe pain for the victims.<sup>212</sup> A surgical procedure is all that is needed to remove the traumatic fistula; however, the emotional wounds of humiliation and defencelessness carry on as post-traumatic stress disorders. The trauma stays long after the conflict has finished and will take years of psychological therapy to overcome.<sup>213</sup> According to Hagan (2013), regardless of the devastation described above, “history records centuries of impunity for such acts committed during conflict.”<sup>214</sup>

In many cases, this impunity is caused by the under-reporting of episodes of sexual violence. Hynes (2004) explains that the reasons for under-reporting can be fear of retribution from the perpetrator (in some cases the rapist might live near the victim), fear of becoming shunned by her family and community, and the suppressed embarrassment caused in some cultures that hold women responsible for male sexual conduct.<sup>215</sup> The Cohen-Nordås dataset (2014) mentions some of the other reasons for under-reporting: “inability to reach authorities”, “pregnancy outside wedlock is stigmatised and abortion is illegal and in contexts where patriarchal norms are strong

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<sup>209</sup> Reed, Holly E., and Keely, Charles B., *Understanding mortality patterns in complex humanitarian emergencies* (2001) Available at <http://www.ncbi.nlm.nih.gov/books/NBK223340/>, Accessed 15.02.16; Waldman, Ronald, and Martone, Gerald, “Public health and complex emergencies: new issues, new conditions” *American Journal of Public Health* Vol. 89, No. 10 (1999): 1483–1485; Stark, Lindsay, and Ager, Alastair, “A systematic review of prevalence studies of gender-based violence in complex emergencies” *Trauma, Violence, & Abuse* Vol. 12, No. 3 (2011) 127–134; Tjaden, Patricia, and Thoennes, Nancy, “*Full report of the prevalence, incidence, and consequences of violence against women series: Research report*” Atlanta, GA: Centers for Disease Control and Prevention (2000).

<sup>210</sup> Waldman, *Idem* at 1484: “In addition, over and above the need to provide care and counseling to victims of rape and other forms of sexual violence that increase in times of war, reproductive health services ... have been relatively neglected.”

<sup>211</sup> “Traumatic gynecologic fistula as a result of sexual violence” Acquire Technical Update (2006) Available at [http://pdf.usaid.gov/pdf\\_docs/Pnadf980.pdf](http://pdf.usaid.gov/pdf_docs/Pnadf980.pdf) Accessed 15.02.16.

<sup>212</sup> *Ibid.*

<sup>213</sup> *Ibid.*

<sup>214</sup> Hagan, *supra* n 189 at 281.

<sup>215</sup> Hynes, *supra* n 78 at 434.

and virginity is highly prized”; and “victims and witnesses of sexual violence may not survive the assault or the war in order to report the violation.”<sup>216</sup>

Askin (1999) explains that the best examples of impunity are that, even though large evidence of sexual violence committed during the Second World War was presented, the Nuremberg and Tokyo tribunals blatantly overlooked gender-based crimes.<sup>217</sup> Fortunately, the ICTY and ICTR have surpassed unwillingness and other obstacles to address these crimes, overcoming the historical negligence of women’s rights and necessities and have prosecuted sexual crimes such as rape and sexual slavery.<sup>218</sup>

According to De Brouwer (2005), the ICC Statute is a very important milestone in ending impunity, because for the first time in international law there is an express criminalisation of rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilisation and other forms of sexual violence as a crime against humanity and as a war crime.<sup>219</sup> Also, the ICC can prosecute rape and other forms of sexual violence as a crime of genocide under “serious bodily and mental harm”.<sup>220</sup> De Brouwer states that “With the exception of rape and enforced prostitution, these specific crimes of sexual violence were never laid down in a treaty on the supranational criminal law level before.”<sup>221</sup> Kohen and Ragnhild (2014) affirm that nowadays there is no doubt that sexual violence in armed conflict is recognised as a problem of international security.<sup>222</sup>

According to their nature, the consequences of sexual violence can be classified in four categories:

### 1) Direct physical consequences

As victims of sexual violence, women suffer immediate physical consequences. De Brouwer (2005) names as examples of physical consequences the following: “severe pains and bleeding, loss of consciousness, miscarriage due to rape, the loss of virginity

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<sup>216</sup> Cohen, Dara Ka, and Ragnhild, Nordås, “Sexual violence in armed conflict: Introducing the SVAC dataset, 1989–2009.” *Journal of Peace Research* Vol. 51 No. 3 (2014) 421.

<sup>217</sup> Askin, Kelly D., “Sexual violence in decisions and indictments of the Yugoslav and Rwandan tribunals: Current status” *American Journal of International Law* Vol. 93 No. 1 (1999) 99.

<sup>218</sup> *Ibid.*

<sup>219</sup> De Brouwer, *supra* n 7 at 427; Rome Statute, *supra* n 30 at articles 7 and 8.

<sup>220</sup> *Ibid.* Rome Statute, *supra* n 30 at article 6.

<sup>221</sup> *Ibid.*

<sup>222</sup> Cohen, *supra* n 216 at 418.

and sexual mutilation.”<sup>223</sup> Victims may also suffer a range of physical injuries: genital wounds (such as tears, bruising, abrasions, redness and swelling) and non-genital wounds (such as bruises and contusions, lacerations, ligature marks to ankles, wrists and neck, and pattern injuries, i.e. handprints, finger marks, belt marks, bite marks, anal or rectal trauma).<sup>224</sup>

## 2) Emotional complications

Emotional or psychological effects depend on the victim as every person is different; however, sexually abused people normally present some of the following complications: rape trauma syndrome,<sup>225</sup> post-traumatic stress disorder,<sup>226</sup> depression, social phobias, anxiety, increased substance use or abuse and suicidal behaviour.<sup>227</sup>

De Brouwer (2005) gives as an example of emotional complications the fact that many women have had to witness a family member being killed, while being raped; or being raped in front of family or a big crowd; or forced to watch their own baby disposed of before being raped. Also, circumstances like gang rapes, multiple rapes or sexual mutilation tend to worsen the physical consequences.<sup>228</sup> Additionally, in patriarchal societies, women who give birth after rape are subject to severe psychological harm, because in those societies ethnicity is given by the father – thus, the rapist.<sup>229</sup>

According to Chinkin (1994), the consequences of sexual violence go further than the particular assaults, commonly enduring for the rest of a woman’s days.<sup>230</sup> The fear originating from sexual assaults continues and the same fear is also shared by women who are not the victims of the assault, but are conscious that they could have been or that they might be some day.<sup>231</sup>

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<sup>223</sup> De Brouwer, *supra* n 7 at 55.

<sup>224</sup> World Health Organization, “Guidelines for medico-legal care of victims of sexual violence” Geneva: World Health Organization (2003) 12–13.

<sup>225</sup> *Idem* at 14. Rape trauma syndrome (RTS): “the stress response pattern of a person who has experienced sexual violence”. RTS may be manifested in somatic, cognitive, psychological and/or behavioural symptoms.

<sup>226</sup> “Post-traumatic stress disorder (PTSD) is a mental health condition that’s triggered by a terrifying event – either experiencing it or witnessing it. Symptoms may include flashbacks, nightmares and severe anxiety, as well as uncontrollable thoughts about the event.” See <http://www.mayoclinic.org/diseases-conditions/post-traumatic-stress-disorder/basics/definition/con-20022540> Accessed on 14.02.15.

<sup>227</sup> World Health Organization, *supra* n 224 at 12.

<sup>228</sup> De Brouwer, *supra* n 7 at 55.

<sup>229</sup> *Ibid.*

<sup>230</sup> Chinkin, *supra* n 52 at 329.

<sup>231</sup> *Ibid.*

Women violated and abused tend to suffer post-traumatic stress disorder.<sup>232</sup> Senier (2010) explains that women are also uniquely conditioned to react to sexual assault with feelings of shame, depression, loss and guilt, and face the reality of displacement and impoverishment.<sup>233</sup> According to Chinkin (1994), in some cases, women who have not been able to cope with the embarrassment caused by sexual abuse have decided to end their lives.<sup>234</sup> Suicide sometimes becomes the ultimate emotional consequence.

### 3) Health complications

Sexual violence has not only direct physical consequences, but also long-term health complications. De Brouwer (2005) explains that some of the health complications of sexual violence can be: “general body aches and pains, abdominal aches, ongoing pain from uterine and vaginal mutilation and general malaise, sexually transmitted diseases and HIV/AIDS.”<sup>235</sup> More and more, women are being infected – in some cases deliberately – with HIV.<sup>236</sup> Chinkin (1994) points out that during armed conflict, the availability of treatment is significantly reduced.<sup>237</sup>

The Association for Genocide Widows (AVEGA) affirms that for women who have survived sexual violence, becoming infected with HIV is the “ultimate violation of their human rights”.<sup>238</sup> The chance of HIV transmission rises by a factor of three when sex is by force, especially for young women and girls whose “vaginal tracts are immature and tear easily”.<sup>239</sup> Moreover, women are more physically vulnerable to HIV than men because “male-to-female transmission during sex is about twice as likely to occur as

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<sup>232</sup> According to the U.S. Department of Veterans’ Affairs: “One study that examined PTSD symptoms among women who were raped found that almost all (94 out of 100) women experienced these symptoms during the two weeks immediately following the rape. Nine months later, about 30 out of 100 of the women were still reporting this pattern of symptoms.” See <http://www.ptsd.va.gov/public/PTSD-overview/women/sexual-assault-females.asp> Accessed 14.02.16. A study by the National Violence against Women Prevention Research Centre discovered that almost one of every three rape victims develop PTSD sometime during their lifetime. See <https://www.musc.edu/vawprevention/research/mentalimpact.shtml> Accessed 14.02.16.

<sup>233</sup> Senier, Amy, “The Nairobi Declaration: A gendered paradigm for post-conflict reparation” in *Protecting humanity: essays in international law and policy in honour of Navanethem Pillay* Eboe-Osuji (ed.) Martinus Nijhoff (2010) 203.

<sup>234</sup> Chinkin, *supra* n 52 at 330.

<sup>235</sup> De Brouwer, *supra* n 7 at 55.

<sup>236</sup> *Idem* at 56.

<sup>237</sup> Chinkin, *supra* n 52 at 330.

<sup>238</sup> Association for Genocide Widows (AVEGA) Available at <http://avega.org.rw/>, as cited by De Brouwer, *supra* n x at 450.

<sup>239</sup> See <http://www.who.int/mediacentre/news/releases/2004/pr86/en/> Accessed 15.02.15.

female-to-male transmission, if no other sexually transmitted infections are present.”<sup>240</sup> Furthermore, it is very unlikely that the rapist would wear condoms during the rapes.<sup>241</sup> For example, in Rwanda, almost 70% of the rapes survivors are infected with HIV/AIDS.<sup>242</sup> According to De Brouwer (2005), these women were infected on purpose and the criminals were not prosecuted for this crime.<sup>243</sup> The result was that these women felt neglected because the real nature of the crime committed against them, intentional transmission of HIV, was never recognised and prosecuted by the ICTR.<sup>244</sup>

Infertility is another possible health complication: as a result of abortions or from the injuries caused by the sexual abuse, some women will never be capable of having children.<sup>245</sup>

#### 4) Social consequences

In many cases, sexual violence involves isolation, stigmatisation and ostracism.<sup>246</sup> Chinkin (1994) explains that “infertility and the loss of virginity make women unmarriageable in some societies”.<sup>247</sup> De Brouwer (2005) adds that women are abandoned by family members or their husbands when they find out that they have been victims of rape.<sup>248</sup> Therefore, being raped turns women into “damaged goods”.

According to Chinkin (1994), when some women become pregnant after being raped, they have to face some horrible prospects. First, if they decide to keep the baby and not abort it, they will have to give birth to the child of the invader.<sup>249</sup> In Rwanda these children are called “*enfants non-desirés*” (unwanted children) or “*enfants de mauvais souvenir*” (children of bad memories), or “children of hate”.<sup>250</sup> These children might

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<sup>240</sup> UNAIDS, *Report on the Global HIV/AIDS Epidemic: 4th global report* (2004) 12.

<sup>241</sup> *Idem* at 40.

<sup>242</sup> Amnesty International, *Sudan Darfur: Rape as a weapon of war: sexual violence and its consequences*, 14 July 14 2004 3. In a study conducted by AVEGA (available at <http://avega.org.rw/>) a survey of 1 125 female survivors of the genocide established that 80% were still severely traumatised and around 70% tested HIV-positive. This number has been used by the authors studied for this research (see De Brouwer, *supra* n 7 at 57 and Weitsman, *supra* n 73 at 577).

<sup>243</sup> De Brouwer, *supra* n 7 at 432.

<sup>244</sup> *Ibid.*

<sup>245</sup> Human Rights Watch, *supra* n 166 at 22.

<sup>246</sup> *Idem* at 43.

<sup>247</sup> Chinkin, *supra* n 52 at 330.

<sup>248</sup> De Brouwer, *supra* n 7 at 55.

<sup>249</sup> Chinkin, *supra* n 52 at 330.

<sup>250</sup> Human Rights Watch, *supra* n 166 at 46.

also be considered by the community as evidence of the woman's cooperation with the adversary<sup>251</sup> or looked upon by the mother as a reminder of the atrocities committed against her and her family.<sup>252</sup> I wonder what opportunities in life a child can have who has been rejected, even before birth, by her or his mother or by the whole community. Second, if the woman decides to abort, medical conditions in conflicts are far from desirable and the first priority for the administration of medical supplies is combatants.<sup>253</sup> According to Chinkin (1994), "abortion is restricted under the teachings of a number of religions, or women have been forcibly detained to prevent the abortion."<sup>254</sup> For example, in Rwanda abortion is illegal, a circumstance that led many women to commit self-induced abortions during the genocide, putting their health and lives in grave danger.<sup>255</sup>

## 5) Economic consequences

According to De Brouwer (2005), several victims of sexual violence, who in many cases survive on less than one or two dollars per day, find themselves trapped paying for medical treatment for their illnesses and having to support themselves and their children, taking care of food and school tuition.<sup>256</sup> Moreover, many women have lost their homes in the conflict due to discriminatory legal systems in which women's inheritance rights cannot be enforced as easily as men's rights.<sup>257</sup> Also, from the economic point of view, if women die as a consequence of the diseases contracted from sexual violence, the chances are that their children will be out on the streets, at risk of sexual assault and other forms of ill-treatment. Many girls are driven into prostitution to make a living.<sup>258</sup>

Finally, Jefferson (2004) explains that an indirect economic consequence is that, since armed conflict upsets normal economic activity and shatters the basis of economic support, many women are put at risk of trafficking or are forced to have "survival

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<sup>251</sup> Chinkin, *supra* n 52 at 330.

<sup>252</sup> Human Rights Watch, *supra* n 166 at 46. One Rwandan woman asked: "How can you have a child of someone who killed your husband and children?"

<sup>253</sup> Chinkin, *supra* n 52 at 330.

<sup>254</sup> *Ibid.*

<sup>255</sup> Human Rights Watch, *supra* n 166 at 46.

<sup>256</sup> De Brouwer, *supra* n 7 at 450.

<sup>257</sup> *Ibid.*, See also Human Rights Watch, *supra* n 166 at 49.

<sup>258</sup> *Ibid.*

sex.”<sup>259</sup> Therefore, sexual violence in armed conflict produces a “domino effect” that eventually completely ruins an innocent woman’s life.

This research does not argue that sexual violence does not affect men as well. The United Nations Division for the Advancement of Women (1998) explains that men can also be the victims of sexual violence; nevertheless, women are more susceptible to becoming victims of sexual attacks.<sup>260</sup> It is clear that women have biologically less physical strength than men, making them more vulnerable to sexual violence. Moreover, women suffer different consequences from sexual violence: men are not exposed to the risk of getting pregnant; men are less likely to be spurned and ostracised after being raped; infertility has different repercussions for men than women, etc.<sup>261</sup> It is very important to recognise and rectify the trauma suffered by both sexes, but it also very important to identify the dissimilar experiences of men and women regarding sexual violence.<sup>262</sup>

This chapter has examined the concept of sexual violence and the definitions of the different crimes of sexual violence; cases of past and ongoing episodes of sexual violence in armed conflict against women around the world; and the appalling consequences of sexual violence that poor and innocent women have to face from day to day. There are no words to describe the horror and suffering that sexual violence causes in women, and the damage that is done can never be erased. However, there is something that can be done in this respect, and it is in the form of accountability and reparations: justice can be provided by making the perpetrators pay for their crimes and giving the surviving victims of sexual violence or their families (in cases where the victim dies), some sort of compensation. Here is where the legal system comes in. The following chapter explains the evolution of the international legal system concerning sexual violence. IHL, HRL and ICL are examined to discover how sexual violence in armed conflict is currently regulated. The interplay between these three bodies of norms is also examined.

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<sup>259</sup> Jefferson, *supra* n 129 at 1.

<sup>260</sup> United Nations Division for the Advancement of Women, *supra* n 31 at 1.

<sup>261</sup> *Ibid.*

<sup>262</sup> *Idem* at 1–2.



# Chapter 3: International instruments that regulate sexual violence in International Law and the interplay between International Humanitarian Law, Human Rights Law and International Criminal Law

## I. Evolution of international law regarding sexual violence

The evolution of international law regarding sexual violence has been slow but steady, and in the last three decades it has been significant. Meron (1993) states that “rape by soldiers has been prohibited by the laws of war for centuries, and violators have been subjected to capital punishment under national military codes, such as those of Richard II (1385) and Henry V (1419).”<sup>1</sup> For example, jurist Alberico Gentili (as cited by Askin, 2013) maintained that all women, including women who fight, should not suffer from the insult of rape.<sup>2</sup>

Another jurist from the fourteenth century, Lucas de Penna (as cited by Askin, 2013) was also of the opinion that soldiers should not have a licence to rape (among other crimes) and if they did this they had to be prosecuted for those crimes.<sup>3</sup> Furthermore,

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<sup>1</sup> Meron, Theodor, “Rape as a crime under international humanitarian law” *American Journal of International Law* Vol. 87, No. 3 (1993) 425.

<sup>2</sup> Askin, Kelly, “Treatment of sexual violence in armed conflicts: a historical perspective and the way forward” in *Sexual violence as an international crime: interdisciplinary approaches* De Brouwer et al. (eds) Antwerp: Intersentia (2013) 22.

<sup>3</sup> *Ibid.*

the sixteenth-century jurist Pierino Belli (as cited by Askin, 2013) believed that soldiers were not discouraged from raping even though it could be punished with death.<sup>4</sup>

Greppi (1999) explains that the first record of an international military trial for war crimes was that of Peter von Hagenbach in 1474. Hagenbach was charged with rape, murder, perjury and other crimes he ordered and instigated in the city of Breissach. His defence argued compliance with superior orders, but the court dismissed this argument.<sup>5</sup> According to Gordon (2012), “Hagenbach’s trial is now thought to be precedent for charging rape as a war crime.”<sup>6</sup>

The famous jurist Hugo Grotius (1583–1645) strongly condemned the crime of rape, stating that the good and Christians nations are obligated to punish the perpetrators.<sup>7</sup>

Furthermore, in the eighteenth century, the jurist Emmerich de Vattel supported the protection of women, but only if they did not participate in armed actions.<sup>8</sup> However, De Vattel seems to justify rape of women when it is the only alternative for the preservation of a nation.<sup>9</sup>

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<sup>4</sup> *Idem* at 23.

<sup>5</sup> Greppi, Edoardo, “The evolution of individual criminal responsibility under international law” *Revue Internationale de la Croix-Rouge/International Review of the Red Cross* Vol. 81 No. 835 (1999) 531.

<sup>6</sup> Gordon, Gregory, “The trial of Peter Von Hagenbach: Reconciling history, historiography, and international criminal law” *SSRN Working Paper Series* (2012).

<sup>7</sup> “You may read in many places that the raping of women in time of war is permissible, and in many others that is not permissible. Those who sanction rape have taken into account only the injury done to the person of another, and have judged that it is not inconsistent with the law of war that everything which belongs to the enemy [including women] should be at the disposition of the victor. A better conclusion has been reached by others ... and consequently [rape] should not go unpunished in war any more than in peace. The latter view is the law of not all nations, but of the better ones. Among Christians, it is right that view just presented shall be enforced, not only as part of military discipline, but also as part of the law of the nations; that is, whoever forcibly violates chastity, even in war, should be everywhere subjected to punishment”. Grotius, Hugo, and Stephen C. Neff, *Hugo Grotius on the Law of War and Peace: Student Edition*, Cambridge: Cambridge University Press (2012) 356.

<sup>8</sup> “Women, children, feeble old men, and sick persons, come under the description of enemies ... But these are enemies who make no resistance; and consequently we have no right to maltreat their persons, or use any violence against them, much less take away their lives ... If, sometimes the furious and ungovernable soldier carries his brutality so far as to violate female chastity ... the officers lament those excesses: they exert their utmost efforts to put a stop to them; and a prudent and humane general even punishes them whenever he can. ... Accordingly, the military law of the Switzers, which forbids the soldier to maltreat women, except those females who have committed any acts of hostility.” De Vattel, Emerich, *The law of nations or the principles of natural law applied to the conduct and to the affairs of nations and of sovereigns*. Carnegie Institution of Washington (1916) Book III, par 123.

<sup>9</sup> “A nation cannot preserve and perpetuate itself, except by propagation. A nation of men has, therefore, a right to procure women, who are absolutely necessary to its preservation; and if its neighbours, who have a redundancy of females, refuse to give some of them in marriage to those men, the latter may justly have recourse to force.” *Idem* at par 122.

Kuo (2002) explains that at the end of the eighteenth century and during the nineteenth century, war codes and treaties began incorporating ambiguous but nonetheless relevant provisions in order to protect women.<sup>10</sup> In 1785, the Treaty of Amity and Commerce stated that in war, “women and children ... shall not be molested in their persons”.<sup>11</sup> In 1874, the Declaration of Brussels on the laws and customs of war specified that “Family honour and rights, and the lives and property of persons, as well as their religious convictions and their practice, must be respected.”<sup>12</sup>

According to Meron (1993), in 1863 the Lieber Code was enacted by President Lincoln to regulate the behaviour of soldiers during the American Civil War. The Lieber Code is considered the first national document establishing a framework for the laws of war at the international level, and it prohibited rape as a war crime under capital crime.<sup>13</sup> According to Kuo (2002) the importance of the Lieber Code is that for the first time rape is prohibited in an explicit way.<sup>14</sup>

De Brouwer (2005) states that perceptions of sexual violence in armed conflict have been progressively transformed from being a “reward for victors” to a “crime against women.”<sup>15</sup> The First World War presented a new example of the prosecution of sexual violence at the supranational level. In 1919 the War Crimes Commission was established to investigate the outrages of the Germans and other Axis nations throughout the war. During the investigation, relevant proof of sexual violence emerged and the commission incorporated rape and enforced prostitution as crimes proscribed by the laws and customs of war.<sup>16</sup> Even though the attempts to indict sexual violence were

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<sup>10</sup> Kuo, Peggy, “Prosecuting crimes of sexual violence in an international tribunal” *Case W. Res. J. Int’l L.* Vol. 34 (2002) 306.

<sup>11</sup> Kingdom of Prussia, Treaty of Amity and Commerce between the Kingdom of Prussia and the United States of America (September 10, 1785) Article XXIII. The Avalon Project at Yale Law School. Available at [http://avalon.law.yale.edu/18th\\_century/prus1785.asp](http://avalon.law.yale.edu/18th_century/prus1785.asp) Accessed on 26.03.16. See also De Brouwer, Anne-Marie, *Supranational criminal prosecution of sexual violence: the ICC and the practice of the ICTY and the ICTR* Cambridge: Intersentia (2005) 5.

<sup>12</sup> Brussels Conference of 1874, Project of an International Declaration concerning the Laws and Customs of War (Brussels, 27 August 1874) Article 38. Available at <https://www.icrc.org/applic/ihl/ihl.nsf/INTRO/135?OpenDocument> Accessed on 26.03.16. See also De Brouwer, *Ibid.*

<sup>13</sup> Meron, *supra* n 1 at 425.

<sup>14</sup> Kuo, *supra* n 10 at 306.

<sup>15</sup> De Brouwer, *supra* n 11 at 5.

<sup>16</sup> *Ibid.*

unsuccessful, the inclusion of rape and enforced prostitution as transgressions of the laws and customs of war was a sign of acceptance of the criminal character of these acts.<sup>17</sup>

## **i. International Humanitarian Law**

According to Viseur (2013), the prime purpose of IHL is to protect specific people – civilians, the wounded on land, the shipwrecked, prisoners of war and individuals not taking part of the fight – from inhumane treatment.<sup>18</sup> Women can certainly be found in every one of the above-mentioned groups.<sup>19</sup>

### **1. The Hague Conventions**

In The Hague Conventions of the Laws and Customs of War on Land of 1899 and 1907, no mention of sexual violence can be found in the explicit list of war crimes. Nevertheless, article 46 of the Hague Convention of 1907 can be interpreted to include some form of protection of women during war: “Family honour and rights, the lives of persons, and private property, as well as religious convictions and practice, must be respected.”<sup>20</sup>

### **2. The Geneva Conventions and Additional Protocols**

Odio (2004) points out that in the 429 articles that constitute the four Conventions, only article 27 of the Fourth Geneva Convention contains an explicit reference to protection of women from rape and forced prostitution:<sup>21</sup> “Women shall be especially protected against any attack on their honour, in particular against rape, enforced prostitution, or any form of indecent assault.”<sup>22</sup> Jarvis (2013) correctly affirms that the Additional Protocols preserve the notion that rape and other forms of sexual violence are not crimes

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<sup>17</sup> *Ibid.*

<sup>18</sup> Viseur, Patricia, “Foreword” in *Sexual violence as an international crime: interdisciplinary approaches* De Brouwer *et al.* (eds) Antwerp: Intersentia (2013) xi.

<sup>19</sup> *Ibid.*

<sup>20</sup> Hague Convention (IV) Respecting the Laws and Customs of War on Land and Its Annex: Regulations Concerning the Laws and Customs of War on Land, 18 October 1907.

<sup>21</sup> Odio, Elizabeth, “Los derechos humanos de las mujeres, la justicia penal internacional y una perspectiva de género” *Novena Conferencia Regional sobre la Mujer de América Latina y el Caribe* Vol. 10 (2004) 2.

<sup>22</sup> Geneva Convention Relative to the Protection of Civilian Persons in Time of War (Fourth Geneva Convention), 12 August 1949, 75 UNTS 287.

of a violent nature, but offences upon personal dignity, disregarding the severity of these crimes.<sup>23</sup>

Common Article 3 to the Geneva Conventions states that in a non-international armed conflict every party has to apply at least certain provisions: to treat humanely and without any kind of discrimination people who are not part of the conflict, including combatants who have surrendered; and that specific acts against these people – violence to life and person, murder of all kinds, mutilation, cruel treatment and torture, outrages upon personal dignity, specially humiliating and degrading treatment – will always be forbidden.<sup>24</sup> Dyani (2006) affirms that even though Common Article 3 does not explicitly include sexual violence, it can be considered a transgression of the prohibitions stated in the article, in connection with article 27.<sup>25</sup> It is clear that rape, enforced prostitution and other forms of sexual assault are cruel treatment and outrages upon personal dignity, and that these acts are committed against civilians, women who have not taken up arms.<sup>26</sup>

According to Sooma (2006), Additional Protocol II (which deals with the protection of victims in a non-international armed conflict) elaborates and complements Common Article 3 establishing obligations for all the combatants.<sup>27</sup> For instance, article 4

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<sup>23</sup> Jarvis, Michelle and Martin, Elena, “Future challenges to prosecuting sexual violence under international law: Insights from the ICTY practice” in *Sexual violence as an international crime: interdisciplinary approaches* De Brouwer *et al.* (eds) Antwerp: Intersentia (2013) 102.

<sup>24</sup> “In the case of armed conflict, not of an international character, occurring in the territory of one of the High Contracting Parties, each Party to the conflict shall be bound to apply, as a minimum, the following provisions:

(1) “Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed ‘hors de combat’ by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria.

To this end, the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons — violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture; outrages upon personal dignity, in particular humiliating and degrading treatment” International Committee of the Red Cross (ICRC), Geneva Convention Relative to the Protection of Civilian Persons in Time of War (Fourth Geneva Convention), 12 August 1949, 75 UNTS 287.

<sup>25</sup> Dyani, Ntombizuko, “Protocol on the Rights of Women in Africa: protection of women from sexual violence during armed conflict” *African Human Rights Law Journal* Vol. 6, No.1 (2006) 176–7.

<sup>26</sup> *Ibid.*

<sup>27</sup> Sooma, Patrick, “Despair and disdain: A tale of sexual abuse against internally displaced women in Northern Uganda” *East African Journal of Peace and Human Rights* Vol. 12, No.1 (2006) 95.

prohibits slavery in all forms and rape,<sup>28</sup> adding to the other prohibitions of Common Article 3.<sup>29</sup>

Additional Protocol II also prohibits rape, forced prostitution and indecent assault in article 76: “Women shall be the object of special respect and shall be protected in particular against rape, forced prostitution and any other form of indecent assault.”<sup>30</sup>

According to the United Nations Division for the Advancement of Women (1998), one of the shortcomings of the provisions of the Geneva Conventions and the Additional Protocols relating to the prohibition of sexual violence, is that they describe rape and sexual violence as assaults against the “honour” of women or upon personal dignity, implying that “honour” is something given to women by men, and therefore women become dishonoured when they are raped.<sup>31</sup> The same can be said about the Hague Convention of 1907, which uses the term “family honour”. These treaties fail to “categorize sexual violence as serious violent crimes that violate bodily integrity, presenting a serious obstacle to addressing crimes of sexual violence against women.”<sup>32</sup>

Poli (2013) affirms that IHL instruments imply a gender-biased notion that a woman is shamed or dishonoured when she becomes a victim of rape; by doing so, they do not properly address the physical and emotional damage caused to the victim.<sup>33</sup> Moreover, Meron (1993) points out that even though these instruments prohibit rape, there is no definition of what constitutes rape.<sup>34</sup>

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<sup>28</sup> Article 4 (2)(e) – Fundamental guarantees: Outrages upon personal dignity, in particular humiliating and degrading treatment, rape, enforced prostitution and any form of indecent assault. Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), 8 June 1977, 1125 UNTS 609.

<sup>29</sup> Sooma, *supra* n 27 at 95.

<sup>30</sup> Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), 8 June 1977, 1125 UNTS 609.

<sup>31</sup> United Nations Division for the Advancement of Women, “Sexual Violence and Armed Conflict: United Nations Response” *Women 2000* (1998) Available at <http://www.un.org/womenwatch/daw/public/w2apr98.htm> Accessed 26.05.15.

<sup>32</sup> *Ibid.*

<sup>33</sup> Poli, Ludovica, “Criminalizing rape and sexual violence as methods of warfare” in *War crimes and the conduct of hostilities: challenges to adjudication and investigation* Pocar, Pedrazzi and Frulli (eds) Cheltenham: Edward Elgar Publishing (2013) 139.

<sup>34</sup> Meron, *supra* n 1 at 425.

The United Nations Division for the Advancement of Women (1998) explains that the Geneva Conventions and Additional Protocol I establish that some crimes are categorised as “grave breaches”, and in terms of the Rome Statute of the ICC, states have the obligation to pursue and prosecute individuals who have allegedly perpetrated these grave breaches. If these perpetrators are found in the state’s territory, they have the duty of either judging them in their own tribunals, or extraditing them for prosecution.<sup>35</sup> This system “creates hierarchy, where some violations of the law of armed conflict are considered more egregious than others.”<sup>36</sup> The problem is that there is not an explicit reference to sexual violence labelled as a “grave breach”; however, sexual violence can be encompassed in other categories of the grave breaches, such as “wilfully causing great suffering or serious injury to body or health” and “torture or inhumane treatment”.<sup>37</sup>

Poli (2013) concludes that the omission of sexual violence as a grave breach gives evidence that sexual assaults were considered minor transgressions and not violent and serious crimes.<sup>38</sup> Because crimes of sexual violence are not included as grave breaches, these crimes are not matter of universal jurisdiction.<sup>39</sup> If crimes of sexual violence are not matter of universal jurisdiction, these crimes can only by prosecuted by national courts, and in the context of armed conflict, sometimes the state is the perpetrator (or aids and abets the crimes), ruling out the chances of a fair and impartial trial, if there is a trial at all.<sup>40</sup>

## **ii. International Criminal Law**

### **1) International Military Tribunals after the Second World War**

#### **a) International Military Tribunal**

During the Second World War sexual violence against women was rampant, as was examined in detail in Chapter 2. Kuo (2002) explains that after the war the IMT was

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<sup>35</sup> United Nations Division for the Advancement of Women, *supra* n 31 at 4.

<sup>36</sup> *Idem* at 5.

<sup>37</sup> *Ibid.*

<sup>38</sup> Poli, *supra* n 33 at 139.

<sup>39</sup> Universal jurisdiction “empower[s] a state to exercise jurisdiction over a crime committed abroad in violation of its own national laws”. Dugard, John, *International Law: A South African Perspective*. Fourth Edition. Cape Town: Juta Academic (2013) 154.

<sup>40</sup> Poli, *supra* n 33 at 139.

created to prosecute war criminals; however, rape was not included in its charter.<sup>41</sup> The IMT did not explicitly try sex crimes, therefore not giving sufficient attention to these crimes, considering the high occurrence of sexual violence during the war.<sup>42</sup> Nevertheless, according to some authors, several forms of sexual violence were documented at the Nuremberg Trials and may be considered to be included in the judgment.<sup>43</sup>

The author Geoffrey Robertson (as cited by Askin, 2013) believes that the Allies refused to convict the Nazi criminals of sexual violence because they themselves were guilty of the same atrocities: “The worst example of tolerated and systematic rape was during the Russian army’s advance on Germany through eastern Europe, during which an estimated two millions of women were sexually abused, with Stalin’s blessing that ‘boys were entitled to their fun’.”<sup>44</sup>

According to Meron (1993), after the Nuremberg trials, Control Council Law No. 10 was established by the four occupying powers to prosecute lesser Nazi war criminals in German courts.<sup>45</sup> Control Council Law No. 10 constituted “another seed for future normative development”.<sup>46</sup> In this legal instrument rape was expressly listed as one of the crimes within the jurisdiction of the Council.<sup>47</sup> Poli (2013) expresses regret that rape

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<sup>41</sup> Kuo, *supra* n 10 at 307.

<sup>42</sup> *Ibid.*

<sup>43</sup> Several authors concur that sexual violence was indirectly charged in the Nuremberg and Tokyo Judgements. Viseur Sellers (2004) explains that the verdicts of the Nuremberg trials, and to a major extent the Tokyo trials, can be interpreted to imply that sexual violence during war amounted to war crimes and crimes against humanity. Viseur Sellers, Patricia, “Individual(s)’ liability for collective sexual violence” in *Gender and Human Rights*, Karen Knop (ed.) (2004) 153.

According to Luping (2009) “even though rape was not explicitly referred to in the indictment, the transcripts of the proceedings show that rape was indeed prosecuted.” Luping, Dianne, “Investigation and prosecution of sexual and gender-based crimes before the International Criminal Court” *Am. UJ Gender Soc. Pol’y & L.* Vol. 17 (2009) 340.

Tompkins (1995) states: “Although rape was not formally prosecuted at the Nuremberg trials in 1945–46, allegations of rape were submitted in affidavits and entered into evidence. An example of one prosecutor’s method of handling rape evidence illustrates the concern.” Tompkins, Tamara L., “Prosecuting rape as a war crime: speaking the unspeakable” *Notre Dame L. Rev.* 70 845 (1995) 850.

Askin (2003) claims the following: “While not explicit, gender-related crimes were included as evidence of the atrocities prosecuted during the trial and can be considered subsumed within the IMT Judgement. For example, the Nuremberg Tribunal implicitly recognized sexual violence as torture.” Askin, Kelly, “Prosecuting wartime rape and other gender-related crimes under international law: extraordinary advances, enduring obstacles.” *Berkeley J. Int’l L.* 21 (2003) 301.

<sup>44</sup> Askin, *supra* n 2 at 33.

<sup>45</sup> Meron, *supra* n 1 at 426.

<sup>46</sup> *Ibid.*

<sup>47</sup> *Ibid.* Control Council Law No. 10 Article II (1) (c) provided the Council jurisdiction over: “Atrocities and offenses, including, but not limited to, murder, extermination, enslavement, deportation,



was not prosecuted under Control Council No. 10, despite the large amount of evidence of sexual violence presented in the trials.<sup>48</sup>

#### **b) International Military Tribunal for the Far East**

According to the United Nations Division for the Advancement of Women (1998), in 1946 the IMTFE was created with the same purpose of the IMT, to prosecute war criminals for the atrocities committed in Asia during the war. The IMTFE Charter had the same problem as the IMT Charter: rape and sexual violence were excluded from the list of crimes.<sup>49</sup> Nevertheless, Koenig, Lincoln and Groth (2011) clarify that rape was charged in the IMTFE under “failure to prevent atrocities at the command level.”<sup>50</sup>

Goldstone and Dehon (2003) affirm that rape can be included in the conviction of General Iwane Matsui for crimes against humanity and war crimes founded on the atrocities perpetrated by the forces under his command.<sup>51</sup> Ellis (2006) adds that Commander Shunroku Hata and Foreign Minister Hirota were also convicted of several crimes that included rapes committed by their subordinates.<sup>52</sup>

According to Viseur (2008), after the Tokyo Tribunals, the Allies continued to prosecute minor war criminals in the “subsequent trials”.<sup>53</sup> Askin (2013) explains that during the trial of General Tomoyuki Yamashita, the prosecution presented firm evidence that sexual violence, among other atrocities, was perpetrated by Yamashita’s troops.<sup>54</sup> According to Lael (as cited by Askin, 2013) the court “learnt of rape and necrophilia; of how 476 women in Manila were imprisoned in two hotels and repeatedly

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imprisonment, torture, rape, or other inhumane acts committed against any civilian population, or persecutions on political, racial or religious grounds whether or not in violation of the domestic laws of the country where perpetrated” Control Council Law No. 10, Punishment of Persons Guilty of War Crimes, Crimes Against Peace and Against Humanity, December 20, 1945, 3 Official Gazette Control Council for Germany 50–55 (1946).

<sup>48</sup> Poli, *supra* n 33 at 142.

<sup>49</sup> United Nations Division for the Advancement of Women, *supra* n 31 at 3.

<sup>50</sup> Koenig, K. Alexa, Lincoln, Ryan, and Groth, Lauren, “The jurisprudence of sexual violence” *Berkeley Human Rights Center* (2011) 6.

<sup>51</sup> Goldstone, Richard J., and Dehon, Estelle A., “Engendering accountability: gender crimes under International Criminal Law.” *New England Journal of Public Policy* Vol. 19 No. 1 (2003) 123.

<sup>52</sup> Ellis, Mark, “Breaking the silence: Rape as an international crime” *Case W. Res. J. Int’l L.* Vol. 38 (2006) 228.

<sup>53</sup> Viseur-Sellers, Patricia, “The prosecution of sexual violence in conflict: the importance of human rights as means of interpretation.” Available at [www2.ohchr.org/english/issues/women/docs](http://www2.ohchr.org/english/issues/women/docs) (2008). Accessed 25.03.16

<sup>54</sup> Askin, *supra* n 2 at 47.

raped over and over for a period of eighty days by officers and enlisted men alike; of how twenty Japanese soldiers raped one girl and then, as a grand finale, cut off her breasts; and how drunken soldiers, after killing women civilians, rape their corpses.”<sup>55</sup>

At the end, Yamashita was found guilty and sentenced to death by hanging:

[I]t is absurd ... to consider a commander a murderer or rapist because one of his soldiers commits a murder or a rape. Nevertheless, where murder and rape and vicious, revengeful actions are widespread offences, and there is no effective attempt by a commander to discover and control the criminal acts, such a commander may be held responsible, even criminally liable, for the lawless acts of his troops, depending upon their nature and the circumstances surrounding them.<sup>56</sup>

Kuo (2002) believes that the IMTFE received important evidence of the high incidence of rape but decided to focus on what they considered bigger crimes, such as murder and mass enslavement, and avoided addressing the crime of rape explicitly.<sup>57</sup> Overall, sexual violence during the war was not sufficiently addressed, compared the large number of sexual assaults that took place in Europe and the Far East.<sup>58</sup> An example of this is that the large-scale sexual slavery in Asia (the “comfort women”) was completely ignored until 2000, when a symbolic trial was held in which the women could tell their stories.<sup>59</sup>

## 2) The International ad-hoc Tribunals for the Former Yugoslavia and Rwanda

Jefferson (2004) affirms that the prosecution of crimes of sexual violence by international tribunals has grown significantly in the last three decades.<sup>60</sup> This is mostly thanks to the work of the ICTY, created in 1993, and the ICTR, created in 1994.<sup>61</sup> De

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<sup>55</sup> *Idem* at 48.

<sup>56</sup> *Trial of General Tomoyuki Yamashita*, United States Military Commission, Manila, 8th October – 7th December 1945, in *American Journal of International Law* (1946) 1547. This case dealt with the doctrine of command responsibility. Also cited by Askin, *idem* at 58.

<sup>57</sup> Kuo, *supra* n 10 at 305.

<sup>58</sup> *Idem* at 307.

<sup>59</sup> *Ibid.*

<sup>60</sup> Jefferson, L. R., “In war as in peace: Sexual violence and women’s status” *Human Rights Watch World Report* (2004). Available at <http://www.refworld.org/pdfid/402bac094.pdf> Accessed 26.05.15.

<sup>61</sup> *Ibid.*

Brouwer (2005) claims that, concerning substantive ICL, the most noteworthy jurisprudential accomplishment of the ICTY and ICTR is the recognition that rape and sexual violence can amount to genocide, war crimes and crimes against humanity.<sup>62</sup>

In 2010 the Security Council created the United Nations Mechanism for International Criminal Tribunals (MICT) with the purpose of continuing some of the fundamental duties of the ICTR and the ICTY after the conclusion of their mandates.<sup>63</sup> The MICT has two branches: one is situated in The Hague and assumed the tasks of the ICTY. It became operative on 1 July 2013. The other branch took over the duties of the ICTR and is situated in Arusha, Tanzania. It became operative on 1 July 2012.<sup>64</sup>

De Brouwer (2005) concludes that the work of the ICTY and the ICTR has been crucial in the advancement of the prosecution of sexual violence at the international level.<sup>65</sup> According to Bedont (1999/2000) these tribunals paved the way for the establishment of the permanent ICC.<sup>66</sup>

**a) International Tribunal for the former Yugoslavia (ICTY)**

De Brouwer (2005) explains that the ICTY was created in 1993 in The Hague, Netherlands.<sup>67</sup> Its territorial jurisdiction covers the territory of the former Social Federal Republic of Yugoslavia, this is Croatia, Bosnia and Herzegovina, Kosovo and Macedonia, but not Slovenia.<sup>68</sup> The temporal jurisdiction comprises the crimes perpetrated since 1991.<sup>69</sup> The UN Security Council established the ICTY “under chapter VII in response to the threat to international peace and security in former Yugoslavia”.<sup>70</sup>

According to Jarvis (2013), at the time the ICTY was created, “there were signs of the international community’s determination to open a new chapter in the treatment of war-

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<sup>62</sup> De Brouwer, *supra* n 11 at 17.

<sup>63</sup> See <http://www.unmict.org/en/about> Accessed 05.09.15.

<sup>64</sup> *Ibid.*

<sup>65</sup> De Brouwer, *supra* n 11 at 354.

<sup>66</sup> Bedont, Barbara C., “En-gendering justice: The statute of the international criminal court in a gender perspective” in *Human Rights in Development: Yearbook 1999/2000 Millennium Edition* Stokke and Tostensen (eds) Leiden: Kluwer Law International (1999/2000) 139.

<sup>67</sup> De Brouwer, *supra* n 11 at 15.

<sup>68</sup> *Ibid.*

<sup>69</sup> *Ibid.*

<sup>70</sup> *Ibid.*

time sexual violence and to leave behind the inadequacies of the past approaches.”<sup>71</sup>  
The heart of the mandate of the ICTY is its promise to obtain accountability for severe crimes perpetrated during the war, in particular rape, which was outlined by the Security Council as one of the specially condemnable crimes committed.<sup>72</sup>

The ICTY Statute particularly mentioned rape as a crime against humanity in article 5:

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;** [emphasis added]
- (h) persecutions on political, racial and religious grounds;
- (i) other inhumane acts<sup>73</sup>

Jarvis (2013) states that the Rules of Procedure and Evidence incorporated articles that guaranteed adequate methods for dealing with evidence related to sexual violence.<sup>74</sup> For example, rule 34 states the following:

- (A) There shall be set up under the authority of the Registrar a Victims and Witnesses Section consisting of qualified staff to:

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<sup>71</sup> Jarvis, *supra* n 23 at 101.

<sup>72</sup> UN Security Council, Resolution 808 (1993) Adopted by the Security Council at its 3175th meeting, on 22 February 1993, 22 February 1993, S/RES/808 (1993): “Noting also with grave concern the ‘report of the European Community investigative mission into the treatment of Muslim women in the former Yugoslavia’ ...”; “Expressing once again its grave alarm at continuing reports of widespread and flagrant violations of international humanitarian law occurring within the territory of the former Yugoslavia, and especially in the Republic of Bosnia and Herzegovina, including reports of mass killings, massive, organized and systematic detention and **rape of women** [emphasis added], and the continuance of the practice of ‘ethnic cleansing’, including for the acquisition and the holding of territory” UN Security Council Resolution 827 (1993). Adopted by the Security Council at its 3217th meeting on 25 May 1993, S/RES/827 (1993). See also Jarvis, *Ibid.*

<sup>73</sup> Statute of the International Criminal Tribunal for the Former Yugoslavia (as amended on 17 May 2002), 25 May 1993.

<sup>74</sup> Jarvis, *supra* n 23 at 103.

(ii) provide counseling and support for them, in particular, in cases of rape and sexual assault.

(B) Due consideration shall be given, in the appointment of staff, to the employment of qualified women.<sup>75</sup>

The most relevant ICTY cases concerning sexual violence are the following:

- ***Prosecutor v. Furundžija***

Anto Furundžija was the local commander of a unit of the Croatian Defence Council (HVO) named the “Jokers”, in the Vitez municipality in Bosnia and Herzegovina.<sup>76</sup> Furundžija was found guilty on charges of torture and outrages upon personal dignity, including rape (violations of the laws or customs of war).<sup>77</sup> The Trial Chamber II established the following definition of the crime of rape:

“the following may be accepted as the objective elements of rape:

(i) 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.”<sup>78</sup>

The court held that “[I]t would seem that the prohibition [of sexual violence under international law], embraces all serious abuses of a sexual nature inflicted upon the physical and moral integrity of a person by means of coercion, threat of force or intimidation in a way that is degrading and humiliating for the victim’s dignity.”<sup>79</sup>

According to this paragraph, the tribunal decided that oral sex constitutes rape. This is relevant because it abandons a traditional approach that rape can only take place by penetration by the male sexual organ.<sup>80</sup>

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<sup>75</sup> Statute of the International Criminal Tribunal for the Former Yugoslavia, *supra* n 73.

<sup>76</sup> See [http://www.icty.org/x/cases/furundzija/cis/en/cis\\_furundzija.pdf](http://www.icty.org/x/cases/furundzija/cis/en/cis_furundzija.pdf) Accessed 19.02.15

<sup>77</sup> *Ibid.*

<sup>78</sup> *Prosecutor v. Anto Furundžija* (Trial Judgement), IT-95-17/1-T, International Criminal Tribunal for the former Yugoslavia (ICTY), 10 December 1998, henceforth *Furundžija Trial*, par 185.

<sup>79</sup> *Idem* at par 186.

<sup>80</sup> For example article 361 of the Chilean Penal Code stated that rape was the act of a man lying with a woman using force or intimidation or when the woman is deprived of reason or sense or when she is

Koenig, Lincoln and Groth (2011) explain that the *Furundžija* judgement was dictated only months after the *Akayesu* judgment, but despite both tribunals being established by the UN Security Council with same purposes but in different places, the case law of one is not binding for the other.<sup>81</sup> Therefore, the ICTY decided to elaborate its own definition of rape.<sup>82</sup> According to De Brouwer (2005), this definition is considered a regression compared to the *Akayesu* broad definition as it adopts a mechanical approach.<sup>83</sup> However, Schomburg and Peterson (2007) argue that in reference to the circumstances in which an act constitutes rape, *Furundžija* follows *Akayesu* by only changing the wording from “circumstances that are coercive” to “coercion or force or threat of force against the victim or a third person”, altering only the form, not the substance.<sup>84</sup>

Brammertz and Jarvis (2010) say that the judgement is relevant from the procedural point of view, because it dismissed the argument that a victim who suffers from PTSD is not a reliable and trustworthy witness.<sup>85</sup> “The Trial Chamber bears in mind that even when a person is suffering from PTSD [post-traumatic stress disorder], this does not mean that he or she is necessarily inaccurate in their testimony. There is no reason why a person with PTSD cannot be a perfectly reliable witness.”<sup>86</sup>

As I explained in Chapter 2, studies have shown that the majority of the victims of sexual violence suffer from PTSD. If they are not considered reliable and credible witnesses, this will open the door for the impunity of many offenders, because in some cases the victim is the only witness.<sup>87</sup>

- ***Prosecutor v. Delalić and others (the Čelebići Case)***

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under 12 years old. This was only modified in 1999 by Law No. 19.617 to a gender-neutral provision that incorporated anal and oral sex as rape. See <http://www.leychile.cl/Navegar?idNorma=138814> Accessed 19.02.16.

<sup>81</sup> Koenig, *supra* n 50 at 11.

<sup>82</sup> *Ibid.*

<sup>83</sup> De Brouwer, *supra* n 11 at 114.

<sup>84</sup> Schomburg, Wolfgang, and Peterson, Ines, “Genuine consent to sexual violence under international criminal law” *American Journal of International Law* Vol. 101 No.1 (2007) 138.

<sup>85</sup> Brammertz, Serge and Jarvis, Michelle, “Lessons learned in prosecuting gender crimes under international law: Experiences from the ICTY” in *Protecting humanity: essays in international law and policy in honour of Navanethem Pillay* Eboe-Osuji (ed) Martinus Nijhoff (2010) 110.

<sup>86</sup> *Furundžija Trial*, *supra* n 78 at par 109.

<sup>87</sup> See *supra* n 78 at chapter 2 of this work.

In this case, Zejnik Delalić, Zdravko Mucić, Hazim Delić and Esad Landžo were charged with “wilfully causing great suffering or serious injury, unlawful confinement of civilians, wilful killings, torture, inhuman treatment (grave breaches of the Geneva Conventions).”<sup>88</sup> The first three accused were superiors at the Čelebići camp; Landžo was a guard.<sup>89</sup>

Delalić, Mucić and Delić were in charge of the Čelebići prison camp and had authority over all the guards that worked there, who continually mistreated the prisoners. The prosecutor argued that the accused knew or had reason to know of the behaviour of their subordinates, but did not take the necessary actions to avoid such acts or to discipline the offenders.<sup>90</sup> They were also responsible for the actions of guards who forced “persons to commit fellatio with each other.”<sup>91</sup>

Hazim Delić was accused of subjecting a prisoner to repeated incidents of forcible sexual intercourse: a woman was raped by three different persons in one night and on another occasion she was raped in front of other persons; another woman was subjected to repeated incidents of forcible anal and vaginal intercourse by Delić himself: he raped her during her first interrogation and continued to rape her every few days over a six-week period thereafter.<sup>92</sup>

The Čelebići judgement found Mucić and Delić guilty of the charges against them (grave breaches of the Geneva Conventions for wilfully causing great suffering or serious injury, unlawful confinement of civilians, wilful killings, torture, inhuman treatment), and used the argument of the principle of command responsibility, including responsibility for sexual violent crimes, and recognised that rape is torture.<sup>93</sup>

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<sup>88</sup> See [http://www.icty.org/x/cases/mucic/cis/en/cis\\_mucic\\_al\\_en.pdf](http://www.icty.org/x/cases/mucic/cis/en/cis_mucic_al_en.pdf) Accessed 19.02.16.

<sup>89</sup> *Ibid.*

<sup>90</sup> *The Prosecutor v. Zdravko Mucic aka “Pavo”, Hazim Delic, Esad Landzo aka “Zenga”, Zejnil Delalic* (Trial Judgement), IT-96-21-T, International Criminal Tribunal for the former Yugoslavia (ICTY), 16 November 1998, from henceforth *Čelebići Case* par 21.

<sup>91</sup> *Idem* at par 26.

<sup>92</sup> *Idem* at 14.

<sup>93</sup> *Idem* at par 495–496: “The Trial Chamber considers the rape of any person to be a despicable act which strikes at the very core of human dignity and physical integrity. The condemnation and punishment of rape becomes all the more urgent where it is committed by, or at the instigation of, a public official, or with the consent or acquiescence of such an official. Rape causes severe pain and suffering, both physical and psychological. Accordingly, whenever rape and other forms of sexual violence meet the aforementioned criteria, then they shall constitute torture, in the same manner as any other acts that meet this criterion”.

- ***Prosecutor v. Kunarac et al. (the Foča Case)***

In the Foča case, originally eight men from the Foča district (Kunarač, Kovač, Vuković, Gagović, Zelenović, Janković, Janjić and Stanković) were indicted on charges of crimes against humanity, grave breaches of the Geneva Conventions of 1949, and violations of the laws and customs of war.<sup>94</sup> Afterwards, the indictment was split and Zelenović, Janković, Janjić, Vuković and Stanković were charged separately. The indictment against Gagović was withdrawn. The charges against Kunarač, Kovač and Vuković included rape, torture, outrages upon personal dignity, enslavement and inhumane treatment against Muslim women.<sup>95</sup>

In this case, the tribunal dealt again with the definition of rape:

the *actus reus* of the crime of rape in international law is constituted by: the sexual penetration, however slight: (a) of the vagina or anus of the victim by the penis of the perpetrator or any other object used by the perpetrator; or (b) of the mouth of the victim by the penis of the perpetrator; where such sexual penetration occurs without the consent of the victim. Consent for this purpose must be consent given voluntarily, as a result of the victim's free will, assessed in the context of the surrounding circumstances. The *mens rea* is the intention to effect this sexual penetration, and the knowledge that it occurs without the consent of the victim.<sup>96</sup>

De Brouwer (2005) explains that in this definition, the Trial Chamber endorsed the first part of the *Furundžija* definition (a mechanical approach), but in this particular case, it considered it necessary to elucidate its understanding of the second part concerning the requirement of the sexual act to be committed “by coercion or force or threat against the victim or third person.”<sup>97</sup>

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<sup>94</sup> See [http://www.icty.org/x/cases/kunarac/cis/en/cis\\_kunarac\\_al\\_en.pdf](http://www.icty.org/x/cases/kunarac/cis/en/cis_kunarac_al_en.pdf) Accessed 20.02.15.

<sup>95</sup> *Ibid.*

<sup>96</sup> *Prosecutor v. Dragoljub Kunarac, Radomir Kovac and Zoran Vukovic* (Trial Judgment), IT-96-23-T & IT-96-23/1-T, International Criminal Tribunal for the former Yugoslavia (ICTY), 22 February 2001 from henceforth *Foča Case* par 460.

<sup>97</sup> *Idem* at par 438. “The trial chamber decided ... the *Furundžija* definition does not refer to other factors which would render an act of sexual penetration non-consensual or non-voluntary on the part of the victim, which, as foreshadowed in the hearing and as discussed below, is in the opinion of this Trial Chamber the accurate scope of this aspect of the definition in international law”. See also De Brouwer, *supra* n 11 at 120.



According to Lawry (2013), this judgement made history because “for the first time ... an international war crimes trial, it focused exclusively on crimes of sexual assault.”<sup>98</sup> The judgement is also ground-breaking because it concluded that crimes of sexual violence can consist of enslavement as a crime against humanity and that rape was utilised as a weapon of intimidation to expel the Muslims from Foča district.<sup>99</sup>

- *Prosecutor v Tadić*

Duško Tadić – who was the president of the Local Board of the Serb Democratic Party in Kozarac – was charged and convicted for “wilful killing; torture or inhuman treatment; wilfully causing great suffering or serious injury to body or health (grave breaches of the 1949 Geneva conventions).”<sup>100</sup> Poli (2013) believes that the Tadić case is very relevant because it is an example of the contribution of the ICTY to determining that rape can amount to violation of the law or customs of war.<sup>101</sup>

Tadić was accused of several crimes of sexual violence; some were perpetrated directly by him, and others were aided or abetted by him.<sup>102</sup> He was charged with participating in “killings, torture, sexual assaults and other physical and psychological abuse of Muslims and Croats” outside and inside Omarska, Keraterm and Trnopolje camps.<sup>103</sup> For example, he forced one male prisoner to perform oral sex on another male prisoner, and during the act the coerced prisoner had to sexually mutilate the victim by biting one of his testicles off. The victim died as result of the sexual assault.<sup>104</sup> Additionally, female prisoners were regularly raped and gang-raped in the camps.<sup>105</sup>

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<sup>98</sup> Lawry, Lynn, Johnson, Kirsten and Asher, Jana, “Evidence-based documentation of gender-based violence” in *Sexual violence as an international crime: interdisciplinary approaches* De Brouwer *et al.* (eds) Antwerp: Intersentia (2013) 246.

<sup>99</sup> *Ibid*, “Further indications of enslavement include exploitation; the exaction of forced or compulsory labour or service, often without remuneration and often, though not necessarily, involving physical hardship; sex; prostitution; and human trafficking ... The ‘acquisition’ or ‘disposal’ of someone for monetary or other compensation, is not a requirement for enslavement”. See *Foča Case, supra* n 96 at par 542.

<sup>100</sup> See [http://www.icty.org/x/cases/tadic/cis/en/cis\\_tadic\\_en.pdf](http://www.icty.org/x/cases/tadic/cis/en/cis_tadic_en.pdf) Accessed 20.02.16

<sup>101</sup> Poli, *supra* n 33 at 143–4.

<sup>102</sup> *Prosecutor v. Dusko Tadic aka “Dule”* (Opinion and Judgment), IT-94-1-T, International Criminal Tribunal for the former Yugoslavia (ICTY), 7 May 1997, from henceforth *Tadić Trial* par 730.

<sup>103</sup> *Idem* at par 38.

<sup>104</sup> *Idem* at par 194 and 198.

<sup>105</sup> *Idem* in general, especially par 151, 165, 175 and 470.

Regrettably, the charges of forcible sexual intercourse were withdrawn,<sup>106</sup> because the main witness refused to testify.<sup>107</sup> Viseur (1998) explains that this is something that recurrently occurs in trials, and will continue to be problem in any prosecution. This problem does not undermine that value of the contribution of the *Tadić* judgement.<sup>108</sup>

Viseur (1998) further elucidates that the *Tadić* judgement contains “absolute gems and nuggets throughout” and that it “will be a forerunner of the richness of sexual assault jurisprudence”.<sup>109</sup> For this author, the tribunal’s interpretation of evidence is quite relevant, considering that sexual assaults can be triggered by religion or ethnic circumstances, showing a motivation based on discrimination.<sup>110</sup>

Viseur (1998) also highlights the contribution made by the *Tadić* trial by convicting the accused of crimes against humanity for inhumane acts, violations of law and customs of war and for cruel treatment. This conviction arose from the sexual mutilation event, based on the fact that his mere presence in the place of the crime was a form of encouragement, even though he did not made physical contact with the victim or speak during the attack.<sup>111</sup>

Regarding the number of convictions, the ICTY situation is very different to the ICTR; 30 individuals have been convicted for their responsibility for crimes of sexual violence, as defined under article 7(1) of the ICTY Statute.<sup>112</sup> Four of them were additionally convicted for failing to prevent the attacks or punish the actual perpetrators of the crimes, under article 7(3) of the Statute: Banović, Bralo, Brđanin, Češić, Đorđević, Furundžija, Krajišnik, Krstić, Kunarac, Kovač, Vuković, Prać, Kvočka, Kos, Radić, Martić, Delić, Landžo, Nikolić, Plavšić, Rajić, Pavković, Šainović, Sikirica, Došen, Kolundžija, Simić, Stakić, Tadić, Todorović and Zelenović. Almost 50% of the persons

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<sup>106</sup> *Idem* at par 22.

<sup>107</sup> Poli, *supra* n 33 at 144.

<sup>108</sup> Viseur-Sellers, Patricia, “Emerging jurisprudence on crimes of sexual violence” *American University International Law Review* Vol. 13, No. 6 (1998) 1529.

<sup>109</sup> *Idem* at 1528.

<sup>110</sup> *Idem* at 1530.

<sup>111</sup> *Idem* at 1531.

<sup>112</sup> See <http://www.icty.org/sid/10586> Accessed 05.05.2015.

convicted by the ICTY were found to be responsible for crimes of sexual violence. There were only 13 withdrawn indictments or deaths of the accused before trial.<sup>113</sup>

According to Jarvis (2013), the jurisprudence of the ICTY confirms that sexual violence is one of the most serious crimes of war. The ICTY has rendered convictions for sexual violence and this represents acknowledgment of the gravity of sexual violence.<sup>114</sup>

Inder (2013) believes that the ICTY can be considered “the unsung institutional hero in the development and practice of international justice for conflict-related violence against women”.<sup>115</sup> The ICTY has contributed to ICL with the biggest compilation of international case law regarding gender-based crimes made by one single tribunal, including ground-breaking jurisprudence for rape as torture, sexual violence as a war crime and sexual violence as a crime against humanity.<sup>116</sup>

Jarvis (2013) correctly affirms that the ICTY has made unprecedented recognitions, such as the fact that crimes of sexual violence can comply with the elements of a range of serious international crimes that have never before been construed as incorporating sexual violence. The ICTY also established that proof of sexual violence is important to decide if the elements of enslavement are present, departing from the historic notion that enslavement is connected only to the forced work of men.<sup>117</sup>

#### **b) International Tribunal for Rwanda (ICTR)**

The ICTR was created as an ad hoc tribunal to prosecute the serious violations of IHL perpetrated in the territory of Rwanda and to try Rwandan citizens responsible for genocide and other such violations perpetrated in neighbouring countries between 1 January and 31 December 1994.<sup>118</sup>

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<sup>113</sup> *Ibid.*

<sup>114</sup> Jarvis, *supra* n 23 at 103.

<sup>115</sup> Inder, Brigid, “Partners for gender justice” in *Sexual violence as an international crime: interdisciplinary approaches* De Brouwer *et al.* (eds) Antwerp: Intersentia (2013) 319.

<sup>116</sup> *Ibid.*

<sup>117</sup> Jarvis, *supra* n 23 at 104.

<sup>118</sup> Statute of the International Criminal Tribunal for Rwanda (as last amended on 13 October 2006), 8 November 1994, from henceforth ICTR Statute article 1.

Bianchi (2013) highlights that this was the first time that an international tribunal had a mandate to judge offenses of humanitarian law in a non-international armed conflict.<sup>119</sup> The work of the ICTR, in the same way as the ICTY, created a “shift in paradigm” in the way that crimes of sexual violence are regarded by the international community: they are no longer considered “spoils of war” but constitute real international crimes.<sup>120</sup> Furthermore, the whole documentation of the tribunal constitutes an important contribution to international law, despite the final number of gender-based convictions which is considered low, because it establishes a testimony of the occurrence of the crimes themselves.<sup>121</sup>

Inder (2013) affirms that in the field of gender-based crimes, the ICTR has had fewer convictions than the ICTY because the prosecution commonly opted to discard sexual violence charges in exchange for a guilty confession on different charges.<sup>122</sup> Nevertheless, its largest contribution to international law was the *Akayesu* judgement<sup>123</sup> that is examined in detail later in this chapter.

The ICTR Statute defines rape as a crime against humanity in article 3:

The International Tribunal for Rwanda shall have the power to prosecute persons responsible for the following crimes when committed as part of a widespread or systematic attack against any civilian population on national, political, ethnic, racial or religious grounds:

- (a) Murder;
- (b) Extermination;
- (c) Enslavement;
- (d) Deportation;
- (e) Imprisonment;
- (f) Torture;
- (g) **Rape**; [emphasis added]
- (h) Persecutions on political, racial and religious grounds;

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<sup>119</sup> Bianchi, Linda, “The prosecution of rape and sexual violence: lessons from prosecutions of the ICTR” in *Sexual violence as an international crime: interdisciplinary approaches* De Brouwer *et al.* (eds) Antwerp: Intersentia (2013) 123.

<sup>120</sup> *Idem* at 124.

<sup>121</sup> *Ibid.*

<sup>122</sup> Inder, *supra* n 115 at 320.

<sup>123</sup> *Ibid.*

(i) Other inhumane acts.<sup>124</sup>

According to Bianchi (2013), in terms of this provision, sexual violence has been charged as a crime against humanity under torture, persecution on political, racial and religious grounds, and other inhumane acts. Examples of this are the *Akayesu*, *Gacumbisti*, *Muhimana*, *Bagasora*, *Hategekimana*, *Agustin Bizimungu*, *Nyiramasuhuko*, *Ntahobali*, *Karamera* and *Nigirumpatse* trials.<sup>125</sup>

In addition, the ICTR Statute criminalises sexual violence as a war crime in article 4:

The International Tribunal for Rwanda shall have the power to prosecute persons committing or ordering to be committed serious violations of article 3 common to the Geneva Conventions of 12 August 1949 for the Protection of War Victims, and of Additional Protocol II thereto of 8 June 1977. These violations shall include, but shall not be limited to:

- (a) Violence to life, health and physical or mental well-being of persons, in particular murder as well as cruel treatment such as torture, mutilation or any form of corporal punishment;
- (b) Collective punishments;
- (c) Taking of hostages;
- (d) Acts of terrorism;
- (e) **Outrages upon personal dignity, in particular humiliating and degrading treatment, rape, enforced prostitution and any form of indecent assault;** [emphasis added]
- (f) Pillage;
- (g) The passing of sentences and the carrying out of executions without previous judgement pronounced by a regularly constituted court, affording all the judicial guarantees which are recognised as indispensable by civilized people;
- (h) Threats to commit any of the foregoing acts<sup>126</sup>

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<sup>124</sup> ICTR Statute, *supra* n 118

<sup>125</sup> Bianchi, *supra* n 119 at 140.

<sup>126</sup> ICTR Statute, *supra* n 118

Bianchi (2013) affirms that concerning this article, sexual violence has been charged under provisions (e) and (a). This occurred in the *Agustin Bizimungu*, *Basagora*, *Nyiramasuhuko* and *Ntahobali* trials.<sup>127</sup>

Finally, sexual violence can constitute a crime of genocide according to article 2 of the ICTR Statute:

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

- (a) Killing members of the group;
- (b) Causing serious bodily or mental harm to members of the group;
- (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
- (d) Imposing measures intended to prevent births within the group;
- (e) Forcibly transferring children of the group to another group.<sup>128</sup>

According to Bianchi (2013) the office of the prosecutor managed to bring charges for genocide in the *Akayesu*, *Gacumbitsi*, *Muhimana*, *Bagosora*, *Karempera* and *Ngirumpatse* trials.<sup>129</sup>

The most relevant case law of the ICTR concerning sexual violence is the following:

- ***The Prosecutor v. Akayesu***

Jean-Paul Akayesu was the *bourgmestre*<sup>130</sup> of the commune of Taba from April 1993 until June 1994. He was in charge of public order in the commune, had exclusive control over the police and was responsible for the execution of the law and administration of justice.<sup>131</sup> He was indicted by the prosecutor for genocide, crimes against humanity and violations of the Geneva Conventions for rape and other forms of sexual violence and murder, among other atrocities.<sup>132</sup>

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<sup>127</sup> Bianchi, *supra* n 119 at 140.

<sup>128</sup> ICTR Statute, *supra* n 118

<sup>129</sup> Bianchi, *supra* n 119 at 140.

<sup>130</sup> The equivalent of a town mayor.

<sup>131</sup> *The Prosecutor v. Jean-Paul Akayesu* (Trial Judgement), ICTR-96-4-T, International Criminal Tribunal for Rwanda (ICTR), 2 September 1998, from henceforth *Akayesu Trial* par 2, 3 and 4.

<sup>132</sup> *Idem* at counts 1–15.

Kaitesi (2014) believes the *Akayesu* sentence is an important milestone in the prosecution of sexual violence in international law.<sup>133</sup> This verdict is outstanding for several reasons:

- First, it established that sexual violence and rape constituted acts of genocide just as murder and concluded that superiors are individually accountable along with their subordinates for genocidal sexual violence.<sup>134</sup>
- Second, according to Koenig, Lincoln and Groth (2011), the trial chamber for the first time in history identified that rape and other forms of sexual violence have different elements, hence are separate crimes that can constitute crimes against humanity.<sup>135</sup>
- Third and finally, many authors agree that the chamber articulated progressive and broad definitions of both sexual violence and rape.<sup>136</sup> The *Akayesu* Trial Chamber defined sexual violence as “any act of a sexual nature which is committed on a person under circumstances which are coercive”.<sup>137</sup> Rape, on the other hand, was defined separately. However, the trial chamber remarked that sexual violence includes rape. Rape was defined by the trial chamber as “a physical invasion of a sexual nature, committed on a person under circumstances which are coercive”.<sup>138</sup> De Brouwer (2005) explains that the trial chamber decided that the absence of consent as an element of the crime of rape or in relation to other acts of sexual nature should be discarded when this violence occurs in a context of genocide.<sup>139</sup>

The trial chamber held that “while rape has been historically defined in national jurisdictions as non-consensual sexual intercourse, variations of the forms of rape may

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<sup>133</sup> Kaitesi, Usta, *Genocidal gender and sexual violence: the legacy of the ICTR, Rwanda’s ordinary courts and Gacaca court* Cambridge: Intersentia (2014) 181.

<sup>134</sup> *Ibid.* “... rape and sexual violence, the Chamber wishes to underscore the fact that in its opinion, they constitute genocide in the same way as any other act as long as they were committed with the specific intent to destroy, in whole or in part, a particular group, targeted as such. Indeed, rape and sexual violence certainly constitute infliction of serious bodily and mental harm on the victims and are even, according to the Chamber, one of the worst ways of inflicting harm on the victim as he or she suffers both bodily and mental harm.” See *Akayesu Trial*, *supra* n 131 at par 685.

<sup>135</sup> Koenig, *supra* n 50 at 10.

<sup>136</sup> Schomburg, *supra* n 84 at 123; Koenig, *supra* n 50 at 10; Askin, Kelly D., “Sexual violence in decisions and indictments of the Yugoslav and Rwandan tribunals: Current status” *American Journal of International Law* Vol. 93 No. 1 (1999)107.

<sup>137</sup> *Akayesu Trial*, *supra* n 131 at par 598.

<sup>138</sup> *Ibid.*

<sup>139</sup> De Brouwer, *supra* n 11 at 455.

include acts which involve the insertion of objects and/or the use of bodily orifices not considered to be intrinsically sexual.”<sup>140</sup>

According to Kaitesi (2014) “genocidal gender and sexual violence is used by the perpetrators of genocide to annihilate, terrorise, eliminate, dehumanise, destroy the desire to procreate, spoil the identity of victims, alter family lineage in patriarchal societies, humiliate, instil fear, kill and eventually destroy individuals and their societies at the same time.”<sup>141</sup> Without any doubt, genocidal sexual violence is one of the most egregious crimes that exist, founded on pure evil and hatred.

Kaitesi (2014) further explains that the ICTR Statute does not consider sexual violence as an element of the crime of genocide because it literally replicates the Genocide Convention; rape is included as crime against humanity and as an infraction to article 3 common to the Geneva Conventions and Additional Protocol II.<sup>142</sup> In a remarkable decision, the tribunal went beyond the statute’s specific limitation and ruled that rape and sexual violence can be elements of the crime of genocide if they are perpetrated with genocidal intent.<sup>143</sup>

Kaitesi (2014) regrets that the outstanding accomplishment of the *Akayesu* judgment in recognising sexual violence as genocide was not followed in the *Muhimana* and *Nyiramasuhuko* sentences, because in the amended indictments the Office of the Prosecutor (OTP) made the mistake of not incorporating rape and sexual violence in the genocide charges, preventing a conviction for genocidal sexual violence.<sup>144</sup> This is disappointing, because in the prefectures of Butare and Kibuye, where *Nyiramasuhuko* and *Muhimana* ruled, genocidal gender and sexual violence was rampant.<sup>145</sup> There were no legal consequences for these two individuals for their crimes of genocide. On the bright side, in both the *Nyiramasuhuko* and *Muhimana* trials, the court did acknowledge

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<sup>140</sup> *Akayesu Trial*, *supra* n 131 at par 686.

<sup>141</sup> Kaitesi, *supra* n 133 at 17.

<sup>142</sup> *Idem* at 17–18.

<sup>143</sup> *Idem* at 18. See also *Akayesu Trial*, *supra* n 131 at par 685.

<sup>144</sup> *Idem* at 181.

<sup>145</sup> *Ibid.*



that sexual violence and rape amount to genocide when serious bodily and mental harm is inflicted.<sup>146</sup>

Finally, Inder (2013) highlights that the *Akayesu* trial was the first verdict in history to give a complete picture of the real-life story of women victims during the genocide. The judgement also revealed the motivation and significance of rape in the conflict.<sup>147</sup> The contribution of *Akayesu* is significant to criminal law – both national and international systems – granting an improved comprehension of rape and sexual violence, and by doing so, perfecting the forms of prosecution of these sorts of crime.<sup>148</sup>

- ***Prosecutor v. Musema***

Musema was charged with genocide under articles 6 (1) and 6 (3) of the ICTR Statute (Count 1), crimes against humanity for rape (Count 7), and serious violations of Common Article 3 of the Geneva Conventions and Additional Protocol II under article 4(e) of the Statute (Count 9).<sup>149</sup>

Musema was a member of the Prefecture Council of Byumba and member of the Technical Committee in the Butare Commune. He was in charge of socio-economic and developmental affairs.<sup>150</sup> Musema was accused of ordering and perpetrating the rape of Tutsi women in the Bisesesero region.<sup>151</sup>

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<sup>146</sup> *The Prosecutor v. Mikaeli Muhimana* (Judgement and Sentence), ICTR-95-1B-T, International Criminal Tribunal for Rwanda (ICTR), 28 April 2005, par 502 and 513; *The Prosecutor v. Pauline Nyiramasuhuko et al.* (Judgement and Sentence), ICTR-98-42-T, International Criminal Tribunal for Rwanda (ICTR), 24 June 2011, from henceforth *Butare Case* par 5731 and 5868. See also Kaitesi, *Idem* at 182.

<sup>147</sup> Inder, *supra* n 115 at 320.

<sup>148</sup> *Ibid.*

<sup>149</sup> *The Prosecutor v. Alfred Musema* (Judgement and Sentence), ICTR-96-13-T, International Criminal Tribunal for Rwanda (ICTR), 27 January 2000, from henceforth *Musema Trial* par 16.

<sup>150</sup> *Idem* at par 16.

<sup>151</sup> *Idem* at par 907 “With the help of four young men, Ruhindara dragged the woman on the ground and brought her to Musema who had his rifle in his hand. The four young men, who were restraining Nyiramusugi, dropped her on the ground and pinned her down. Two of them held her arms, while the other two clamped her legs. The latter two opened the legs of the young woman and Musema tore her garments and undergarments, before undressing himself. In a loud voice, Musema said: ‘The pride of the Tutsi is going to end today’. Musema raped Nyiramusugi. During the rape, as Nyiramusugi struggled, Musema immobilized her by taking her arm which he forcibly held to her neck. Standing nearby, the four men who initially held Nyiramusugi to the ground watched the scene. After Musema’s departure, they came back to the woman and also raped her in turns. Thereafter, they left Nyiramusugi for dead.” See also par 830, 846 908 and 933.

The court explored the context of rape as genocide, specifically as “causing serious bodily and mental harm and rape as crime against humanity”:

rape and other forms of sexual violence were often accompanied by humiliating utterances, which clearly indicated that the intention underlying each specific act was to destroy the Tutsi group as a whole. The Chamber notes, for example, that during the rape of Nyiramusugi Musema declared: ‘The pride of the Tutsis will end today’. In this context, the acts of rape and sexual violence were an integral part of the plan conceived to destroy the Tutsi.<sup>152</sup>

Concerning crimes of sexual violence, Musema was found guilty of genocide and crimes against humanity for rape.<sup>153</sup>

- ***Prosecutor v. Semanza***

Laurent Semanza was representative to the National Assembly of the *Mouvement Républicain National et Démocratique* (MRND), the political party of the President of Rwanda, Juvénal Habyarimana.<sup>154</sup> Semanza was charged with 14 counts of genocide, crimes against humanity, and serious violations of Common Article 3 and Additional Protocol II for organising, executing, directing, and personally participating in assaults, which included killings, causing serious bodily or mental harm, and committing acts of sexual violence in the regions of Bicumbi and Gikoro.<sup>155</sup>

Semanza was found guilty of Count 10, for rape as a crime against humanity. He spoke to a group of people and instigated them to rape Tutsi women before killing them, which led an individual to immediately rape a girl who was hiding nearby and who was later killed by two men. The court established the clear connection between the permission given by Semanza and the act of the perpetrator.<sup>156</sup> In connection with the same event, Semanza was found guilty of torture (Count 11). Considering the circumstances of the rape of the girl, the court concluded that severe mental suffering

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<sup>152</sup> *Idem* at par 933.

<sup>153</sup> *Idem* at 7. Verdict.

<sup>154</sup> *The Prosecutor v. Laurent Semanza* (Judgement and Sentence), ICTR-97-20-T, International Criminal Tribunal for Rwanda (ICTR), 15 May 2003, from henceforth *Semanza Trial* par 15.

<sup>155</sup> *Idem* at par 7 and 9.

<sup>156</sup> *Idem* at par 475–479.

was inflicted upon the victim with the intention of discrimination (because she was targeted for being a Tutsi) amounting to torture.<sup>157</sup>

Unfortunately, concerning Count 9 (outrages upon personal dignity, in particular humiliating and degrading treatment, rape, enforced prostitution and any form of indecent assault), Semanza was found not guilty because the prosecutor failed to present sufficient evidence of rapes and sexual violence taking place in these locations.<sup>158</sup> It should be noted that in the way the OTP builds up the case, mistakes like this have grave consequences such as impunity for egregious crimes of sexual violence.

Semanza was found not guilty of Count 13 (serious violations of Common Article 3 and Additional Protocol II) under article 4 (a) of the ICTR Statute, due to the application of the law on cumulative convictions; he had already been found guilty of genocide (Count 3) and of crimes against humanity (Counts 10, 11 and 12).<sup>159</sup> However, the appeal chamber reversed this decision, arguing that “simultaneous convictions are permissible for war crimes, crimes against humanity and complicity to commit genocide as each has a materially distinct element”<sup>160</sup> and convicted Semanza of war crimes for instigating rape and torture.<sup>161</sup>

Concerning the definition of rape, the court stated that “the *actus reus* of rape is non-consensual sexual penetration”.<sup>162</sup> Obote-Odora (2005) affirms that the court departed from the *Akayesu* broad definition and opted for the *Kunarac* restrictive approach.<sup>163</sup>

- ***The Prosecutor v. Gacumbitsi***

Sylvestre Gacumbitsi was the *bourgmestre* (mayor) of the commune of Resumo from 1993 to 1994.<sup>164</sup> Gacumbitsi received instructions from military authorities that the “Tutsi had to be killed in order to stop the war”.<sup>165</sup>

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<sup>157</sup> *Idem* at par 480–483.

<sup>158</sup> *Idem* at par 437–439.

<sup>159</sup> *Idem* at par 540–552.

<sup>160</sup> *Laurent Semanza v. The Prosecutor* (Appeal Judgement), ICTR-97-20-A, International Criminal Tribunal for Rwanda (ICTR), 20 May 2005, par 369.

<sup>161</sup> *Idem* at par 370.

<sup>162</sup> *Semanza Trial*, *supra* n 154 at par 154.

<sup>163</sup> Obote-Odora, Alex, “Rape and sexual violence in international law: ICTR contribution” *New Eng. J. Int’l & Comp. L.* Vol. 12 (2005) 153.

Gacumbitsi was charged with rape as a crime against humanity (Count 5) among other atrocities.<sup>166</sup> The chamber decided that the evidence proved that Gacumbitsi instigated the rape of Tutsi girls in public (by ordering that a stick should be inserted in their vaginas in case they resisted) and that several rapes and other forms of sexual violence were committed as a result of his instigation.<sup>167</sup> The court also recognised that the episodes of sexual violence “were part of a systematic and widespread attack against Tutsi civilians in Rusumo commune.”<sup>168</sup>

The chamber established that “any penetration of the victim’s vagina by the rapist with his genitals or with any object constitutes rape, although the definition of rape under article 3(g) of the Statute is not limited to such acts alone.”<sup>169</sup> Therefore, the chamber expanded the scope of the definition of rape of the charter in order to include rapes perpetrated by the introduction of sticks in women’s genitals.<sup>170</sup>

Gacumbitsi also drove around Rubare with a megaphone encouraging young Hutu men to rape Tutsi girls who refused to marry them.<sup>171</sup> The chamber determined that the women were selected by Gacumbitsi because they were part of the Tutsi ethnic group and by doing so he discriminated against them.<sup>172</sup> The chamber inferred that the victims did not consent to the rapes, based on the fact that Gacumbitsi gave orders that women should be killed in heinous ways if they resisted and that they were raped by the attackers when they tried to escape.<sup>173</sup> In the light of the above reasoning, Sylvestre Gacumbitsi was convicted of rape as a crime against humanity.<sup>174</sup>

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<sup>164</sup> *The Prosecutor v. Sylvestre Gacumbitsi* (Trial Judgement), ICTR-2001-64-T, International Criminal Tribunal for Rwanda (ICTR), 17 June 2004, from henceforth *Gacumbitsi Trial* par 6.

<sup>165</sup> *Idem* at par 90.

<sup>166</sup> *Idem* at par 36.

<sup>167</sup> *Idem* at par 224.

<sup>168</sup> *Idem* at par 225 and 228.

<sup>169</sup> *Idem* at par 321.

<sup>170</sup> *Ibid.*

<sup>171</sup> *Idem* at par 215.

<sup>172</sup> *Idem* at par 324.

<sup>173</sup> *Idem* at par 325.

<sup>174</sup> *Idem* at 333.

The appeal chamber confirmed the conviction of Gacumbitsi for rape as a crime against humanity.<sup>175</sup> Regarding the issue of consent, the chamber explained that the OTP could prove the existence of coercive circumstances in which genuine consent was not possible, and that this was enough evidence to conclude that there was non-consent. Therefore, it was not necessary to prove what the victims said or their behaviour, or their connection with the rapist, or the use of force: coercive circumstances, such as ongoing genocide, imply by themselves the absence of consent.<sup>176</sup>

- *The Prosecutor v. Nyiramasuhuko et al. (the Butare case)*

Nyiramasuhuko, Ntahobali, Nsabimana, Nteziryayo, Kanyabashi and Ndayambaje were all authorities in the prefecture of Butare in 1994, and cooperated in the creation and execution of the government's plot of mass murder against the Tutsi ethnic group.<sup>177</sup> For the purpose of this research, only the charges against Nyiramasuhuko and Ntahobali are examined.

Pauline Nyiramasuhuko was designated Minister of Family and Women's Development in 1992 and was also elected as the representative of the Butare prefecture in the MRND.<sup>178</sup> Her son, Arsène Shalom Ntahobali, was a student and part-time manager of Hotel Ihuliro.<sup>179</sup>

Ntahobali was charged under both articles 6 (1) and 6 (3) of the Statute; Nyiramasuhuko was charged only under article 6 (3) of the Statute (Count 6).<sup>180</sup> The OTP made a serious mistake by excluding the charges under article 6 (1) in the case of Nyiramasuhuko.<sup>181</sup>

Nyiramasuhuko and Ntahobali ran the Butare Prefecture Office and commanded the *Interahamwe* to kill, abduct and rape the Tutsi refugees.<sup>182</sup> For example, during May 1994, Nyiramasuhuko, Ntahobali and some *Interahamwe* forced refugees into a

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<sup>175</sup> *Sylvestre Gacumbitsi v. The Prosecutor* (Appeal Judgement), ICTR-2001-64-A, International Criminal Tribunal for Rwanda (ICTR), 7 July 2006, IV Disposition.

<sup>176</sup> *Idem* at par 155.

<sup>177</sup> *Butare Case*, *supra* n 146 at par 1.

<sup>178</sup> *Idem* at par 11.

<sup>179</sup> *Idem* at par 18.

<sup>180</sup> *Idem* at par 6074.

<sup>181</sup> *Idem* at par 6087.

<sup>182</sup> *Idem* at par 2781.

camouflaged pickup truck and three Tutsi women were gang-raped by Ntahobali and the *Interahamwe*. Ntahobali and the *Interahamwe* frequently forced Tutsi women refugees to undress and raped, beat, abused and sometimes killed them following Nyiramasuhuko's orders.<sup>183</sup> Women were also raped, abused and murdered by the *Interahamwe* outside the Hotel Ihuliro. Ntahobali himself raped a girl at the roadblock near the hotel.<sup>184</sup>

The chamber found that Nyiramasuhuko ordered the *Interahamwe* to rape Tutsi women in Butare based on her authority as their superior. Evidence showed that she was aware of the rapes and did not prevent or punish them. She had superior responsibility over these crimes.<sup>185</sup> The chamber also confirmed that Ntahobali personally raped, ordered the *Interahamwe* to rape, and aided and abetted the rapes of, several Tutsi women.<sup>186</sup>

The chamber found both Nyiramasuhuko and Ntahobali guilty of crimes against humanity for rape (Count 7) and of serious violations of Article 3 Common to the Geneva Conventions and of Additional Protocol II for Outrages upon Personal Dignity (Count 11).<sup>187</sup> The appeal chamber confirmed the convictions for these counts.<sup>188</sup> Kaitesi (2014) points out that Pauline Nyiramasuhuko was the first woman prosecuted in an international tribunal.<sup>189</sup>

Since 5 May 2015, the ICTR has completed its work at the trial level for all 93 accused indicted by the tribunal, including 55 first-instance judgements, 75 accused, 10 referrals to national jurisdictions (four apprehended accused and six fugitive cases), three top-priority fugitives whose cases have been transferred to the International Residual Mechanism for Criminal Tribunals, two withdrawn indictments and three indictees who died prior to judgement.<sup>190</sup> Appellate proceedings have been resolved in respect of 56 persons. Throughout the reporting period, the residual mechanism delivered its first

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<sup>183</sup> *Ibid.*

<sup>184</sup> *Idem* at par 3144 and 6077.

<sup>185</sup> *Idem* at 6087–6088–6093.

<sup>186</sup> *Idem* at 6094.

<sup>187</sup> *Idem* at 6186.

<sup>188</sup> *The Prosecutor v Nyiramasuhuko et al.* (Appeal Judgement), ICTR-2001-64-A, International Criminal Tribunal for Rwanda (ICTR), 14 December 2015, VIII Disposition.

<sup>189</sup> Kaitesi, *supra* n 133 at 166.

<sup>190</sup> See <http://www.unictt.org/sites/unictt.org/files/legal-library/150515-completion-strategy-en.pdf> Accessed 05.09.15.

judgement on the appeal from the trial judgement in the *Ngirabatware* case.<sup>191</sup> According to De Brouwer (2005), considering the large number of crimes of sexual violence in Rwanda, ICTR records on rape and other forms of sexual violence convictions are scarce: concerning rape as genocide and/or as a crime against humanity, only 11 persons were convicted (*Akayesu, Semanza, Gacumbitsi, Muhimana, Hategekimana, Bizimungo, Ngirabatware, Karamera* and *Ngirumpatsi*).<sup>192</sup>

The heritage of the ICTR is very important. According to Bianchi (2013), the case law of the ICTR has left an historic register of the massive sexual violence that took place in Rwanda. The compilation of evidence registered by the office of the prosecutor will help with the same objective.<sup>193</sup> Furthermore, since 2003 the office of the prosecutor began elaborating the “OTP Rape Database”, which is a bigger collection of testimonies of victims, eye-witnesses and other supporting testifiers of the occurrence of rape during the Rwandan genocide.<sup>194</sup>

Bianchi (2013) concludes that the ICTR has held accountable the perpetrators of sexual violence committed during the Rwandan genocide and continues to do so to this day.<sup>195</sup> The confirmation of the counts of crimes of sexual violence in the *Nyiramasuhuko* appeal is evidence of this.<sup>196</sup> Bianchi (2014) affirms that the know-how gained by the ICTR in addition to the fruitful contribution of the tribunal to the elaboration of a legal framework concerning the prosecution of crimes of sexual violence, will assist as a model for future prosecutions on a domestic and international level, particularly in the events of sexual violence occurring every day around the world in countries such as the DRC, Sudan and Central African Republic (CAR), just to mention a few.<sup>197</sup> Bianchi correctly affirms that “ending impunity for such crimes is an essential element in seeking sustainable peace, justice, truth, and national reconciliation.”<sup>198</sup>

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<sup>191</sup> *Ibid.*

<sup>192</sup> De Brouwer, *supra* n 11 at 334 Updated Available at <http://unictr.unmict.org/en/cases> Accessed 05.09.15.

<sup>193</sup> Bianchi, *supra* n 119 at 148.

<sup>194</sup> *Idem* at 148–149.

<sup>195</sup> *Idem* at 149.

<sup>196</sup> *Prosecutor v Nyiramasuhuko et al.* (Appeal Judgement), *supra* n 188.

<sup>197</sup> Bianchi, *supra* n 119 at 149.

<sup>198</sup> *Ibid.*

### 3) The International Criminal Court

The long-lasting desire of the international community to create a permanent ICC became a reality in 1998 in Rome, Italy. The United Nations Conference of Plenipotentiaries approved the ICC Statute (120 votes in favour, 7 against and 21 abstaining).<sup>199</sup> On 11 April 2002 the total number of ratifications was obtained, 66 in total with a minimum of 60 required for entry into force. In this way, the ICC received permanent jurisdiction over war crimes, crimes against humanity and genocide from 1 July 2002.<sup>200</sup> The ICC is located in The Hague, The Netherlands and is not meant to replace national courts, but it is complementary to national jurisdictions in cases that states are unwilling or unable to prosecute. The objective of the ICC is to “investigate and prosecute most serious crimes of international concern”.<sup>201</sup>

Regarding the prosecution of sexual violence by the ICC, it is interesting to highlight the words of former prosecutor Luis Moreno-Ocampo (2013):

I have the privilege and responsibility to be the first prosecutor of the International Criminal Court (ICC). My mandate is to put to an end to impunity for the most serious crimes of concern of the international community, including gender crimes as part of genocide, crimes against humanity and war crimes, and to contribute to the prevention of such crimes. The Rome Statute pays particular attention to gender crimes.<sup>202</sup>

Bendont (1999/2000) explains that the Rome Statute includes an extensive range of sexual and gender violence crimes provisions: rape, sexual slavery, enforced prostitution, forced pregnancy, forced sterilisation, and any other forms of sexual violence that amount to crimes against humanity and war crimes (articles 7 and 8 of the

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<sup>199</sup> Available at [https://www.iccpi.int/en\\_menus/icc/about%20the%20court/icc%20at%20a%20glance/Pages/establishment%20of%20the%20court.aspx](https://www.iccpi.int/en_menus/icc/about%20the%20court/icc%20at%20a%20glance/Pages/establishment%20of%20the%20court.aspx) Accessed 20.02.16.

<sup>200</sup> *Ibid.*

<sup>201</sup> Available at [https://www.iccpi.int/en\\_menus/icc/about%20the%20court/icc%20at%20a%20glance/Pages/icc%20at%20a%20glance.aspx](https://www.iccpi.int/en_menus/icc/about%20the%20court/icc%20at%20a%20glance/Pages/icc%20at%20a%20glance.aspx) Accessed 20.02.16.

<sup>202</sup> Moreno-Ocampo, Luis, “The place of sexual violence in the strategy of the ICC Prosecutor” in *Sexual violence as an international crime: interdisciplinary approaches* De Brouwer *et al.* (eds) Antwerp: Intersentia (2013) 152.



Rome Statute).<sup>203</sup> Moreover, De Brouwer (2005) affirms that the EoC establish that rape and other forms of sexual violence can constitute genocide [article 6 (b), element 1, footnote 3 Elements of Crime].<sup>204</sup> This is the first time that these crimes of sexual violence have been laid down in an international instrument.<sup>205</sup>

According to Poli (2013), article 8 of the Rome Statute (which expressly lists a series of crimes of sexual violence) “represents the convergence of the normative evolution criminalising sexual violence as war crimes and crimes against humanity”.<sup>206</sup> Poli also celebrates the important advancement that has been made regarding the protection of both men and women during armed conflict, due to the gender-neutral character of the specific provisions.<sup>207</sup>

Another relevant gender provision is article 21 (3) of the Rome Statute regarding the sources of law that the court can apply: “The application and interpretation of law pursuant to this article must be consistent with internationally recognized human rights, and be without any adverse distinction founded on grounds such as gender as defined in article 7, paragraph 3”.<sup>208</sup>

Bedont (1999/2000) explains that this article is “one of the most significant gender-specific provisions under the Rome Statute” for several reasons.<sup>209</sup> First, the article can be considered a “constitutional-type guarantee of rights to all those who appear before the Court, both male and female, victims or accused.”<sup>210</sup> Second, this norm will permit the courts to make reference in their judgements to international human rights treaties, like the Convention of Elimination of All Forms of Discrimination against Women (CEDAW), the Convention on Elimination of Racial Discrimination, and the Convention of the Rights of the Child (CRC).<sup>211</sup> Third, this provision will grant a check and balance mechanism during sexual violence trials in case of extrapolation of discriminatory legal rules and practices from domestic jurisdictions, like intimidating

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<sup>203</sup> Bedont, *supra* n 66 at 142.

<sup>204</sup> De Brouwer, *supra* n 11 at 21.

<sup>205</sup> *Idem* at 20.

<sup>206</sup> Poli, *supra* n 33 at 149.

<sup>207</sup> *Ibid.*

<sup>208</sup> Rome Statute of the International Criminal Court (last amended 2010), 17 July 1998.

<sup>209</sup> Bedont, *supra* n 66 at 143.

<sup>210</sup> *Ibid.*

<sup>211</sup> *Ibid.*

cross-examination of victims or verification of the testimonies of female victims.<sup>212</sup> Fourth and finally, this article will influence in a gender-friendly way all the other norms of the Rome Statute, like the provisions that contain the definitions of crimes and the duties of the different bodies of the ICC.<sup>213</sup>

According to De Brouwer (2005), the ICC also incorporated some important procedural changes. For example, the rules of evidence in sexual violence proceedings included new progressive measures: they eliminated the need for corroboration of the testimony of victims of sexual violence; they suppressed the requirement of proof of previous sexual behaviour; and in the context of coercion, the element of consent is not considered.<sup>214</sup> The ICC also included provisions that defend and support the victims, encouraging their participation and establishing ways of reparation.<sup>215</sup> ICTR and ICTY did not contain provisions for participation and reparation of victims, hence the ICC can be regarded as one of the major contributors to international law in this field.<sup>216</sup>

For Moreno-Ocampo (2013), the idea of “gender violence” or “gender crimes” is recognised strongly in the ICC Statute.<sup>217</sup> Article 7 (1) (h) states the “persecution against any identifiable group or collectivity on ... gender ‘might constitute a crime against humanity’.”<sup>218</sup> The Rome Statute also defines the term “gender” as “the two sexes, male and female, within the context of society”.<sup>219</sup> Several norms of the Statute establish what can be categorised as gender crimes; for example rape, enforced prostitution, forced pregnancy and sexual slavery can be prosecuted as a crime against humanity and/or as a war crime.<sup>220</sup>

Moreno-Ocampo (2013) maintains that concerning the office of the prosecutor and gender crimes, the Rome Statute contains important provisions<sup>221</sup> like article 42 (9): “The Prosecutor shall appoint advisers with legal expertise on specific issues, including,

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<sup>212</sup> *Ibid.*

<sup>213</sup> *Ibid.*

<sup>214</sup> De Brouwer, *supra* n 11 at 21.

<sup>215</sup> *Ibid.*

<sup>216</sup> *Ibid.*

<sup>217</sup> Moreno-Ocampo, *supra* n 202 at 152.

<sup>218</sup> Rome Statute, *supra* n 208

<sup>219</sup> *Ibid.*

<sup>220</sup> Moreno-Ocampo, *supra* n 202 at 152.

<sup>221</sup> *Idem* at 153.

but not limited to, sexual and gender violence and violence against children”<sup>222</sup> and article 54 (1) (b): “The Prosecutor shall take appropriate measures to ensure the effective investigation and prosecution of crimes ... respect the interests and personal circumstances of victims and witnesses, including age, gender ... and take into account the nature of the crime, in particular when it involves sexual violence, gender violence or violence against children.”<sup>223</sup>

According to Spees (2014), another advancement of the Rome Statute is its express mandate to guarantee the presence of women and gender experts in the court.<sup>224</sup> Article 36 (8) establishes that “Parties shall, in the selection of judges, take into account ... fair representation of female and male judges” and the “need to include judges with legal expertise on specific issues, including, but not limited to, violence against women or children.”<sup>225</sup>

Currently, women are outnumbered by men in the ICC (11 to 6). Nevertheless, on 11 March 2015 Judge Silvia Fernandez de Gurmendi from Argentina was elected as the first woman president of the ICC. This is clearly a large milestone in the equal participation of women in the ICC.<sup>226</sup>

Oosterveld (2013) affirms that one of the biggest contributions of the ICC regarding the evolution of sexual violence law is that this is the first time in history that the basis of gender became an element of crime, specifically persecution as a crime against humanity.<sup>227</sup> In the ICC case of *Prosecutor v. Thomas Lubanga Dyil*, charges of sexual violence and gender-based crimes were not among those included by the prosecution case.<sup>228</sup> In the opinion of Grey (2013), the lack of sexual violence charges was broadly

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<sup>222</sup> Rome Statute, *supra* n 208

<sup>223</sup> *Ibid.*

<sup>224</sup> Spees, Pam, “Women’s advocacy in the creation of the International Criminal Court: Changing the landscapes of justice and power.” *Signs* Vol.40 No.1 (2014) 1242.

<sup>225</sup> Rome Statute, *supra* n 208.

<sup>226</sup> See [http://www.iccpi.int/en\\_menus/icc/press%20and%20media/press%20releases/Pages/pr1096.aspx](http://www.iccpi.int/en_menus/icc/press%20and%20media/press%20releases/Pages/pr1096.aspx) Accessed 05.09.2015.

<sup>227</sup> Oosterveld, Valerie, “Prosecuting gender-based persecution as an international crime” in *Sexual violence as an international crime: interdisciplinary approaches* De Brouwer *et al.* (eds) Antwerp: Intersentia (2013) 57.

<sup>228</sup> *Prosecutor v. Thomas Lubanga Dyilo*, ICC-01/04-01/06, International Criminal Court (ICC), 14 March 2012.

regarded as a step backwards from the improvements of the ICC.<sup>229</sup> Nevertheless, Prosecutor Moreno-Ocampo (2013) highlights the inclusion of the gender dimensions in the crime of enlisting and conscripting children under the age of 15 years. The OTP proved that Lubanga used sexual violence to dominate child soldiers of both sexes and turned them into instruments to accomplish his vicious ends.<sup>230</sup> Girls as young as 12 years old were forced to be sex slaves. Many of these girls are still retained as “wives” of the commanding officers or roam the streets as prostitutes because they were ostracised by their own people.<sup>231</sup>

The status of all sexual violence charges across each case prosecuted by the ICC until August of 2015 is given below.

- ***Prosecutor v. Ngudjolo (DRC)***<sup>232</sup>

In February 2015, the appeals chamber confirmed, by majority, the Trial Chamber II decision to acquit Mathieu Ngudjolo Chui of charges of crimes against humanity. The charges against Ngudjolo were rape as a crime against humanity, rape as a war crime, sexual slavery as a crime against humanity, and sexual slavery as a war crime.

- ***Prosecutor v. Katanga (DRC)***<sup>233</sup>

The charges against Katanga were rape as a crime against humanity, rape as a war crime, sexual slavery as a crime against humanity, and sexual slavery as a war crime. He was acquitted on all gender-based charges in March 2014.

- ***Prosecutor v. Bemba (CAR)***<sup>234</sup>

Bemba is currently on trial. The trial opened on 29 September 2015. The charges against Bemba are rape as a crime against humanity and rape as a war crime.

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<sup>229</sup> Grey, Rosemary, “Beyond rape – the evolving concept of ‘sexual violence’ under international criminal law” Available at <http://asiapacific.anu.edu.au/regarding-rights/2013/09/20/beyond-rape-evolving-understandings-of-sexual-violence-in-international-criminal-law/> Accessed 04.05.15.

<sup>230</sup> Moreno-Ocampo, *supra* n 202 at 154.

<sup>231</sup> *Ibid.*

<sup>232</sup> Women’s Initiatives for Gender Justice, “Gender Report Card on the International Criminal Court 2014” Available at <http://www.iccwomen.org/documents/Gender-Report-Card-on-the-ICC-2013.pdf>.(2013) Accessed 26.07.15. (Updated until August 2015 at <http://www.icc-cpi.int/Pages/default.aspx> Accessed 28.08.15.)

<sup>233</sup> *Ibid.*

<sup>234</sup> *Ibid.*

- ***Prosecutor v. Kenyatta et al. (Kenya)***<sup>235</sup>

On 13 March 2015 Trial Chamber V, noting the prosecution's withdrawal of charges against Kenyatta, decided to terminate the proceedings in this case and to vacate the summons to appear against him. The charges against Kenyatta were rape as a crime against humanity, other inhumane acts as a crime against humanity, and persecution (by means of rape and other inhumane acts) as a crime against humanity. All charges against Muthaura were withdrawn by the prosecution in March 2013, including all charges for gender crimes. The charges against Muthaura were rape as a crime against humanity, other inhumane acts as a crime against humanity, and persecution (by means of rape and other inhumane acts) as a crime against humanity.

- ***Prosecutor v. Laurent Gbagbo (Côte d'Ivoire)***<sup>236</sup>

Gbagbo is currently on trial, which started on 7 July 2015. The charges against Laurent Gbagbo are rape as a crime against humanity, and persecution (including acts of rape) as a crime against humanity.

- ***Prosecutor v. Ntaganda (DRC)***<sup>237</sup>

Ntaganda is currently on trial. The proceedings started on 2 September 2015. The charges against Ntaganda are rape of civilians as a crime against humanity, rape of civilians as a war crime, rape of child soldiers as a war crime, sexual slavery of civilians as a crime against humanity, sexual slavery of civilians as a war crime, sexual slavery of child soldiers as a war crime, and persecution (including acts of rape and sexual slavery) as a crime against humanity.

- ***Prosecutor v. Mbarushimana (DRC)***<sup>238</sup>

No charges were confirmed for trial, and the suspect was released from custody in December 2011. The initial charges against Mbarushimana were torture as a crime against humanity, torture as a war crime, rape as a crime against humanity, rape as a war crime, other inhumane acts (including acts of rape and mutilation of women) as a crime against humanity, inhuman treatment (including acts of rape and mutilation of

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<sup>235</sup> *Ibid.*

<sup>236</sup> *Ibid.*

<sup>237</sup> *Idem* at 107.

<sup>238</sup> *Ibid.*

women) as a war crime, persecution (based on gender) as a crime against humanity, and mutilation as a war crime

- ***Prosecutor v. Simone Gbagbo (Côte d'Ivoire)***<sup>239</sup>

The arrest warrant was issued on 22 November 2012, but the suspect is not yet in custody. The charges against Simone Gbagbo are rape and other forms of sexual violence as a crime against humanity, and persecution as a crime against humanity.

- ***Prosecutor v. Blé Goudé (Côte d'Ivoire)***<sup>240</sup>

On 20 December 2014 the case was referred to the Trial Chamber I, which will be in charge of the trial. The charges against Blé Goudé are rape as a crime against humanity, and persecution as a crime against humanity.

- ***Prosecutor v. Mudacumura (DRC)***<sup>241</sup>

The arrest warrant was issued on 13 July 2012, but no suspect is in custody yet. The charges against Mudacumura are rape as a war crime, torture as a war crime, mutilation as a war crime, and outrages upon personal dignity as a war crime.

- ***Prosecutor v. Hussein (Sudan)***<sup>242</sup>

An arrest warrant was issued on 1 March 2012, but no suspect is in custody. The charges against Hussein are persecution (including acts of sexual violence) as a crime against humanity, rape as a crime against humanity, rape as a war crime, and outrages upon personal dignity as a war crime.

- ***Prosecutor v. Al-Bashir (Sudan)***<sup>243</sup>

The arrest warrant was issued on 12 July 2010, but no suspect is in custody. The charges against Al-Bashir are sexual violence causing serious bodily or mental harm as an act of genocide, and rape as a crime against humanity

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<sup>239</sup> *Ibid.*

<sup>240</sup> *Ibid.*

<sup>241</sup> *Ibid.*

<sup>242</sup> *Idem* at 108.

<sup>243</sup> *Ibid.*

- ***Prosecutor v. Harun and Kushayb (Sudan)***<sup>244</sup>

The arrest warrants were issued on 27 April 2007, but no suspects are in custody. The charges against Harun are rape as a crime against humanity (two counts), rape as a war crime (two counts), outrages on personal dignity as a war crime, and persecution by means of sexual violence as a crime against humanity (two counts). The charges against Kushayb are rape as a crime against humanity (two counts), rape as a war crime (two counts), outrages upon personal dignity as a war crime (two counts), and persecution by means of sexual violence as a crime against humanity (two counts).

- ***Prosecutor v. Kony et al. (DRC)***<sup>245</sup>

The arrest warrants were issued on 13 October 2005, but no suspects are in custody. The charges against Kony are sexual slavery as a crime against humanity, rape as a crime against humanity, and rape as a war crime. The charges against Otti (believed to be deceased) are sexual slavery as a crime against humanity, and rape as a war crime.

I consider the case law of the ICC rather disappointing. No individual has been convicted for sexual violence or gender-based crimes to date. Many of these suspects are at large; in the future, if these individuals are brought to justice, there might be some convictions. Nevertheless, there are some positive developments. Inder (2013) affirms that “Since the Rome Statute came into force and the ICC has been established, the Court has been learning, testing and defining how to interpret this visionary treaty and operationalise its jurisdictional mandates.”<sup>246</sup> To date, the ICC has started investigations in nine situations (Uganda, the DRC, Darfur (Sudan), CAR I and CAR II, Kenya, Libya, Côte d’Ivoire and Mali).<sup>247</sup> It should be noted that the ICC has encountered several difficulties: the current work and investigation is taking place in some of the most aggressive and corrupt countries around the globe, and many states do not want to guarantee the arrest of ICC indictees present in their territories.<sup>248</sup>

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<sup>244</sup> *Ibid.*

<sup>245</sup> *Ibid.*

<sup>246</sup> Inder, *supra* n 115 at 321.

<sup>247</sup> Available at

[https://www.icccpi.int/en\\_menus/icc/situations%20and%20cases/situations/Pages/situations%20index.aspx](https://www.icccpi.int/en_menus/icc/situations%20and%20cases/situations/Pages/situations%20index.aspx) Accessed 27.02.16.

<sup>248</sup> Inder, *supra* n 115 at 321.

#### 4) Final remarks about the prosecution of sexual violence in International Criminal Law

De Brouwer (2005) explains that at the supranational criminal law level, sexual violence has to be a constituent of genocide, war crimes or crimes against humanity so it can be prosecuted, because the ICC only has jurisdiction over these crimes.<sup>249</sup> Viseur (2013) stresses that “Acts characterized as genocide, crimes against humanity, or war crimes must be pursued at all times, irrespective the factual basis of an act, be it a massacre or rape.”<sup>250</sup> These crimes are so heinous that they create non-derogatory obligations for states, which must establish implementation mechanisms to compensate the damage caused to the international community.<sup>251</sup>

De Brouwer (2005) affirms that despite the immense progress achieved by some tribunals like the ICTR and ICTY, it has to be acknowledged that ICL is to some extent a new system made of different branches of laws and customs, a system that is still developing and consequently has no fixed definitions of crimes.<sup>252</sup> In the construction of proper definitions of crimes of sexual violence like rape or forced prostitution, several sources will have to be consulted. The non-binding EoC of the ICC could be useful in determining the definition of crimes of sexual violence included the Rome Statute as a starting point; nevertheless other sources such as HRL, IHL, the jurisprudence of the domestic and international tribunals, and the teachings of the most highly qualified publicists are also key to elaborating good definitions.<sup>253</sup>

According to Viseur (2013), prosecution for sexual violence under criminal law is now “coming of age”, thanks to international tribunals and courts.<sup>254</sup> However, the upcoming mission though auspicious is still fragile: it needs inventiveness and awareness, since there have been many problems regarding the prosecution of sexual violence (insufficient attention, overlooked and sometimes distorted case law and non-remorseful

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<sup>249</sup> De Brouwer, *supra* n 11 at 39.

<sup>250</sup> Viseur, *supra* n 18 at viii.

<sup>251</sup> *Ibid.*

<sup>252</sup> De Brouwer, *supra* n 11 at 39.

<sup>253</sup> *Ibid.*

<sup>254</sup> Viseur, *supra* n 18 at vii.



impunity) that have contributed to the incapacity to implement the proscription of sexual violence in the international law system.<sup>255</sup>

### iii. Human Rights Law

According to De Brouwer, Kuo, Römken and Van de Herik (2013), even though efforts to penalise crimes of sexual violence can be traced to olden days, a concerted international action to stop impunity for these crimes has taken a long time to come to the light.<sup>256</sup> From the decade of the 1970s, combined collaborations of international women's organisations have had the task of ending the silence and raising awareness of the issue of violence against women, steering the way to the acknowledgment that rape and sexual violence are weapons of war utilised systematically.<sup>257</sup> These authors conclude that "this historical shift in perspective on violence against women translated into the international legal recognition of the discriminatory nature of violence against women and as a violation of the fundamental human rights of women."<sup>258</sup> This principle has been strongly entrenched since the decade of the 1990s in mandatory international HRL.<sup>259</sup>

The most important human rights efforts made to address sexual violence against women in armed conflict are the following:<sup>260</sup>

#### 1) Core Traditional Human Rights Instruments

The Universal Declaration of Human Rights (UDHR) of 1948, the International Covenant on Civil and Human Rights (ICCPR) of 1976, the European Convention on Human Rights (ECHR) of 1953, and the American Convention on Human Rights (ACHR) of 1978.

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<sup>255</sup> *Ibid.*

<sup>256</sup> De Brouwer, Anne-Marie; Kuo, Charlotte; Römken, René E.M. and Van den Herik, Larissa, "Interdisciplinary approaches to recognizing, investigating and prosecuting sexual violence as an international crime" in *Sexual violence as an international crime: interdisciplinary approaches* De Brouwer *et al.* (eds) Antwerp: Intersentia (2013) 3.

<sup>257</sup> *Idem* at 3-4.

<sup>258</sup> *Idem* at 4.

<sup>259</sup> *Ibid.*

<sup>260</sup> See the definitions of hard and soft law at chapter 1.

It is relevant to explain the legal status of these instruments in order to determine their enforceability. The UDHR, as its name says, is a declaration therefore is not legally binding (not hard law). Nevertheless states have been invoking the principles contained in the UDHR for years, therefore it can be considered to have reached the status of customary law, becoming legally binding.<sup>261</sup> The ICPR, ECHR and ACHR are conventions, which means that they are international treaties signed by states and become mandatory when the states ratify them.<sup>262</sup>

According to Stephens (1993) if these documents – considered key human rights instruments – are analysed, it can be concluded that the right to be free from sexual violence has not been recognised as a basic human right.<sup>263</sup> Nevertheless, these treaties contain generic language prohibiting violations to physical integrity, but this prohibition has not been commonly used to include sexual violence situations.<sup>264</sup> However, Quéniwet (2005) affirms that it can be interpreted that the prohibition of physical violence could give persons the right to confront their own state “for having failed to protect their physical (sexual) integrity”.<sup>265</sup> In HRL, to guarantee adequate protection, it is necessary to encompass sexual crimes within the classification of non-derogable rights (being those fundamental rights that a state cannot claim extraordinary circumstances to validate actions that violate these rights).<sup>266</sup> For Hajjar (2000), the prohibition of ill treatment is a non-derogable right.<sup>267</sup> Quéniwet (2005) states that these rights are enumerated in article 4(2) of the ICCPR and article 15 of the ECHR.<sup>268</sup> Furthermore, Quéniwet argues that the prohibition of ill-treatment has become not only international customary law, but *Jus Cogens* as well.<sup>269</sup> Hajjar (2000) thinks this is

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<sup>261</sup> See <https://www.humanrights.gov.au/publications/what-universal-declaration-human-rights> Accessed 20.02.16.

<sup>262</sup> See <http://indicators.ohchr.org/> Accessed 20.02.16.

<sup>263</sup> Stephens, Beth, “Women and the atrocities of war” Chicago: American Bar Association *Human Rights Reference Collection, Human Rights* Vol. 20 No.3 (1993) 13.

<sup>264</sup> *Ibid.*

<sup>265</sup> Quéniwet, Noëlle, *Sexual offences in armed conflict and international law* Ardsley: Transnational (2005) 35.

<sup>266</sup> *Ibid.*

<sup>267</sup> Hajjar, Lisa, “Sovereign bodies, sovereign states and the problem of torture” *Studies in Law Politics and Society* Vol. 21 (2000) 109.

<sup>268</sup> Quéniwet, *supra* n 265 at 35–36.

<sup>269</sup> *Idem* at 36.

remarkable in terms of liability, concerning the interpretation that many international tribunals have adopted, equating sexual violence with ill-treatment and torture.<sup>270</sup>

Sexual crimes are aggressive acts that violate a person's physical integrity and can fall inside the sphere of article 5 of the UDHR ("No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment");<sup>271</sup> article 7 of ICCPR ("No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.");<sup>272</sup> article 3 of the ECHR ("No one shall be subjected to torture or to inhuman or degrading treatment or punishment");<sup>273</sup> and article 5 of the ACHR ("Every person has the right to have his physical, mental, and moral integrity respected. No one shall be subjected to torture or to cruel, inhuman, or degrading punishment or treatment.").<sup>274</sup> Therefore, crimes of sexual violence can certainly be considered inhuman or degrading treatment, and in the more extreme crimes like rape or sexual mutilation they can amount to torture.<sup>275</sup>

In my opinion, encompassing sexual violence within inhuman or degrading treatment is a positive feature (it is almost redundant, because it quite evident that victims of sexual violence are being treated inhumanely and being degraded, and that torture is being inflicted upon them), but is not enough. The prohibition of sexual violence should be expressly incorporated in these core human rights treaties as a non-derogable right, so that in case of violation, individuals have the right to challenge their state in regional or international courts.

## **2) UN General Assembly Declaration on the Protection of Women and Children in Emergency and Armed Conflict (1974)**

According to the United Nations Division for the Advancement of Women (1998), in 1969, the Commission on the Status of Women started to evaluate if it was necessary to

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<sup>270</sup> Hajjar, *supra* n 267 at 139.

<sup>271</sup> UN General Assembly, Universal Declaration of Human Rights, 10 December 1948, 217 A (III).

<sup>272</sup> UN General Assembly, International Covenant on Civil and Political Rights, 16 December 1966, United Nations, Treaty Series, Vol. 999, 171.

<sup>273</sup> Council of Europe, European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14, 4 November 1950, ETS 5.

<sup>274</sup> Organization of American States (OAS), American Convention on Human Rights, "Pact of San Jose", Costa Rica, 22 November 1969.

<sup>275</sup> Quéniévet, *supra* n 265 at 43.

grant, during armed conflict or emergency contexts, extraordinary protection for especially vulnerable groups, in particular women and children.<sup>276</sup> Consequently, the Economic and Social Council (ECOSOC) requested the General Assembly to issue a declaration in this subject and the General Assembly consented. Hence, the Declaration on the Protection of Women and Children in Emergency and Armed Conflict was born in 1974, which acknowledges the suffering of women and children in armed conflict; highlights the relevant role that women play “in society, in the family and particularly in the upbringing of children”; and emphasises the need to grant them “special protection.”<sup>277</sup> However, there is not an express mention of how women are especially vulnerable to sexual assaults during armed conflict, though there is a general plea for obedience to the laws of armed conflict, including the Fourth Geneva Convention that explicitly forbids rape.<sup>278</sup>

It should be noted that being a declaration of the General Assembly, the Declaration on the Protection of Women and Children in Emergency and Armed Conflict is not legally binding, therefore the legal statute can be categorised as soft law. I think this declaration is too vague and imprecise, without any explicit reference to sexual violence. Nevertheless, this flaw is understandable considering the time in which declaration was adopted: the early 1970s was very early to expect more progressive resolutions addressing sexual violence. Therefore, I believe that this declaration is a good starting point in the evolution of the prohibition of sexual violence in HRL.

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<sup>276</sup> United Nations Division for the Advancement of Women, *supra* n 31 at 5.

<sup>277</sup> UN General Assembly, Declaration on the Protection of Women and Children in Emergency and Armed Conflict, 14 December 1974, A/RES/3318 (XXIX): “Aware of the suffering of women and children in many areas of the world, especially in those areas subject to suppression, aggression, colonialism, racism, alien domination and foreign subjugation, ... Conscious of its responsibility for the destiny of the rising generation and for the destiny of mothers, who play an important role in society, in the family and particularly in the upbringing of children ... Bearing in mind the need to provide special protection of women and children belonging to the civilian population.”

<sup>278</sup> *Ibid.* “3. All States shall abide fully by their obligations under the Geneva Protocol of 1925 and the Geneva Conventions of 1949, as well as other instruments of international law relative to respect for human rights in armed conflicts, which offer important guarantees for the protection of women and children.” See also United Nations Division for the Advancement of Women, *supra* n 31 at 5.

### **3) The Convention on the Elimination of All Forms of Discrimination against Women (1979).**

The CEDAW is a treaty, therefore it is legally binding for the states that ratify it. No specific provision on violence against women can be found in this convention.<sup>279</sup> De Brouwer, Kuo, Römkens and Van de Herik (2013), believe that the reason for this omission is that in 1979 it was still too controversial to expressly include violence against women in a treaty; not until 13 years later (in 1992) the organ created to monitor the Women's Convention (the Committee on the Elimination of Discrimination against Women) adopted a general recommendation on "Violence against Women".<sup>280</sup>

In my view, considering the legally binding status of the CEDAW, it is disappointing that sexual violence against women was not included. It is hard to think of any situation in which a woman can be more discriminated against than when she is being raped or sexually abused. If a convention on this matter does not address an issue that exemplifies discrimination against women so well, it is better not to adopt the convention at all. Nevertheless, as explained above, context has to be taken into consideration. Hence for the late 1970s the CEDAW can be regarded as a fairly reasonable advancement. Furthermore, it planted the seed of further advancement in the protection of women from sexual violence in armed conflict.<sup>281</sup>

### **4) The World Conference to Review and Appraise the Achievements of the United Nations Decade for Women: Equality, Development and Peace and the Agenda and Nairobi Forward Looking Strategies for Advancement of Women (1985)**

The World Conference to Review and Appraise the Achievements of the United Nations Decade for Women: Equality, Development and Peace took place in Nairobi in 1985.<sup>282</sup> The Conference adopted the Agenda and Nairobi Forward Looking Strategies for Advancement of Women, which highlighted that "women are one of the most vulnerable groups in the regions affected by armed conflicts" and that "women are

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<sup>279</sup> Convention on the Elimination of All Forms of Discrimination Against Women, 18 December 1979, United Nations, Treaty Series, vol. 1249.

<sup>280</sup> De Brouwer *et al.*, *supra* n 256 at 4.

<sup>281</sup> UN CEDAW General Recommendation No. 19: Violence against women, 1992, par 16 "Wars, armed conflicts and the occupation of territories often lead to increased prostitution, trafficking in women and sexual assault of women, which require specific protective and punitive measures."

<sup>282</sup> United Nations Division for the Advancement of Women, *supra* n 31 at 7.

‘sexually abused and raped’.”<sup>283</sup> The United Nations Division for the Advancement of Women (1998) regrets that the explicit connection between sexual violence against women and armed conflict was not addressed.<sup>284</sup>

The legal status of the agenda is soft law, therefore is not legally binding. The importance of this document is that the evolution of the language can be appreciated; even though sexual violence against women and armed conflict are not directly intertwined, the two concepts are addressed in the same document. This reflects a slow but steady progress to achieving an express prohibition of sexual violence against women in armed conflict in HRL.

## 5) The Convention Against Torture (1987)

According to article 1 of the Convention, torture is any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person performed by a person in a public official capacity, with the purpose to obtain information, to punish, to intimidate or to coerce.<sup>285</sup>

According to Amnesty International (2000), acts of sexual violence committed by government officials are a common technique of torture of women.<sup>286</sup> Sexual violence can amount to torture when it fulfils the elements of the crime: if a public official

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<sup>283</sup> *Ibid.*, See also the Agenda and Nairobi Forward Looking Strategies for Advancement of Women, A/CONF.116/28/Rev.1(1986) par 41: “In line with the recommendations of the commission on the Status of Women, acting as the Preparatory Body for the Conference at its second session, particular attention is given to especially vulnerable and underprivileged groups of women, such as rural and urban poor women; **women in areas affected by armed conflicts**” [emphasis added]; par 243 “Since **women are one of the most vulnerable groups in the regions affected by armed conflicts** [emphasis added] special attention has to be drawn to the need to eliminate obstacles to the fulfilment of the objectives of equality, development and peace and the principles of the Charter of the United Nations; par 258 “Violence against women exists in various forms in everyday life in all societies. Women are beaten, mutilated, burned, **sexually abused and raped** [emphasis added]. Such violence is a major obstacle to the achievement of peace”.

<sup>284</sup> United Nations Division for the Advancement of Women, *supra* n 31 at 5.

<sup>285</sup> UN General Assembly, Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 10 December 1984, United Nations, Treaty Series, vol. 1465, “...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.”

<sup>286</sup> Callamard, Agnès, *Monitoring and investigating sexual violence/Amnesty International and Codesria* Amnesty International, (2000) 9.

sexually attacks a woman, he or she is inflicting physical pain and injuring the victim, causing her great distress from the psychological point of view.<sup>287</sup>

The CAT constitutes hard law for the ratifying states because it is a treaty. Even though sexual violence against women in armed conflict is not expressly mentioned in the CAT, it is very relevant to include it in this research because of the similarities between torture and sexual violence, which can lead to many judges concluding that sexual violence assaults are in some cases acts of torture. It would be even better if the definition of torture did not limit the perpetrator of the crime to a public official, as anyone could inflict torture during an armed conflict. This way the protection of women from sexual violence could be expanded.

#### **6) The Convention on the Rights of the Child (1990) and Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography (2002)**

Protection from sexual violence can be found in articles 19 and 34 of the CRC.<sup>288</sup> According to article 19: “State Parties shall take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse.”<sup>289</sup> Article 34 affirms that “States Parties undertake to protect the child from all forms of sexual exploitation and sexual abuse.”<sup>290</sup>

In the Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography, articles 1, 2, 3 and 4 refer to sexual violence against children, without making the distinction of whether it takes place in an armed conflict or not.<sup>291</sup>

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<sup>287</sup> *Ibid.*

<sup>288</sup> UN General Assembly, Convention on the Rights of the Child, 20 November 1989, United Nations Treaty Series, Vol. 1577.

<sup>289</sup> *Ibid.*

<sup>290</sup> *Ibid.*

<sup>291</sup> UN General Assembly, Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography, 16 March 2001, A/RES/54/263.

The legal status of both the CRC and the Optional Protocol is that they are legally binding for the states that sign and ratify them. These instruments are included in this research because the term “children” includes both boys and girls. Furthermore, the language used by the CRC and the Protocol is very broad, and it does not limit the protection exclusively to times of peace. Therefore, it can be inferred that the protection granted by these instruments includes armed conflict. This makes sense because during armed conflict children are especially vulnerable to sexual violence. However, I would have preferred an explicit prohibition of sexual violence against children in armed conflict. Regarding the protection of victims of sexual violence, it is preferable that the prohibition is directly laid down rather than being inferred from the text of the document – especially in an area as sensitive as sexual violence against children. It should be noted also that sexual violence against children constitutes a different crime to when it is inflicted upon adults: paedophilia and statutory rape.

#### **7) The Declaration on the Elimination of Violence against Women (1993).**

In December 1993, the General Assembly adopted this declaration that recognises three main categories of violence against women: physical, sexual and psychological violence taking place in the family, in the community and perpetrated or condoned by the state.<sup>292</sup>

The legal status of this declaration is soft law, hence is not legally binding. The Preamble expressly acknowledges that women in armed conflict are especially vulnerable to violence.<sup>293</sup> However, feminists like Charlesworth (1999) criticise the declaration because it “makes violence against women an issue of international concern, but refrains from categorizing violence against women as a human rights issue in its operative articles.”<sup>294</sup>

I do not agree with this opinion. The declaration is quite firm in condemning violence against women in all its articles, specially violence of a sexual nature, including a list of

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<sup>292</sup> UN General Assembly, Declaration on the Elimination of Violence against Women, 20 December 1993, A/RES/48/104., article 2.

<sup>293</sup> *Ibid.*

<sup>294</sup> Charlesworth, Hilary, “Feminist methods in international law” *American Journal of International Law* Vol. 93 No.2 (1999) 382.



human rights to which women are entitled that can be undermined by violence.<sup>295</sup> It also encourages UN organs and agencies to contribute in the implementation of the rights and principles of the declaration.<sup>296</sup> It is very important that the declaration makes reference to violence perpetrated or condoned by the state, because this is what happens almost all the time during armed conflict.<sup>297</sup> From the reference in the Preamble to the vulnerability of women in armed conflict, it can be concluded that the principles and rights of the declaration apply both to peacetime and armed conflict. So far, this is the finest human rights instrument examined in this research concerning the prohibition of sexual violence. I only wish it could be hard law instead of soft law.

#### **8) The Vienna Conference on Human Rights and the Vienna Declaration and Programme of Action (1993)**

According to the United Nations Division for the Advancement of Women (1998), this conference was a turning point for women's human rights, because it recognised that violence against women is a human rights matter of special importance.<sup>298</sup> Prior to this, these problems were considered a private matter in which the government or any international institution could not interfere.<sup>299</sup> During the Vienna Conference many women NGOs participated and were responsible for emphasising the issue of violence against women, influenced by the large amount of media information regarding the ongoing sexual violence against women in the conflict in the former Yugoslavia.<sup>300</sup> The conference concluded with the Vienna Declaration and Programme of Action. Unfortunately, because the Vienna Declaration and Programme of Action is a result of an international conference and not a treaty, its legal status is only soft law and is not legally binding.

The most relevant provision of the Vienna Declaration and Programme of Action is Principle 39:

Violations of the human rights of women in situations of armed conflict are violations of the fundamental principles of international human rights and

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<sup>295</sup> UN General Assembly, Declaration on the Elimination of Violence against Women, *supra* n 292 at article 3.

<sup>296</sup> *Idem* at article 5.

<sup>297</sup> *Idem* at article 2.

<sup>298</sup> United Nations Division for the Advancement of Women, *supra* n 31 at 12.

<sup>299</sup> *Ibid.*

<sup>300</sup> *Ibid.*

humanitarian law. All violations of this kind, including in particular murder, systematic rape, sexual slavery, and forced pregnancy, require a particularly effective response.<sup>301</sup>

In accordance with the legal status of soft law of the Vienna Declaration and Programme of Action, principle 39 is not enforceable in practice. Nevertheless, in the future principle 39 could be enforced if it reaches the status of customary international law. This principle was certainly taken into consideration in international criminal law: the Rome Statute is evidence of this.

Chinkin (1994) explains that this principle was well received concerning its application of the Geneva Conventions because it did not make a distinction between international and non-international armed conflict.<sup>302</sup> The Fourth Geneva Convention specifically prohibits rape but it only applies to an international armed conflict; in a non-international armed conflict, Common Article 3 would apply concerning the protection of civilians, but it only contains a prohibition that could be interpreted to include rape (cruel treatment, torture or humiliating and degrading treatment).<sup>303</sup> Considering that principle 39 is only soft law, it is understood that Chinkin welcomes the logic behind the principle, but this does not mean it has real effect in the Geneva Conventions. However, as soft law, this principle might influence a reform of the Geneva Conventions in the future.

#### **9) The special rapporteur on the situation of systematic rape, sexual slavery and slavery-like practices during armed conflict (1993) and the special rapporteur on violence against women (1994)**

In 1993, the UN Sub-Commission on the Prevention of Discrimination and the Protection of Minorities appointed their member Ms Linda Chavez of the US as the special rapporteur on the situation of systematic rape, sexual slavery and slavery-like practices during armed conflict.<sup>304</sup>

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<sup>301</sup> Vienna Declaration and Programme of Action, 12 July 1993, A/CONF.157/23.

<sup>302</sup> Chinkin, Christine, "Rape and sexual abuse of women in international law" *Eur. J. Int'l L.* Vol. 5 (1994) 332.

<sup>303</sup> *Ibid.*

<sup>304</sup> See <http://www.ohchr.org/EN/Issues/Women/SRWomen/Pages/SRWomenIndex.aspx> Accessed 17.02.16.

Her first preliminary report was submitted in 1996. The final report was submitted by her successor Ms Gay McDougal in 1998.<sup>305</sup> This report recognises sexual violence as a weapon of war and centres on the task of developing ICL to end impunity for crimes of sexual violence.<sup>306</sup>

The Commission on Human Rights appointed in 1994 a special rapporteur on violence against women, its causes and consequences. Ms Radhika Coomaraswamy from Sri Lanka was designated in this position and served until July 2003.<sup>307</sup> Her successor was Dr Yakin Ertürk from Turkey, who served in the position from August 2003 until July 2009. From August 2009 to July 2015, Ms Rashida Manjo from South Africa occupied the position and in August 2015 Dr Dubravka Šimonović from Croatia was appointed. The mandate was extended by the Commission on Human Rights in 2003 and last renewed in 2013.<sup>308</sup>

According to the mandate, the special rapporteur is requested to investigate the reasons for and consequences of violence against women, to suggest actions to eradicate the violence and to ameliorate its consequences, to work together with the Human Rights Council and its bodies, and continue to embrace an inclusive and universal approach for the eradication of violence against women.<sup>309</sup>

The reports issued by the special rapporteur have the legal status of soft law. Nevertheless, they have very relevant persuasive authority. The majority of the authors consulted in this research have cited some of the reports of the special rapporteurs (Kelly Askin, Christine Chinkin, Anne-Marie De Brouwer, Patricia Viseur etc.) the

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<sup>305</sup> United Nations Division for the Advancement of Women, *supra* n 31 at 3.

<sup>306</sup> UN Sub-Commission on the promotion and protection of human rights, systematic rape, sexual slavery and slavery-like practices during armed conflict, Final report submitted by Gay J. McDougall, special rapporteur (1998) par 5: “2. The use of sexual slavery and sexual violence as tactics and weapons of war is an all too common, yet often overlooked, atrocity that demands consistent and committed action on the part of the global community. Although a wide range of responses is needed, this final report focuses primarily on the development of international criminal law as a fruitful area for effective action at the national and international levels to end the cycle of impunity for slavery, including sexual slavery, and for sexual violence, including rape.”

<sup>307</sup> See <http://www.ohchr.org/EN/Issues/Women/SRWomen/Pages/SRWomenIndex.aspx> Accessed 17.02.16.

<sup>308</sup> *Ibid.*

<sup>309</sup> UN Commission on Human Rights, Question of integrating the human rights of women into the human rights mechanisms of the United Nations, 8 March 1995, E/CN.4/RES/1995/86.

ICTR and ICTY have cited them in their judgements as well. I believe the figure of the special rapporteur is very important, especially when he or she investigates certain countries. Their work is not only valuable from the academic point of view, but they also assume a monitoring function that can pressure the governments of the investigated countries and create awareness in the international community about what kind of violations of human rights are taking place in those territories.

Even though the mandate of the special rapporteur on the situation of systematic rape, sexual slavery and slavery-like practices was not renewed, the Office of Special Representative of the Secretary-General on Sexual Violence in Conflict created in 2009 has assumed most of the functions of the special rapporteur. Furthermore, it extended the scope of investigation from certain crimes of sexual violence (rape, sexual slavery) to sexual violence in general.<sup>310</sup> The office is currently working in eight countries that are priority considering the rampant episodes of sexual violence currently raging in them: Bosnia and Herzegovina; Colombia; CAR; Cote d'Ivoire; Liberia; DRC; South Sudan; and Sudan.<sup>311</sup>

#### **10) The Inter-American Convention on the Prevention, Punishment and Eradication of Violence Against Women (1994)**

The Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women, or Convention of Belém do Pará, is very similar in its text to the Declaration on the Elimination of Violence against Women. It prohibits physical, sexual and psychological violence against women taking place in the family and community and being perpetrated or condoned by the state.<sup>312</sup> This instrument refers specially to the protection of women during armed conflict in article 9, which takes into special account the situation of women affected by armed conflict who are victims of violence.<sup>313</sup>

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<sup>310</sup> See <http://www.un.org/sexualviolenceinconflict/about-us/about-the-office/> Accessed 14.03.16.

<sup>311</sup> *Ibid.*

<sup>312</sup> Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women (“Convention of Belém do Para”), 9 June 1994, article 2.

<sup>313</sup> *Idem* at article 9: “The States Parties shall take special account of the vulnerability of women to violence by reason of, among others, their race or ethnic background or their status as migrants, refugees or displaced persons. Similar consideration shall be given to women subjected to violence while pregnant or who are disabled, of minor age, elderly, socioeconomically disadvantaged, affected by armed conflict or deprived of their freedom.”

Being a convention this is legally binding and therefore constitutes hard law; furthermore, there is a special regional court that can enforce the convention: the Inter-American Court of Human Rights.<sup>314</sup>

This treaty is visionary for its time and a very powerful instrument for the protection of women from sexual violence; it proscribes it and has real enforceability in a regional court. It should be noted that Europe only adopted a similar convention with regional enforceability 17 years later, in 2011. South Africa did the same nine years later in 2004.<sup>315</sup> As a Chilean woman, lawyer and diplomat, I feel very proud to come from a region of the world that was a pioneer in the field of protection of women against violence in the human rights system.

### **11) The Fourth World Conference on Women and the Beijing Declaration of Action (1995)**

In November 1995 the Fourth World Conference on Women took place in Beijing, China. During this conference sexual violence against women in armed conflict was a very relevant issue.<sup>316</sup> The result of this conference was reflected in the Beijing Declaration of Action, which recognises women in armed conflict as one of the 12 crucial areas of urgent action to guarantee gender equality:<sup>317</sup>

While entire communities suffer the consequences of armed conflict and terrorism, women and girls are particularly affected because of their status in society and their sex. Parties to the conflict often rape women with impunity, sometimes using systematic rape as a tactic of war and terrorism. The impact of violence against women and violations of the human rights of women in such situations is experienced by women of all ages, who suffer displacement, loss of home and property, loss or involuntary disappearance of close relatives, poverty and family separation and disintegration, and who are victims of acts of murder, terrorism, torture, involuntary disappearance, sexual slavery, rape, sexual abuse

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<sup>314</sup> See <http://www.corteidh.or.cr/index.php/es/acerca-de/instrumentos> Accessed 29.02.16. It should be noted that individuals that want to invoke the convention have to make a submission first to the Inter-American Commission of Human Rights and this organ will decide to elevate the case to the court or not.

<sup>315</sup> The European Convention on Preventing and Combating Violence against Women and Domestic Violence (2011) (see *infra* at 15); The Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa (2003) (See *infra* at 13).

<sup>316</sup> United Nations Division for the Advancement of Women, *supra* n 31 at 14.

<sup>317</sup> See <http://www.unwomen.org/en/news/in-focus/csw/feature-stories> Accessed 29.02.16.

and forced pregnancy in situations of armed conflict, especially as a result of policies of ethnic cleansing and other new and emerging forms of violence. This is compounded by the life-long social, economic and psychologically traumatic consequences of armed conflict and foreign occupation and alien domination.<sup>318</sup>

This paragraph is remarkable, because it describes perfectly the meaning of sexual violence during armed conflict for girls and women. Unfortunately, the Beijing Declaration of Action is only soft law, with no legally binding effect. Nevertheless, the conclusions and principles established at the conference paved the way for further action from the UN in this field, efforts that culminated in 2010 with the creation of UN Women, the first United Nations Entity for Gender Equality and the Empowerment of Women.<sup>319</sup> The first Executive Director of UN Women was the former and current president of my country, Chile – Her Excellency Michelle Bachelet.

## **12) The Guiding Principles on Internal Displacement (1998)**

According to Sooma (2006) the Guiding Principles on Internal Displacement (GPID) were established in a resolution of the UN Economic and Social Council with the purpose of reaffirming and compiling human rights and humanitarian law relevant to internally displaced persons.<sup>320</sup> According to Principle 11:

Internally displaced persons, whether or not their liberty has been restricted, shall be protected in particular against: (a) Rape, mutilation, torture, cruel, inhuman or degrading treatment or punishment, and other outrages upon personal dignity, such as acts of gender-specific violence, forced prostitution and any form of indecent assault; (b) Slavery or any contemporary form of slavery, such as sale into marriage, sexual exploitation, or forced labour of children.<sup>321</sup>

I believe this principle is very relevant, because when women and girls are internally displaced they become especially vulnerable to sexual violence and should be protected

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<sup>318</sup> United Nations, Beijing Declaration and Platform of Action, adopted at the Fourth World Conference on Women, 27 October 1995, par 135.

<sup>319</sup> See <http://www.unwomen.org/en/about-us/about-un-women> Accessed 26.02.16.

<sup>320</sup> Sooma, *supra* n 27 at 97.

<sup>321</sup> UN High Commissioner for Refugees (UNHCR), Guiding principles on internal displacement, 22 July 1998, ADM 1.1, PRL 12.1, PR00/98/109.

from it. Unfortunately, as the title states, these are only “guiding principles”, with no legally binding effect; they constitute soft law. Nevertheless, the GPID can become binding to the extent that they reflect customary law.

### **13) The Protocol to the African Charter on Human and People’s Rights on the Rights of Women in Africa (the Women’s Protocol) (2003)**

Article 11 of the Protocol states a clear protection of women against sexual violence in armed conflict as follows:

States Parties undertake to protect asylum-seeking women, refugees, returnees and internally displaced persons, against all forms of violence, rape and other forms of sexual exploitation, and to ensure that such acts are considered war crimes, genocide and/or crimes against humanity and that their perpetrators are brought to justice before a competent criminal jurisdiction.<sup>322</sup>

The Women’s Protocol is very significant for Africa. According to Dyani (2006), from the protocol “it is clear sexual violence against women will not be tolerated”<sup>323</sup> as it constitutes an infraction of IHL that may amount to international war crimes, genocide and crimes against humanity. The protocol also creates accountability for the perpetrators of those crimes.<sup>324</sup> Nevertheless, the Women’s Protocol does not provide specific guidelines on how to execute the duties of the states, creating a problem for the future operation of the African Court.<sup>325</sup>

The protocol is legally binding for the African states that ratify it and can be enforced by the African Court of Human and People’s Rights (to become in the future the African Court of Justice and Human Rights). This future may not be very near, because only five members of the African Union have ratified the protocol of 2008 that merges the African Court of Justice with the African Court of Human and People’s Rights.<sup>326</sup> Furthermore, only 27 members of the African Union have ratified the Protocol of the African Court of Human and People’s Rights.<sup>327</sup> Therefore, even if the Protocol to the

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<sup>322</sup> Protocol to the African Charter on Human and People’s Rights on the Rights of Women in Africa, 11 July 2003.

<sup>323</sup> Dyani, *supra* n 25 at 186.

<sup>324</sup> *Ibid.*

<sup>325</sup> *Idem* at 187.

<sup>326</sup> See <http://www.au.int/en/organs/cj> Accessed 26.02.16.

<sup>327</sup> *Ibid.*

African Charter on Human and People’s Rights on the Rights of Women in Africa is hard law, the small number of states that are under the jurisdiction of the court makes the protection granted by this instrument very weak. Looking at all the ongoing armed conflicts in Africa, this situation is very concerning to say the least. Furthermore, the reticence of African countries to render ICC indictees up to justice, claiming that “the ICC has bullied Africa”,<sup>328</sup> makes this situation even more concerning. I attended a lecture at the University of Johannesburg in 2015, which accused the ICC of shameless partiality against African leaders and alleged that Al-Bashir was a victim wrongfully accused and persecuted by the court.<sup>329</sup> Despite the strong criticism of the ICC, no one suggested a viable alternative or mentioned the role of the African Court. If the ICC is such a partial and unfair institution, why doesn’t anyone propose the African Court as a viable alternative? Or is impunity for war criminals the only option in Africa? The silence of the academics, members of the diplomatic corps and students concerning the African Court is indicative of the amount of faith they have in the future and effectiveness of that court.

#### **14) The Nairobi Declaration on Women and Girls’ Right to Remedy and Reparation (2007)**

This declaration was adopted at the International Meeting on Women and Girls’ Rights to Remedy and Reparation, held in 2007 in Brazzaville, Republic of Congo.<sup>330</sup>

According to Senier (2010), the Nairobi Declaration creates a “roadmap” of ways the international community can include reparations for the damage resulting from armed conflict and ways of preventing this damage, involving in the process women’s needs and strengths.<sup>331</sup> Par. 3 of the Nairobi declaration states: “Reparation must drive post-conflict transformation of socio-cultural injustices, and political and structural inequalities that shape the lives of women and girls; that reintegration and restitution by

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<sup>328</sup> Holie, David, *Justice Denied: The reality of the International Criminal Court*, The Africa Research Centre (2014) 405.

<sup>329</sup> Lecture on “The International Criminal Court – dream and reality – the Al-Bashir case and South Africa.” University of Johannesburg, Auckland Park Campus, 13 August 2015.

<sup>330</sup> See <http://www.achpr.org/sessions/42nd/resolutions/111/> Accessed 18.02.16.

<sup>331</sup> Senier, Amy, “The Nairobi Declaration: a gendered paradigm for post-conflict reparations” in *Protecting humanity: essays in international law and policy in honour of Navanethem Pillay Eboe-Osuji* (ed) Martinus Nijhoff (2010) 227.



themselves are not sufficient goals of reparation, since the origins of violations of women and girls' human rights predate the conflict situation."<sup>332</sup>

This paragraph is interesting because it states that reparations are not sufficient because they are only a remedy for damage that is already irreversible; therefore is essential to go to the source of that damage (the armed conflict) and try to avoid it. The legal status of the declaration is soft law, creating no legal obligation; however it is relevant because it can illuminate a path for tribunals to grant restitution and reparations in the case of conflict-related sexual violence. However, for the Nairobi declaration to have this enlightening effect, the African human rights system has to be fully operative, incorporating the majority of the members of the African Union.

### **15) The European Convention on Preventing and Combating Violence against Women and Domestic Violence (2011)**

According to De Brouwer *et al.* (2013), this instrument is one of the most remarkable advancements in addressing violence against women as a violation of human rights.<sup>333</sup>

According to the convention there can be no real gender equality if women are victims of gender-based violence on a mass scale and if states ignore this situation.<sup>334</sup>

According to article 2 of the convention:

1 This Convention shall apply to all forms of violence against women, including domestic violence, which affects women disproportionately.

2 Parties are encouraged to apply this Convention to all victims of domestic violence. Parties shall pay particular attention to women victims of gender-based violence in implementing the provisions of this Convention.

3 This Convention shall apply in times of peace and in situations of armed conflict.<sup>335</sup>

The Convention also prohibits expressly sexual violence including rape, forced marriage, female genital mutilation, and forced abortion and forced sterilization.<sup>336</sup>

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<sup>332</sup> International Meeting on Women's and Girl's Rights to Remedy and Reparation, Nairobi Declaration on Women's and Girls' Right to Remedy and Reparation, 21 March 2007, par 3.

<sup>333</sup> De Brouwer *et al.*, *supra* n 256 at 4.

<sup>334</sup> See [http://www.coe.int/t/dghl/standardsetting/convention-violence/about\\_en.asp](http://www.coe.int/t/dghl/standardsetting/convention-violence/about_en.asp) Accessed 05.09.2015.

<sup>335</sup> Council of Europe, The Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence, November 2014, ISBN 978-92-871-7990-6.

This convention is legally binding for the European states that ratify it and it can be enforced by the European Court of Human Rights.<sup>337</sup> The convention is impressive, with its text expressly including different crimes of sexual violence. However, Europe only adopted a convention of this nature in 2011; America did it in 1994 and Africa did it in 2003. From the point of view of ICL, Europe has constantly supported the ICC from its early stages. But from the human rights point of view, especially concerning the rights of women, it is extremely late in addressing the issue of sexual violence in general.

## 16) United Nations Security Council Resolutions

Pratt (2013) explains that there are several UN Security Council resolutions that either mention or are focused on sexual violence, including resolutions concerning mandates of UN peace operations. Many of these resolutions acknowledge sexual violence as a critical international security problem and as an important element of the protection of civilians.<sup>338</sup> The most relevant of these resolutions are discussed below.

### a) 1325 (2000) Women and peace and security

According to Pratt (2013), this was the first time the Security Council addressed women and gender in association with peace and security.<sup>339</sup> This resolution has very relevant objectives, such as achieving an official understanding of gender within UN institutions,<sup>340</sup> incorporating women into peace processes to end conflicts,<sup>341</sup> and urging states to take measures to protect women from sexual assaults during armed conflict.<sup>342</sup>

It also emphasises the responsibility of states to end the impunity of perpetrators of genocide, war crimes and crimes against humanity, including sexual violence in that context.<sup>343</sup> It also stresses the necessity of engaging with women's groups and NGOs to

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<sup>336</sup> *Idem* at articles 36, 37, 38, 39.

<sup>337</sup> See <http://www.echr.coe.int/Pages/home.aspx?p=home> Accessed 01.03.15.

<sup>338</sup> Pratt, Nicola, "Reconceptualizing gender, reinscribing racial-sexual boundaries in international security: the case of UN Security Council Resolution 1325" *International Studies Quarterly* Vol. 57 No. 4 (2013) 773.

<sup>339</sup> *Ibid.*

<sup>340</sup> UN Security Council, Security Council Resolution 1325 (2000) [on women and peace and security], 31 October 2000, S/RES/1325, par 2.

<sup>341</sup> *Idem* at par 1.

<sup>342</sup> *Idem* at par 10.

<sup>343</sup> *Idem* at par 11.

incorporate gender considerations in Security Council missions.<sup>344</sup> Finally, the resolution invites the Secretary General to elaborate a study on the impact of armed conflict on women and girls and the participation of women in peace building and conflict resolution.<sup>345</sup>

b) 1612 (2005) Children and armed conflict

This resolution is almost entirely about the protection of children during armed conflict and the prohibition of enlisting child soldiers; there are only two references to sexual violence. The first is in paragraph 1, which “strongly condemns all other violations and abuses committed against children in situations of armed conflict.”<sup>346</sup> The second reference is regarding the “Secretary General’s zero tolerance policy on sexual exploitation and abuse” among the peacekeeping operations personnel.<sup>347</sup> This is very relevant because it is the first mention of this policy in a Security Council resolution and was not included in Resolution 1325.

c) 1674 (2006) Protection of civilians in armed conflict

This resolution’s main focus is the protection of civilians (that includes women and girls) in armed conflict in general. Although sexual violence is a relevant issue it is not the main concern of the resolution.<sup>348</sup> This resolution recognises the importance of education in preventing sexual violence against civilians in armed conflict.<sup>349</sup> It also condemns torture and gender-based violence against civilians in armed conflict.<sup>350</sup> The resolution condemns all forms of sexual violence against women and children and urges peacekeeping operations to take all feasible measures to prevent this violence.<sup>351</sup> Finally, it also makes reference to the zero tolerance policy of the Secretary General to sexual exploitation and abuse in peacekeeping operations.<sup>352</sup>

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<sup>344</sup> *Idem* at par 15.

<sup>345</sup> *Idem* at par 16.

<sup>346</sup> UN Security Council, Security Council Resolution 1612 (2005) [on children in armed conflict], 26 July 2005, S/RES/1612, par 1.

<sup>347</sup> *Idem* at par 11.

<sup>348</sup> UN Security Council, Security Council Resolution 1674 (2006) [on protection of civilians in armed conflict], 28 April 2006, S/RES/1674.

<sup>349</sup> *Idem* at Preamble.

<sup>350</sup> *Idem* at par 5.

<sup>351</sup> *Idem* at par 19.

<sup>352</sup> *Idem* at par 20.

d) 1820 (2009) Women and peace and security

This resolution is entirely about sexual violence in armed conflict, and it is very relevant because it has the principles and measures of resolution 1325 as a basis but includes stronger measures to prevent sexual violence and protect women.<sup>353</sup> In this resolution, for the first time the Security Council recognised that sexual violence can be used as a weapon of war, targeting women to humiliate, dominate and forcibly remove them from their communities.<sup>354</sup> It also acknowledges that when sexual violence is perpetrated as part of a widespread or systematic attack against civilians, it constitutes a threat to the maintenance of international peace and security.<sup>355</sup> This resolution uses stronger language than the previous ones, because it demands that all parties to a conflict immediately cease all actions of sexual violence against civilians.<sup>356</sup> Resolution 1820 explicitly recognises, for the first time, that sexual violence can constitute war crimes, crimes against humanity or an act of genocide and that states are obligated to prosecute the perpetrators of these crimes, without the option of amnesty.<sup>357</sup> It also stresses the need for the Secretary General and the relevant UN agencies to consult with women NGOs to prevent and address sexual violence against women in conflicts.<sup>358</sup> This resolution also incorporates a very relevant element, the need to support the developing and strengthening of national institutions, especially judicial and health systems, in order to confront properly the post-conflict problems that follow sexual violence.<sup>359</sup> Finally, this resolution suggests the Security Council should take into consideration the perpetration of sexual violence against girls and women in the decision of imposing or renewing state-specific sanction regimes.<sup>360</sup> This is quite ground-breaking, because sanctions are one of the most severe measures the Security Council can adopt in order to maintain international peace and security.

e) 1882 (2009) Children and armed conflict

Similar to Resolution 1612, this resolution focuses mainly in the protection of children in armed conflict. However, there are more references to sexual violence and it

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<sup>353</sup> UN Security Council, Report of the Secretary-General pursuant to Security Council Resolution 1820, 15 July 2009, S/2009/362.

<sup>354</sup> *Idem* at Preamble and par 1.

<sup>355</sup> *Idem* at par 1.

<sup>356</sup> *Idem* at par 2.

<sup>357</sup> *Idem* at par 4.

<sup>358</sup> *Idem* at par 10.

<sup>359</sup> *Idem* at par 13.

<sup>360</sup> *Idem* at par 5.

incorporates stronger measures to prevent and punish it.<sup>361</sup> This resolution expresses its deep concern for the brutality of rape and sexual violence in armed conflict and recognises that in some cases it is used as a weapon of war.<sup>362</sup> It also strongly condemns acts of rape and sexual violence against children.<sup>363</sup> In Resolution 1612 this was implied because it condemned “all violations and abuses”,<sup>364</sup> but there was not an explicit reference to sexual violence.

Resolution 1882 incorporates a very important measure: the “name and shame” power of the Secretary General, who can include in the annexes of his or her reports the names of the parties to a conflict who perpetrate rape and other acts of sexual violence.<sup>365</sup> The resolution also urges to the parties named in the annexes of the Secretary General’s reports to “prepare and implement concrete time-bound actions plans” to stop the actions of rape and sexual violence against children in contravention of international law.<sup>366</sup> Finally, Resolution 1882 calls upon parties to prosecute the perpetrators of crimes of sexual violence, either through national courts or international mechanisms, or mixed criminal courts when applicable.<sup>367</sup>

f) 1888 (2009) Women and peace and security

This resolution in general is very similar to Resolution 1820.<sup>368</sup> However, it incorporates some new elements that Resolution 1820 does not have. For example, it stresses the importance of justice and reconciliation mechanisms like “mixed” courts and truth and reconciliation commissions in order to achieve not only accountability for the crimes but also truth, reconciliation and promotion of the rights of the victims.<sup>369</sup> This resolution, for the first time, makes reference to the principle of the command responsibility of military and civilian leaders to ensure prevention of sexual violence and end impunity, sending a clear message that sexual violence will not be tolerated.<sup>370</sup>

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<sup>361</sup> UN Security Council, Security Council Resolution 1882 (2009) [on children and armed conflict], 4 August 2009, S/RES/1882.

<sup>362</sup> *Idem* at Preamble.

<sup>363</sup> *Idem* at par 1.

<sup>364</sup> Resolution 1612, *supra* n 346 at Preamble.

<sup>365</sup> Resolution 1882, *supra* n 361 at par 3.

<sup>366</sup> *Idem* at par 5, b).

<sup>367</sup> *Idem* at par 16.

<sup>368</sup> UN Security Council, Security Council Resolution 1888 (2009) [on acts of sexual violence against civilians in armed conflicts], 30 September 2009, S/RES/1888.

<sup>369</sup> *Idem* at Preamble.

<sup>370</sup> *Ibid.*

Furthermore, it highlights the important role of the recently designated Office of the Special Adviser on Gender Issues for the promotion of Resolution 1325 to motivate gender issues, gender equality and women's empowerment in the UN system.<sup>371</sup> The resolution also requests the Secretary General to quickly deploy a team of experts to situations of special concern relating to sexual violence abuses.<sup>372</sup> It also introduces the position of a women's protection adviser among the gender advisers in peacekeeping operations when necessary.<sup>373</sup> This resolution also requests the Secretary General to guarantee more systematic reporting on trends, evolving patterns and early warning signs of sexual violence in armed conflict<sup>374</sup> and to devise, preferably within three months, specific proposals to protect women and children more effectively and proficiently from rape and sexual violence.<sup>375</sup> Finally, this resolution expressly gives the Secretary General the power to "name and shame", requesting him in his next report to include "information regarding parties to armed conflict that are credibly suspected of committing patterns of rape or other forms of sexual violence".<sup>376</sup> This is the first time this faculty has been given to the Secretary General in a "women and peace and security" Security Council resolution.

g) 1889 (2009) Women and peace and security

This resolution is mainly about the incorporation and participation of women in all stages of peacebuilding processes, in UN authority positions, in peacekeeping missions, in political and economic decisions, in the recovery processes and other post-conflict situations and so on. Therefore it is more focused on gender equality and women empowerment than on sexual violence.<sup>377</sup> Hence, there are very few references to sexual violence thorough the resolution. It is worth mentioning paragraph 3, which condemns rape and sexual violence against women and girls, demanding that all parties cease such actions and compelling states to prosecute the perpetrators of those crimes.<sup>378</sup> Paragraph

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<sup>371</sup> *Ibid.*

<sup>372</sup> *Idem* at par 8.

<sup>373</sup> *Idem* at par 12.

<sup>374</sup> *Idem* at par 24.

<sup>375</sup> *Idem* at par 26.

<sup>376</sup> *Idem* at par 27(c).

<sup>377</sup> UN Security Council, Security Council Resolution 1889 (2009) [on women and peace and security], 5 October 2009, S/RES/1889.

<sup>378</sup> *Idem* at par 3.

12 also requests the parties to the conflicts to respect civilians and refugees and protect them from all forms of violence, including rape and other forms of sexual violence.<sup>379</sup>

h) 1960 (2010) Women and peace and security

This resolution is very similar to resolutions 1325, 1820 and 1888, but adds some new relevant elements.<sup>380</sup> In the previous resolutions the Secretary General was requested to include in his or her report the names of the parties to armed conflict engaged in actions of sexual violence against civilians. In this resolution the Secretary General is asked to “apply a listing and the de-listing criteria for parties”.<sup>381</sup> This is an important feature, because if countries cease these actions it is only fair that they are taken off the “name and shame” list. Resolution 1960 also requests the Secretary General to include more specific issues in his or her annual reports, such as a strategy plan on the opportune and ethical recollection of information; information on the advancements made in the implementation of monitoring, analysis and reporting preparations on sexual violence; and not just a list of parties suspected of committing acts of sexual violence against women, but also a list of parties “being responsible for patterns of rape and other forms of sexual violence”.<sup>382</sup> Identifying the patterns of perpetration of sexual violence is a very significant measure to prevent the perpetration of sexual violence in a systematic and widespread way.

i) 1998 (2011) Children and armed conflict

It addresses sexual violence in armed conflict, and is almost identical to Resolution 1882 (2009).<sup>383</sup> However, this resolution is focused mainly on condemning and addressing recurrent attacks on schools and/or hospitals.<sup>384</sup> This resolution also includes a listing a de-listing procedure for parties mentioned in the Secretary General’s reports as engaging in sexual violence against children.<sup>385</sup> Regarding references to sexual violence, this resolution includes the same provisions as Resolution 1882.<sup>386</sup>

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<sup>379</sup> *Idem* at par 12.

<sup>380</sup> UN Security Council, Security Council Resolution 1960 (2010) [on women and peace and security], 16 December 2010, S/RES/1960.

<sup>381</sup> *Idem* at par 4.

<sup>382</sup> *Idem* at par 18.

<sup>383</sup> UN Security Council, Security Council Resolution 1998 (2011) [on children and armed conflict], 12 July 2011, S/RES/1998.

<sup>384</sup> *Ibid.*

<sup>385</sup> *Idem* at par 22 (c).

<sup>386</sup> *Idem* at par 1, par 6 (a) and (b), par 11.

j) 2106 (2013) Accountability for sexual violence

This resolution is also in line with Resolutions 1325, 1820 1888 and 1960.<sup>387</sup> Nevertheless, it also includes some new elements worth mentioning. In the Preamble, the Security Council recognises that the effective prosecution of sexual violence is key to deterrence and prevention, because it defies “the myths that sexual violence in armed conflict is a cultural phenomenon or an inevitable consequence of war or a lesser crime.”<sup>388</sup> As can be appreciated in this research, this is an essential principle in the problem of sexual violence against women in armed conflict, and it is surprising that the Security Council has not mentioned it before in previous resolutions. This resolution also highlights the important work done by the recently created agency UN Women in the implementation of the “women and peace and security” resolutions.<sup>389</sup> This resolution also celebrates the provision in the Arms Trade Treaty,<sup>390</sup> which addresses “the risk of covered conventional arms or items” being utilised to perpetrate or assist gender-based crimes.<sup>391</sup> Resolution 2106 highlights the noteworthy task done by the ICC, ad-hoc and mixed tribunals, and chambers of domestic courts in the battle against impunity for the most egregious international crimes perpetrated against women.<sup>392</sup> The previous resolution only acknowledged the inclusion of crimes of sexual violence in the Statutes of the ICC and ad-hoc tribunals, but never before has the Security Council praised the work done by these institutions. I think it is very relevant that the Security Council expressly recognised the contribution made by these tribunals to international law.

Additionally, concerning sanctions, this resolution goes a step further than the previous resolution; it not only requests the sanctions committee to consider designation criteria related to the perpetration of sexual violence while imposing sanctions, but urges the committee to “apply targeted sanctions against those who perpetrate and direct sexual

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<sup>387</sup> UN Security Council, Security Council Resolution 2106 (2013) [on sexual violence in armed conflict], 24 June 2013, S/RES/2106.

<sup>388</sup> *Idem* at Preamble.

<sup>389</sup> *Ibid.*

<sup>390</sup> The Arms Trade Treaty was opened for signature on 3 June 2013 and “was adopted by the UN General Assembly to regulate international trade in conventional arms by establishing the highest international standards and to prevent and eradicate illicit trade and diversion of conventional arms.” See <http://www.thearmstradetreaty.org/index.php/en/the-arms-trade-treaty> Accessed 03.03.16.

<sup>391</sup> Resolution 2106, *supra* n 387 at Preamble.

<sup>392</sup> *Idem* at par 3.



violence in armed conflict”.<sup>393</sup> This is a real milestone, because in the previous resolution sexual violence was only one of the criteria or guidelines specified in order to impose sanctions. With this measure, however, if an individual commits or directs a crime of sexual violence he or she will be punished with targeted sanctions. This is a truly important advancement in ending impunity for crimes of sexual violence. Finally, this resolution makes reference to the connection between sexual violence in armed conflict and the high incidence of HIV/AIDS infection in post-conflict situations.<sup>394</sup> This is relevant, because after massive and widespread rape in armed conflict HIV infection is a large problem. For example, as was explained in Chapter 2, it is estimated that around 70% of the woman raped during the Rwandan genocide became infected with HIV/AIDS.

k) 2122 (2013) Women, peace and security

This resolution is very similar to Resolution 1889 and it focuses on women’s empowerment and gender equality. Even though sexual violence is included, the references are brief and are related to the fact that sexual violence constitutes an impediment to women’s development and leadership.<sup>395</sup> I would like to highlight that this resolution makes reference to the necessity “for access to the full range of sexual and reproductive health services, including regarding pregnancies resulting from rape, without discrimination.”<sup>396</sup> This reference was not included in previous resolutions, and it is very important considering the high incidence of rape and unwanted pregnancies during armed conflict.

In order to provide a more accurate analysis of the several UN Security Council resolutions that deal with sexual violence in armed conflict, Charter 1 and 2 compare the resolutions regarding different issues of relevance to the topic of this research.

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<sup>393</sup> *Idem* at 13.

<sup>394</sup> *Idem* at par 20.

<sup>395</sup> UN Security Council, Security Council Resolution 2122 (2013) [on women and peace and security], 18 October 2013, S/RES/2122. Preamble, par 12 and 15.

<sup>396</sup> *Idem* at Preamble.

Charter 1: Comparison of UN Security Council Resolutions										
	Reference to International Human Rights and Humanitarian Law Instruments that protect women and girls	Importance of the participation of women in processes of promotion and maintenance of peace and of conflict prevention and resolution	Vulnerability of women and/or children, as civilians, refugees and IDPs, to sexual violence in armed conflict	Concerning peace-keeping operations: incorporate more women in the personnel, and include gender-sensitive guidelines in training.	Condemns sexual or gender-based violence and calls on parties to take special measures to protect women and girls from sexual violence	Request states to end impunity and make accountable perpetrators of war crimes, crimes against humanity and genocide including sexual violence crimes	Request Secretary General for further report in the same issue	Secretary General's zero tolerance policy on sexual exploitation and abuse in peacekeeping operations	Use of systematic and widespread sexual violence as a weapon of war, threatening international peace and security	Refers to the sexual violence offences in the Rome Statute and the Statutes of the ad-hoc tribunals
Resolution No.										
1325 (2000)	yes	yes	yes	yes	yes	yes	yes (no deadline)	no	no	no
1612 (2005)	yes	no	Yes	no	no	Yes	yes (18 months)	yes	no	no
1674 (2006)	yes	no	yes	no	yes	yes	yes (18 months)	yes	no	no
1820 (2008)	yes	yes	yes	yes	yes	yes	yes (1 year)	yes	yes	yes
1882(2009)	yes	no	yes	no	yes	yes	yes (8 months)	no	yes	no
1888 (2009)	yes	yes	yes	yes	yes	yes	yes (1 year)	yes	yes	yes
1889 (2009)	yes	yes	yes	yes	yes	yes	yes (1 year)	no	no	no
1960 (2010)	yes	yes	yes	yes	yes	yes	yes (1 year)	yes	yes	yes
1998 (2011)	yes	no	yes	no	yes	yes	yes (11 months)	no	no	no
2106 (2013)	yes	yes	yes	yes	yes	yes	yes (9 months)	yes	yes	Yes
2122 (2013)	yes	yes	yes	yes	yes	yes	yes (1 year)	no	no	Yes



Charter 2: Comparison of UN Security Council Resolutions										
	Demands that all parties of the conflict completely cease sexual violence against civilians with immediate effect	Establishes that rape and other forms of sexual violence can constitute a war crime, CAH, or genocide. No amnesty should be granted	Consultation with women or groups to find mechanisms to prevent and redress sexual violence in armed conflict	Need to engage with civil society to strengthen national institutions, specially judicial and health systems to address post-conflict situations	Civilian and military leaders have to be consistent with the principle of command responsibility	Appoints new positions to assist the SG in the sexual violence reports, such as special representatives or envoys, gender experts or advisers, etc.	Recommends that states include criteria for sexual violence in their targeted sanctions designations	Include in the SG reports names of the parties who are suspected of engaging in sexual violence during armed conflict	Parties in armed conflict have to make specific time-bound commitments to combat sexual violence	Link between sexual violence in armed conflict and post-conflict HIV/AIDS
Resolution No.										
1325 (2000)	no	no	no	no	no	no	no	no	no	no
1612 (2005)	no	no	no	no	no	no	no	no	no	no
1674 (2006)	no	no	no	no	no	no	no	no	no	no
1820 (2008)	yes	yes	yes	yes	no	yes	yes	no	no	no
1882(2009)	yes	no	no	yes	no	yes	no	yes	yes	no
1888 (2009)	yes	no	yes	yes	yes	yes	yes	yes	no	no
1889 (2009)	yes	no	yes	yes	no	no	no	no	no	no
1960 (2010)	yes	no	yes	yes	yes	yes	yes	yes	yes	no
1998 (2011)	yes	no	no	no	no	no	yes	yes	yes	no
2106 (2013)	yes	yes	yes	yes	yes	yes	yes	yes	yes	yes
2122 (2013)	no	no	yes	yes	no	no	no	no	no	no

In general all resolutions have several elements in common. First, and most obvious, all resolutions make reference to international HRL and IHL instruments that protect women and girls from sexual violence in armed conflict. Examples are the Geneva Conventions, the Beijing Platform of Action, the CRC, and the Convention on Elimination of all Forms of Violence against Women. Second, all resolutions note the vulnerability of women and/or children, as civilians, refugees and Internally Displaced Persons (IDP), to sexual violence in armed conflict. Third, all the resolutions condemn, either explicitly or implicitly, sexual or gender-based violence in armed conflict and call on parties to take special measures to protect women and girls from these crimes. Fourth, they all request states to end impunity and make perpetrators of war crimes, crimes against humanity and genocide accountable (most of the resolutions include crimes of sexual violence expressly; some do not, but it can be inferred from the context). Fifth, all resolutions request the Secretary General for further reports on the same issue, though the deadline to present those reports varies in the different resolutions (for example, in Resolution 1325 there is no deadline for the report; but in Resolution 1882 the deadline is only eight months. However in general the average deadline is one year). Sixth, and finally, none of the resolutions make reference to the link between rape in armed conflict and the high incidence of HIV/AIDS in post-conflict situations, except for Resolution 2106 (2013), that incorporates this relevant information.

It can also be concluded that Resolution 1325 is the foundation of all the subsequent resolutions. This is based in the fact that all the resolutions make reference to Resolution 1325 and its implementation; however they differ in that they focus and elaborate further on specific issues that were introduced by the foundation resolution. Following this reasoning, the resolutions analysed in this research can be classified into four types:

- 1) Category 1: Resolutions focused on the prevention and protection of sexual violence against women and girls in armed conflict (1820, 1888, 1960, 2106)
- 2) Category 2: Resolutions focused on the protection of children in armed conflict (1612, 1882, 1998)

- 3) Category 3: Resolution focused on the protection of civilians in general (1674)
- 4) Category 4: Resolutions focused on promoting women's empowerment and gender equality (1889, 2122)

Resolutions in category 1 copy almost verbatim all the elements present in Resolution 1325 (“the mother resolution”) but evolve, adding more and more relevant elements to enrich the content, mirroring the concerns of the international community regarding sexual violence in armed conflict. For example, Resolution 1820 (2008)

- includes the Secretary General’s zero tolerance policy on sexual exploitation and abuse in peacekeeping operations;
- recognises the use of systematic and widespread sexual violence as a weapon of war, threatening international peace and security;
- incorporates a reference to the sexual violence offences in the Rome Statute and the statutes of the ad-hoc tribunals;
- demands that all parties to the conflict completely cease sexual violence against civilians with immediate effect;
- establishes that rape and other forms of sexual violence can constitute war crimes, crimes against humanity or genocide;
- stresses the importance of consulting women’s NGOs or groups to find mechanisms to prevent and redress sexual violence in armed conflict;
- notes the necessity of engaging with civil society to strengthen national institutions, specially judicial and health systems, to address post-conflict situations;
- appoints new positions in order to assist the Secretary General or his or her team in their task; and
- recommends including designation criteria for sexual violence in the states’ targeted sanctions

Therefore, from 2000 to 2008 there was enormous progress. Furthermore, Resolution 1888 (2009) continues this process of evolution, incorporates the principle of responsibility of command and gives the Secretary General power to include in his or her reports the names of the parties who are suspected of engaging in sexual violence

during armed conflict. Moreover, Resolution 1960 (2010) requests the Secretary General not only to name the parties suspected of being engaged in the commission of sexual violence, but also to compel these parties to make specific time-bound commitments to combat sexual violence. Finally, Resolution 2016 (2013) includes for the first time the link between rape in armed conflict and the high incidence of HIV/AIDS in post-conflict situations. Even though the progress between 2009 and 2013 was not as great as the progress between 2000 and 2008, it is very relevant in terms of quality concerning the prevention and protection of women and girls in armed conflict.

Resolutions in category 2 take some elements from the mother resolution but focus more on their specific area of concern, which is the protection of children in armed conflict. Concerning sexual violence, the evolution between Resolution 1612 (2005) and Resolution 1882 (2009) is quite impressive: in the first resolution there is only one explicit reference to sexual violence, concerning the zero tolerance policy of the Secretary General on sexual exploitation in peacekeeping operations. The rest of the references can only be inferred from the phrase “all other violations and abuses committed against children in situations of armed conflict”. In the second resolution many express references to sexual violence are included. Resolution 1998 (2011) is pretty much the same as Resolution 1882 (2009) concerning sexual violence, but it should be noted there are only two years between the two.

The resolution of category 3, Resolution 1674 (2006), also takes the mother resolution as a starting point, but develops further the protection of civilians in armed conflict. It should be noted that most civilians are normally women and children and that during armed conflict they are very exposed to sexual violence. It can be appreciated from both charters that not all the elements relating to sexual violence are present in this resolution. However, there a few of them, such as the vulnerability of women and/or children, as refugees and IDPs, to sexual violence in armed conflict; the request for states to end impunity and make perpetrators of war crimes, crimes against humanity and genocide accountable (it does not say expressly that sexual crimes are included, but this can be inferred); and the Secretary General’s zero tolerance policy on sexual exploitation and abuse in peacekeeping operations.

Finally, resolutions in category 4 (Resolution 1889 of 2009 and Resolution 1889 of 2013) are also grounded in the mother resolution, but in the same way as the other categories focus more on their specific field, which is gender equality and women's empowerment. Even though sexual violence is not the central issue of these resolutions, it is definitely an important element because sexual violence is a huge obstacle to gender equality and women's empowerment. Both resolutions elaborate on the importance of the participation of women in all the stages of the processes of promoting and maintaining peace and preventing conflict; they also stress the importance of incorporating more women in peacekeeping operations and including gender-sensitive guidelines in the training of civilian and military personnel. They also note the importance of engaging women's NGOs and women's groups in order to prevent and redress sexual violence in armed conflict. Regarding the express references to sexual violence, both resolutions are very similar, with the only difference being that Resolution 1889 (2013) makes reference to the sexual violence offences included in the Rome Statute and in the statutes of the ad-hoc tribunals.

Hynes (2004) concludes that during the twentieth century human rights treaties for all prospered. This is a paradox because this was also the century that broke the record for deaths, sexual abuses and other human rights violations during armed conflict.<sup>397</sup> Most of the instruments of HRL examined above firmly condemn sexual violence in armed conflict. However, most of these documents are soft law guidelines<sup>398</sup> that do not impose real legal obligations on the states to protect women and forbid sexual violence.<sup>399</sup> In cases where the instruments are in fact hard law, not all the countries necessarily ratify the treaties or implement the conventions in their national legislations. For example, the US – considered by many the most important leader of the international community and a permanent member of the Security Council – has not ratified several human rights treaties such as the CEDAW, the CRC, the Convention for the Protection of all Persons from Enforced Disappearance and the Optional Protocol to

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<sup>397</sup> Hynes, H. Patricia., "On the battlefield of women's bodies: An overview of the harm of war to women" *Women's Studies International Forum* Vol. 27 No. 5 (2004) 442.

<sup>398</sup> For example: The Vienna Conference on Human Rights (1994); The Fourth World Conference on Women (1995); The Nairobi Declaration on Women's and Girls' Rights to Remedy and Reparation (2007). See *supra*, at Chapter 3.

<sup>399</sup> However, as explained in the previous chapters, soft law can have important persuasive authority that can influence the work of academics and publicists, lawyers and the reasoning and decisions of judges. Furthermore, soft law principles can turn into customary international law.

the CAT.<sup>400</sup> Furthermore, 36 African states signed the Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa, but only 15 have ratified it.<sup>401</sup>

It should be noted that these countries do not have the cleanest records concerning human rights abuses (e.g. Guantanamo Bay, Iraq and Afghanistan, and the several ongoing armed conflicts in many African countries, situations in which human rights are constantly trampled on). HRL appears to have become a system of mere declarations of good principles, but with no real enforceability in practice. However, that there is progress in protecting women and girls from sexual violence in armed conflict cannot be denied. Important steps have been taken, but it will take more time and effort from the international community to grant effective protection through human rights instruments.

## **II. How do International Humanitarian Law, Human Rights Law and International Criminal Law interact in the regulation of sexual violence in armed conflict?**

According to the special rapporteur for systematic rape, sexual slavery and slavery-like practices during armed conflict, Gay J. McDougall: “[t]he international legal framework of humanitarian law, human rights law and criminal law which currently exists to prosecute crimes of sexual violence committed during armed conflict, although not always sufficiently explicit, clearly prohibits and criminalizes sexual violence and sexual slavery and provides universal jurisdiction in most cases.”<sup>402</sup> In other words, the three bodies of law intertwine and come together to redress sexual violence in armed conflict.

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<sup>400</sup> See <https://www.hrw.org/news/2009/07/24/united-states-ratification-international-human-rights-treaties> Accessed 04.02.16.

<sup>401</sup> See <http://www.achpr.org/instruments/women-protocol/ratification/> Accessed 04.03.16.

<sup>402</sup> UN Sub-Commission on the Promotion and Protection of Human Rights, *supra* n 306 at par 111.



The United Nations Division for the Advancement of Women (1998) states that IHL and HRL have traditionally evolved as different systems of law: IHL is centred on the mitigation of human affliction during wartime and HRL is focused in the mitigation of human affliction in the context of peace.<sup>403</sup> However, ever since the creation of the United Nations, “there has been a tendency to regard international humanitarian law as part of the broader international humanitarian rights law framework.”<sup>404</sup>

Charlesworth (1999) explains that the distinction between IHL and HRL can lead to certain contradictions and abnormalities; for example, IHL may rule out issues that are not linked to the combatants’ status.<sup>405</sup> The International Committee of the Red Cross (ICRC), considered the custodian of IHL, concluded that the Taliban’s banning women from any place of work was a circumstance outside the ICRC’s mandate.<sup>406</sup> Charlesworth affirms that despite the fact the HRL has a broader scope than IHL, it has delivered a more modest response to the suffering of women.<sup>407</sup>

Askin (2003) notes that IHL and HRL can overlap in some occasions. For example, both bodies of law forbid torture and slavery, but differ in their application depending on the context.<sup>408</sup> International HRL needs the state to perpetrate the act or approve it in order to be applied, while IHL needs the act to be linked to an armed conflict in order to be applied.<sup>409</sup> Furthermore, ICL penalizes slavery and torture as well and the international community is acknowledging more and more that the most severe human rights or humanitarian law infractions can comprise international crimes.<sup>410</sup>

According to Dugard (2013) the jurisprudence of several tribunals, such as the ICTY, the ICTR and the International Court of Justice, has changed the traditional approach that believes that IHL only applies in times of armed conflict and HRL only in times of peace.<sup>411</sup> Dugard states that “Humanitarian law and human rights law have different

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<sup>403</sup> United Nations Division for the Advancement of Women, *supra* n 31 at 6.

<sup>404</sup> *Ibid.*

<sup>405</sup> Charlesworth, *supra* n 294 at 386.

<sup>406</sup> *Ibid.*

<sup>407</sup> *Ibid.*

<sup>408</sup> Askin, *supra* n 43 at 291.

<sup>409</sup> *Ibid.*

<sup>410</sup> *Ibid.* See the definition of international crimes in chapter one, at n 33

<sup>411</sup> Dugard, *supra* n 39 at 532. In the ICTY, the *Furundžija* Judgement concluded that: “the general principle of respect for human dignity is the basic underpinning and indeed the very *raison d’être* of

sources and rules but they are both premised on respect for human dignity and therefore are separate parts of a single system committed to respect for human rights in armed conflicts.”<sup>412</sup>

For example in the *Foča* case, the ICTY had to resort to HRL because the elements of torture were not defined in IHL, going so far as to proclaim that, in certain aspects, there has been a fusion of these two bodies of law:

Because of the paucity of precedent in the field of international humanitarian law, the Tribunal has, on many occasions, had recourse to instruments and practices developed in the field of human rights law. Because of their resemblance, in terms of goals, values and terminology, such recourse is generally a welcome and needed assistance to determine the content of customary international law in the field of humanitarian law. With regard to certain of its aspects, **international humanitarian law can be said to have fused with human rights law** [emphasis added].<sup>413</sup>

After reading the case law used for this research, I agree with this view. It is clear that these two bodies of law apply to times of both peace and war, and in doing so expand the protection to the victims. In the *Advisory Opinion on the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* case, Israel argued that the human rights instruments signed by the country [the International Covenant on Civil

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international humanitarian law and human rights law; indeed in modern times it has become of such paramount importance as to permeate the whole body of international law” at par 183. Therefore, the core value protected by both bodies of law is human dignity, and this principle infuses the complete international system and the circumstances of armed conflict or peacetime make no difference: human dignity must be sheltered. The ICTY further confirms this principle in the *Foča* Judgement: par 467 explains that the court recurrently had to consult HRL, based on the similarities in the objectives and ideals of both IHL and HRL, making the latter a useful source for the interpretation of customary law. However, par 471 established that the chamber has to be cautious while adopting concepts from different legal contexts, always bearing in mind the special features of HRL when exporting it to IHL situations.

The ICTR case law reaffirmed the *Furundžija* conclusion in the *Muhimana* Judgement (par 539) and the *Musema* Judgment (par 183). The conclusion that HRL applies in times of peace and war was established by the International Court of Justice in the *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, ICJ Reports 1996, International Court of Justice (ICJ), 8 July 1996, at par 24–25; in the *Advisory Opinion Concerning Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, International Court of Justice (ICJ), 9 July 2004, at par 102; and in the *Case Concerning Armed Activities in the Territory of the Congo* (Democratic Republic of the Congo v. Rwanda), International Court of Justice (ICJ), 18 September 2002, at par 21 and 217.

<sup>412</sup> Dugard, *Ibid.*

<sup>413</sup> *Prosecutor v. Dragoljub Kunarac, Radomir Kovac and Zoran Vukovic* (Trial Judgment), IT-96-23-T & IT-96-23/1-T, International Criminal Tribunal for the former Yugoslavia (ICTY), 22 February 2001, par 467.

and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR)] should not be applicable to the Palestinian Occupied Territory because the purpose of HRL is to protect citizens from their own state in times of peace, as opposed to IHL that protects individuals in conflicts, like the conflict on the West Bank and the Gaza Strip.<sup>414</sup> However, the court concluded that the protection afforded by HRL was not limited to times of peace and should be applied during armed conflict,<sup>415</sup> and rejected Israel's argument.<sup>416</sup>

Furthermore, customary international law<sup>417</sup> includes certain human rights norms that cannot be derogated and are recognised as mandatory by all countries.<sup>418</sup> These human rights apply during wartime and also during peacetime, prohibiting grave violations of these rights.<sup>419</sup>

As can be appreciated from the analysis of human rights instruments done in this research, HRL offers women and girls extensive protection from sexual violence. This protection has evolved from instruments that do not even expressly use the term "sexual violence" (e.g. the CEDAW) to treaties that expressly condemn sexual violence and that can be enforced by regional courts (e.g. The Inter-American Convention on the Prevention, Punishment and Eradication of Violence Against Women, the Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa and the European Convention on Preventing and Combating Violence against Women and Domestic Violence).

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<sup>414</sup> *Advisory Opinion Concerning Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, International Court of Justice (ICJ), 9 July 2004, par 102.

<sup>415</sup> *Idem* at 106.

<sup>416</sup> *Idem* at 112.

<sup>417</sup> According to article 38(b), if the ICJ Statute international custom is "a general practice accepted as law". United Nations, Statute of the International Court of Justice, 18 April 1946.

<sup>418</sup> This is in reference to peremptory norms or *Jus Cogens*. According to article 53 of the Vienna Convention of the Law of the Treaties: "peremptory norm of general international law is a norm accepted and recognised 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." There is no clarity in international law about which norms constitute *Jus Cogens*; nevertheless par 5 of the Commentary to Draft Article 26 of the ILC states that "peremptory norms that are clearly accepted and recognised include the prohibition of aggression, genocide, slavery, racial discrimination, crimes against humanity and torture, and the right to self-determination".

<sup>419</sup> Stephens, *supra* n 263 at 14.

The UDHR, the ICCPR, the ECHR and the ACHR contain generic language prohibiting violations to physical integrity,<sup>420</sup> such as the prohibition of ill-treatment and torture, that constitute non-derogable rights,<sup>421</sup> which means these rights apply both in times of peace and during armed conflict, because they cannot be derogated.<sup>422</sup>

According to Askin (2003), all human rights instruments consecrate the principle of non-discrimination (that includes “sex” discrimination) and look upon it as the most key core value of HRL.<sup>423</sup> Hence, human rights instruments cannot be construed in a way that discriminates against women.<sup>424</sup> Though it is not contested that IHL applies only during an armed conflict, certain provisions of HRL, particularly non-derogable rights, apply irrespective of the existence of an armed conflict.<sup>425</sup> In conclusion, “international human rights law thus supplements, reinforces and complements humanitarian law.”<sup>426</sup>

According to Quénivet (2005), IHL treaties are a particular kind of human rights treaty that provides direct obligations on states (state responsibility) and on individuals as well (individual liability).<sup>427</sup> However, humanitarian law treaties only confer rights on individuals when states have incorporated these treaties into their domestic jurisdictions.<sup>428</sup> The Geneva Conventions and the Additional Protocols even go beyond the common human rights treaties, and establish that states have the obligation to penalise grave breaches and to forbid acts infringing the fundamental norms of the convention; if they do not comply with this, the person will be criminally liable anyway.<sup>429</sup>

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<sup>420</sup> *Ibid.*

<sup>421</sup> Hajjar, Lisa, *supra* n 267 at 109.

<sup>422</sup> Quénivet, *supra* n 265 at 35.

<sup>423</sup> Askin, *supra* n. 43 at 293.

<sup>424</sup> *Ibid.*

<sup>425</sup> *Ibid.* See also article 2 to the Geneva Conventions: “In addition to the provisions which shall be implemented in peacetime, the present Convention shall apply to all cases of declared war or of any other armed conflict which may arise ... Also, Hague Convention II: “populations and belligerents remain under the protection and empire of the principles of international law, as they result from the usages established between civilised nations, from the laws of humanity and the requirements of the public conscience” Hague Convention (II) with Respect to the Laws and Customs of War on Land and its Annex: *Regulations Concerning the Laws and Customs of War on Land*, 29 July 1899, Preamble.

<sup>426</sup> Askin, *supra* n 43 at 293.

<sup>427</sup> Quénivet, *supra* n 265 at 88.

<sup>428</sup> *Idem* at 88–89.

<sup>429</sup> *Idem* at 89.

Quénivet (2005) further explains that article 76 of the Additional Protocol I<sup>430</sup> creates a double obligation on states: in one hand, they are obliged to guarantee respect for women, and in the other hand, they have to grant protection to women as well.<sup>431</sup> Henceforth, in order to comply with this rule, states have to incorporate a number of implementing measures into their domestic legislations with the purpose of prohibiting acts of rape and protecting the rights consecrated in these treaties.<sup>432</sup>

According to Schabas and McDermott (2010), ICL is the branch of public international law that places responsibility on individuals and proscribes and penalises acts that are defined as crimes by international law.<sup>433</sup> Consequently, in many cases international criminal courts and tribunals, apart from enforcing the provisions of their own statutes, also apply both humanitarian law and HRL. In this field, sexual violence may be included in the scope of international crimes such as crimes against humanity, war crimes, torture and genocide.

IHL and ICL can complement each other. According to Meron (1993) IHL instruments prohibit rape, but do not give a definition of what comprises rape.<sup>434</sup> Therefore, Park (2007) claims that criminal law can fill this lacuna by providing definitions, and this has been done by the jurisprudence of ICTR, ICTY and ICC.<sup>435</sup>

In conclusion, it can be affirmed that sexual violence in armed conflict is strictly prohibited under IHL, HRL and ICL. IHL and HRL set the core provisions that provide the substantive law of sexual violence in armed conflict. If a specific issue is not covered by IHL, it must be complemented by HRL, in order to give the most comprehensive protection to the victims of these crimes. ICL provides the procedural provisions for the prosecution of crimes of sexual violence and through the international tribunals, this substantive law is applied to concrete cases. All of this is complementary to the jurisdiction of domestic tribunals, which according to the principles of

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<sup>430</sup> API article 76, “Women shall be the object of special respect and shall be protected in particular against rape, forced prostitution and any other form of indecent assault.”

<sup>431</sup> Quénivet, *supra* n 265 at 89.

<sup>432</sup> *Idem* at 90.

<sup>433</sup> Schabas, William, and McDermott, Yvonne, *International criminal courts*. New Jersey: John Wiley & Sons (2010) 52.

<sup>434</sup> Meron, *supra* n 1 at 425.

<sup>435</sup> Park, Jennifer, “Sexual violence as a weapon of war in international humanitarian law” *International Public Policy Review* Vol. 3 No.1 (2007) 14.

international law are the first obliged to try and prosecute crimes of sexual violence that take place in their national territories. If they fail to do so, international tribunals have jurisdiction in the matter. Related to the latter, IHL and HRL impose obligations on states to protect their citizens against rape and sexual violence, both in times of peace and during armed conflict. Therefore, ICL can be considered a practical amalgam of IHL and HRL.

## Chapter 4: Conclusion

This chapter presents some concluding remarks that highlight some of the positive aspects of the legislation on sexual violence in armed conflict. Some of the problems in legislation are then analysed in order to conclude what kind of improvements can be made to create a better system. Thereafter, concrete propositions, based on the ideas of the authors consulted in this research, are made. Finally, my personal appreciation of this research is given.

### I. Concluding remarks

According to Schomburg and Peterson (2007), when sexual violence achieves the scale of genocide, crimes against humanity and war crimes, it “takes a form rarely seen in times of peace.”<sup>1</sup> Not only does it tamper with the sexual freedom of the victim, but it also commonly causes severe physical pain in order to hurt the victim and her community; therefore sexual violence is used as a weapon of war.<sup>2</sup>

Askin (2003) affirms that until very recently, whether rape was war crime or not was not even discussed; however, the international tribunals, such as the ICTY, the ICTR and the ICC, have advanced greatly in the case law of sexual violence as a war crime, genocide and crime against humanity.<sup>3</sup> Many people (jurists, academics, experts and human rights advocates) have laboured hard and extensively to guarantee that crimes of sexual violence are appropriately examined, charged and criminalised.<sup>4</sup> This has not been an easy task, because crimes of sexual violence are, in terms of investigation and prosecution, some of the most complex to deal with, due to the personal and graphic nature of the circumstances, which cause distaste and uneasiness. There has been a historical unwillingness to judge these crimes and a natural tendency to overlook them.<sup>5</sup>

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<sup>1</sup> Schomburg, Wolfgang, and Peterson, Ines, “Genuine consent to sexual violence under international criminal law” *American Journal of International Law* Vol. 101 No.1 (2007) 138.

<sup>2</sup> *Ibid.*

<sup>3</sup> Askin, Kelly D., “Prosecuting wartime rape and other gender-related crimes under international law: extraordinary advances, enduring obstacles” *Berkeley J. Int’l L.* Vol. 21 (2003) 346.

<sup>4</sup> *Ibid.*

<sup>5</sup> *Ibid.*

Therefore, according to Askin, “the alternative is silence, impunity, and grave injustice.”<sup>6</sup>

Obote-Odora (2005) praises the fact that in the last years international law has progressed in a significant way concerning the prosecution of rape and other forms of sexual violence. The international community has acknowledged that these crimes are grave and a threat to international peace and security under chapter VII of the United Nations Charter.<sup>7</sup> The Security Council resolutions studied in chapter 3 are also a manifestation of this recognition, in particular Resolutions 1820, 1882, 1888, 1960 and 2106.

Viseur (2013) notes that besides the ICTR, ICTY and ICC, it is worth mentioning the work of other international war crimes tribunals or special chambers established to prosecute atrocities perpetrated in East Timor, Sierra Leone, Bosnia, Cambodia and Kosovo.<sup>8</sup> De Brouwer *et al.* (2013) affirm that even though these courts have not prosecuted sexual violence against women as their main focus, they have nevertheless collectively acknowledged that crimes of sexual violence are amongst the most serious crimes committable, and that under some conditions they can amount to crimes against humanity, genocide, war crimes and persecution based on gender.<sup>9</sup>

According to Askin (2013) it cannot be denied, despite all the shortcomings of these tribunals, that in the last years great progress has been made in addressing crimes of sexual violence, in comparison to all the efforts recorded in history.<sup>10</sup> Askin concludes “With concerted efforts and genuine commitments, the next two decades can make real and demonstrable progress on ending impunity for gender crimes and providing true redress – justice, reparation, security and the reversing of sex crimes stereotypes – for

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<sup>6</sup> *Ibid.*

<sup>7</sup> Obote-Odora, Alex, “Rape and sexual violence in International Law: ICTR contribution” *New Eng. J. Int’l & Comp. L.* Vol. 12 (2005) 157.

<sup>8</sup> Viseur, Patricia, “Foreword” in De Brouwer, Anne-Marie, Kuo, Charlotte; Römkens, René E.M. and Van den Herik, Larissa (eds) *Sexual violence as an international crime: interdisciplinary approaches* (2013) at x. See also Askin, *supra* n 3 at 347

<sup>9</sup> De Brouwer, Anne-Marie, Kuo, Charlotte; Römkens, René E.M. and Van den Herik, Larissa (eds) “Interdisciplinary approaches to recognizing, investigating and prosecuting sexual violence as an international crime” in *Sexual violence as an international crime: interdisciplinary approaches* Antwerp: Intersentia (2013) 6.

<sup>10</sup> Askin, Kelly, “Treatment of sexual violence in armed conflicts: a historical perspective and the way forward” in *Sexual violence as an international crime: interdisciplinary approaches* De Brouwer *et al.* (eds) Antwerp: Intersentia (2013) 20.



the victims.”<sup>11</sup> I completely agree with Askin: if the international community takes the necessary steps, the world can reach a point where there is justice for victims of sexual violence in armed conflict.

According to Leroy (2010), regardless of the small numbers of guilty verdicts for rape at the ICTR, sex crimes are no longer considered inferior crimes. Now they are regarded as grave offences to IHL and ICL.<sup>12</sup> In circumstances of armed conflict, genocide and crimes against humanity, sex crimes perpetrated against women are no longer being overlooked and the accountability of those individuals who did not directly commit the crimes, but who ordered, aided or abetted them, has been established.<sup>13</sup> The ICTR has established a “unique legal framework to address the special difficulties of victims of sexual in order to facilitate their testimonies.”<sup>14</sup> Moreover, the ICTR has collaborated in a very relevant way in the progress achieved concerning the definition of rape and other actions that constitute sexual violence. Additionally, this is the first international tribunal to identify that sexual violence can amount to genocide.<sup>15</sup>

According to De Brouwer *et al.* (2013), the problem of sexual violence is “not an academic theory or subject far removed from people”, but a problem of human beings and societies that are trapped in outbreaks of violence.<sup>16</sup> This is a matter that is important for all of us, that affects us deeply, and thus has to be taken into consideration and confronted on multiple levels, with the aim stopping and punishing it.<sup>17</sup>

Finally, relating to the interplay between the different bodies of law, according to my understanding, sexual violence in armed conflict is strictly prohibited under IHL, HRL and ICL. The view of this research is that IHL and HRL set the core provisions that provide the substantive law of sexual violence in armed conflict. If some specific issue is not covered by IHL, it must be complemented by HRL in order to give the most

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<sup>11</sup> *Ibid.*

<sup>12</sup> Leroy-Hajee, “Prosecuting sexual violence at the ICTR” in *Protecting humanity: essays in international law and policy in honour of Navanethem Pillay* Eboe-Osuji (ed) Martinus Nijhoff (2010) 195.

<sup>13</sup> *Ibid.*

<sup>14</sup> *Idem* at 196.

<sup>15</sup> *Ibid.*

<sup>16</sup> De Brouwer *et al.*, “How to move forward? Interdisciplinary approaches to recognizing, investigating and prosecuting sexual violence as an international crime” in *Sexual violence as an international crime: interdisciplinary approaches* De Brouwer *et al.* (eds) Antwerp: Intersentia (2013) 373.

<sup>17</sup> *Ibid.*

comprehensive protection to the victims of these crimes. ICL provides the procedural provisions for the prosecution of crimes of sexual violence and through the international tribunals, this substantive law is applied to concrete cases. All of this is complementary to the jurisdiction of domestic tribunals, which according to the principles of international law, are the first obliged to try and to prosecute crimes of sexual violence that take place in their national territories. If they fail to do so, international tribunals have jurisdiction in the matter. Related to the latter, IHL and HRL impose obligations on states to protect their citizens against rape and sexual violence, both in times of peace and during armed conflict.

## II. Problems and proposals

Based on the doctrine, instruments and case law examined in this research, several problems with the current legislation regarding the regulation and protection of women from sexual violence were encountered. These problems are mentioned and summarised in the following paragraphs. Additionally, a concrete proposal to solve or ameliorate each problem is presented based on the ideas of the authors and publicists consulted during this work.

### **Problem 1: Education**

Irwin (2013) affirms that sexual violence against women is entrenched in some cultures as something acceptable and not worthy of criminal punishment, due to sexism and many forms of discrimination against women who are seen as second-class citizens.<sup>18</sup> Also, armed conflict “changes people into the worst possible versions of themselves.”<sup>19</sup> According to Odio (2004), there is not yet a universal belief that this world belongs equally to men and women, that we all have exactly same rights and we should have identical power.<sup>20</sup>

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<sup>18</sup> Irwin, Rachel, “How can you meet your rapist and shake his hand?: The role of documentarians in creating awareness about sexual violence” in *Sexual violence as an international crime: interdisciplinary approaches* De Brouwer *et al.* (eds) Antwerp: Intersentia (2013) 343.

<sup>19</sup> *Idem* at 350.

<sup>20</sup> Odio, Elizabeth, “Los derechos humanos de las mujeres, la justicia penal internacional y una perspectiva de género” *Novena Conferencia Regional sobre la Mujer de América Latina y el Caribe* Vol. 10 (2004) 6.

**Proposal:** This behaviour needs to be changed completely and this can be done by starting at the very beginning. Irwin (2013) affirms that education is needed to teach boys that they do not have the right to abuse women and to learn to treat them with respect. Girls need to be educated in order to be empowered and learn to claim and fight for their rights.<sup>21</sup>

Odio (2004) claims that efforts must be made to advance gender equality as a tool to achieve social justice and positive peace.<sup>22</sup> This will reduce conflicts and therefore can contribute in part to ending sexual violence against women, not only during armed conflict, but also in times of peace.<sup>23</sup>

### **Problem 2: Shortcomings of IHL**

According to the United Nations Division for the Advancement of Women (1998), IHL instruments do not directly address sexual violence. These treaties only make reference to sexual violence related to women's honour.<sup>24</sup> Poli (2013) is also critical of the fact that sexual violence is not included in the grave breaches mentioned in the Geneva Conventions.<sup>25</sup>

De Brouwer (2005) affirms that the entry into force of the Rome Statute identifies particular crimes of sexual violence as violations of Common Article 3, grave breaches and crimes against humanity and genocide.<sup>26</sup> These revolutionary provisions call for similar modifications to the Geneva Conventions and their Additional Protocols.<sup>27</sup>

**Proposal:** It is time to bring the law contained into IHL treaties into conformity with the ICL instruments. De Brouwer (2005) states that this can be accomplished by modifying specific provisions of the Geneva Conventions concerning sexual violence,

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<sup>21</sup> Irwin, *supra* n 18 at 343.

<sup>22</sup> Odio, *supra* n 20 at 6.

<sup>23</sup> *Ibid.*

<sup>24</sup> United Nations Division for the Advancement of Women, "Sexual Violence and Armed Conflict: United Nations Response" *Women 2000* (1998) Available at <http://www.un.org/womenwatch/daw/public/w2apr98.htm> Accessed 26.05.15.

<sup>25</sup> Poli, Ludovica, "Criminalizing rape and sexual violence as methods of warfare" in *War crimes and the conduct of hostilities: challenges to adjudication and investigation* Pocar, Pedrazzi and Frulli (eds) Edward Elgar (2013) 139.

<sup>26</sup> De Brouwer, Anne-Marie, *Supranational criminal prosecution of sexual violence: the ICC and the practice of the ICTY and the ICTR* Cambridge: Intersentia (2005) 435.

<sup>27</sup> *Ibid.*

or by elaborating an Additional Protocol.<sup>28</sup> In either of these two alternatives, it must be established that sexual violence is a grave breach in order to impel mandatory universal jurisdiction for states; they will be forced to either prosecute or extradite the individuals accountable for these crimes.<sup>29</sup> Even though the behaviour of states has proved that they are normally hesitant to take action regarding their prosecution obligations, the inclusion of sexual violence provisions in international humanitarian instruments will contribute to their no longer being able to refute the criminal essence of these acts.<sup>30</sup>

**Problem 3:** Abuses of women during peacetime

According to Jefferson (2004), many women who have survived sexual violence during armed conflict have to bear similar sexual mistreatment in peacetime when the conflict is over.<sup>31</sup> There are many discriminatory laws and customary practices that continue to exist in many countries that interfere with women's sexual autonomy, such as: forced marriage; the criminalisation of adult and consensual sex; the inheritance of wives; widow cleansing;<sup>32</sup> non-criminalised spousal rape; inheritance and real estate laws that discriminate against women; personal status laws and customs that provide fewer rights for women in the family; dangerous traditional practices that subjugate women sexually; and the lack of accountability for perpetrators sexual violence.<sup>33</sup>

**Proposal:** Jefferson (2004) suggests that governments take steps to enhance women's human rights in every facet of their lives and halt any sort of discrimination against women, making improvements in several areas such as the protection of women's sexual autonomy and the revision of laws and customary practices that are an obstacle to equal and free sexual decision-making for women.<sup>34</sup>

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<sup>28</sup> *Ibid.*

<sup>29</sup> *Ibid.*

<sup>30</sup> *Idem* at 13.

<sup>31</sup> Jefferson, L. R., "In war as in peace: sexual violence and women's status." Human Rights Watch World Report 2004. Available at <http://www.refworld.org/pdfid/402bac094.pdf> Accessed 26.05.15.

<sup>32</sup> Widow cleansing: "A ritualized dissolution of the bond of the spirit of a dead man with his wife, through her submission to sexual intercourse with one of his living relatives; common in some sub-Saharan cultures." Farlex Partner Medical Dictionary© Farlex 2012. Available at <http://medical-dictionary.thefreedictionary.com/widow+cleansing> Accessed 07.03.16.

<sup>33</sup> Jefferson, *supra* n 31 at 13.

<sup>34</sup> *Idem* at 12–13.

#### **Problem 4:** Shortcomings of HRL

According to Stephens (1993), the UDHR, the ICCPR and the ECHR are considered basic human rights instruments and they only include provisions that prohibit offences against physical integrity in general terms.<sup>35</sup> This proscription has not usually been interpreted to include sexual violence; therefore the “right to be free from gender violence has not been recognised as a fundamental human right.”<sup>36</sup> De Brouwer (2005) also thinks that this basic human right cannot be found in these human rights instruments or any other treaty of this nature.<sup>37</sup> Chinkin (1994) states that women’s rights have been rejected and commonly disregarded by many human rights institutions that have not been able to apply their conventions in ways that are significant to the lives of women and girls.<sup>38</sup>

**Proposal:** This right should be included as basic human right in a new treaty adopted by the United Nations. Askin (1999) concludes that the international community needs to adopt a treaty to openly engage with the situation of women during armed conflict and to categorically penalise gender-based violence as a crime, strictly prohibiting sexual and all other types of violence against women.<sup>39</sup> The language used in this treaty needs to be appropriate and specific and the sanctions established have to be strong and commensurate with the gravity of the crimes.

#### **Problem 5:** Application of international law in practice

According to Neill (2013), and as was demonstrated in chapter 3, there are large numbers of human rights instruments and meetings and ICL mechanisms centred on the problems of women all around the world.<sup>40</sup> Yet it appears that far too many legal provisions, programme initiatives and proclamations do not translate into concrete awareness of or aid to women who are currently in danger of becoming victims of sexual violence.<sup>41</sup> For the women and girls who are caught in the armed conflicts in the

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<sup>35</sup> Stephens, Beth, “Women and the atrocities of war” *American Bar Association* Vol. 20, No.3 (1993) 13.

<sup>36</sup> *Ibid.*

<sup>37</sup> De Brouwer, *supra* n 26 at 155.

<sup>38</sup> Chinkin, Christine, “Rape and sexual abuse of women in international law” *Eur. J. Int’l L.* 5 (1994) 341.

<sup>39</sup> Askin, Kelly D., “Sexual violence in decisions and indictments of the Yugoslav and Rwandan tribunals: Current status” *American Journal of International Law* Vol. 93 No. 1 (1999) 123.

<sup>40</sup> Neill, Kevin Gerard, “Duty, honor, rape: Sexual assault against women during war” *Journal of International Women’s Studies* Vol. 2 No.1 (2013) 50.

<sup>41</sup> *Ibid.*

DRC, Darfur, CAR, Uganda or any other combat area, there will no relevant reduction of the risk of rape due to ongoing trials in The Hague.<sup>42</sup> I think it is important to help and give justice to past victims, but it is equally relevant to protect the girls and women of the present and the future.

According to Chinkin (1994), wartime rape of women does not finish after the conflict is over. Sexual assaults constantly remain after the hostilities have ceased: several types of violence against women are a recurrent problem in the day-to-day lives of many women around the world.<sup>43</sup> The international community needs to acknowledge the terror generated by this subjugation and repression and that the issue of sexual violence is a menace to international peace and security.<sup>44</sup>

**Proposal:** The only solution to this problem seems almost a utopia. Neill (2013) believes that the end of sexual violence could be accomplished by stopping conflicts, because as long as organised massive killings rage on the rape of women and girls will endure.<sup>45</sup>

In my opinion, even though it is almost impossible to achieve world peace, the international community must make every effort possible to stop incipient armed conflicts. In doing so, it is fundamental that the Security Council exercise correctly the most important of its functions: the maintenance of international peace and security. Unfortunately, sometimes political and economic interests stand in the way of this objective. Therefore, a reform of the UN Charter regarding the permanent members with veto power could be a potential solution to this problem. Either expand the permanent members (P5) to include other regions of the world or eliminate the veto. Even if it is not possible to avoid armed conflict, there is much to be done concerning the prevention of sexual violence during wars.

According to Jefferson (2004), one way or another most conflicts can be anticipated; it is very unlikely that a war will break out from one day to the next.<sup>46</sup> If wars can be

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<sup>42</sup> *Ibid.*

<sup>43</sup> Chinkin, *supra* n 38 at 341.

<sup>44</sup> *Ibid.*

<sup>45</sup> Neill, *supra* n 40 at 50.

<sup>46</sup> Jefferson, *supra* n 31 at 6.

predicted, the occurrence of sexual violence against women throughout the conflict can also be predicted.<sup>47</sup> In times of peace, while the conflict is building up, efforts by the relevant stakeholders, such as the United Nations, states, regional organisations and civil society, have to be increased in order to avoid sexual violence against women and girls when the conflict explodes.<sup>48</sup> Preventive measures must be taken, such as training fighters in IHL with an emphasis on the specific provisions on sexual violence.<sup>49</sup> It is probable that informal rebel factions will not receive this training, but at least more structured rebel factions and national soldiers will have a clear knowledge of the unlawfulness and inadmissibility of sexual violence, thus serving as models to informal participants.<sup>50</sup> In civil conflicts there is a chance that civilians will rise and join the hostilities; therefore comprehensive and enhanced education of normal citizens in IHL is very relevant. This can take the form of national programmes of education and broadcasting information stressing the proscription of sexual violence.<sup>51</sup>

**Problem 6:** Shortcomings of ICL in general

Obote-Odora (2005) explains that to date there are still many lacunae in the interpretation and progress of ICL, in particular concerning the regulation of sexual violence.<sup>52</sup> There is no doubt that the notion of ICL and its effect on international criminal prosecution is an old one, but regarding its application it is definitely at an early stage.<sup>53</sup>

**Proposal:** According to Obote-Odora (2005), the international community has a lot to learn about legal processes, starting with the research done by experts who can ponder the elements of crime that are being examined, analyse the evidence compiled and the formulation and ratification of the accusation.<sup>54</sup> It is very important that the prosecutor and his or her team are highly qualified and prepared. The same applies to the judges of international tribunals.

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<sup>47</sup> *Ibid.*

<sup>48</sup> *Ibid.*

<sup>49</sup> *Ibid.*

<sup>50</sup> *Idem* at 7.

<sup>51</sup> *Ibid.*

<sup>52</sup> Obote-Odora, *supra* n 7 at 144.

<sup>53</sup> *Ibid.*

<sup>54</sup> *Ibid.*

**Problem 7:** Obstacles to the testimony of witnesses to sexual violence

Obote-Odora (2004) explains that the prosecutor sometimes has to confront the problem that some key witnesses have passed away (in some cases in suspicious circumstances); or it is not possible to locate them; or they are incapable of giving or reluctant to give their testimony.<sup>55</sup> For example, according to Jefferson (2004) many women in the former Yugoslavia have declined to give their testimony because they are afraid that their names will become known and their loved ones will be in danger of retaliation. In the case of the ICTR, many witnesses who testified before the court discovered, when they returned to their towns, that the contents of their rape testimonies had filtered down to people in their neighbourhood and had to deal with anonymous intimidation and other kinds of persecution.<sup>56</sup> This situation has been so bad that Rwandan NGOs warned that they would sabotage the ICTR and prevent women from participating in the trials if the witness protection system was not improved.<sup>57</sup>

**Proposal:** According to Jefferson (2004), it is very important that the prosecutor gives enough protection and support to the witnesses and guarantees their safety to avoid these problems, because “effective witness and victims protection programs are the cornerstone to a successful prosecution.”<sup>58</sup> Mechanisms must be created to make the witnesses feel safe and willing to give their testimony.

**Problem 8:** Lack of cooperation of some states with the ICC

For the ICC to do its work properly, state members need to fulfil their obligation of cooperation with the court. An example of a flagrant violation of this duty was seen in June 2015, when President Al-Bashir of Sudan visited South Africa for the 25th African Union Summit. Despite the fact that there was a warrant of arrest from the ICC against Al-Bashir and that the North Gauteng High Court in Pretoria forbade him to leave the country while hearings determined the destiny of the ICC arrest warrant, the President of Sudan was able to peacefully attend the summit because of his immunity and left the country in a sort of “Hollywood” top secret operation, with the help of President Jacob

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<sup>55</sup> *Ibid.*

<sup>56</sup> Jefferson, *supra* n 31 at 10–11.

<sup>57</sup> *Idem* at 11.

<sup>58</sup> *Idem* at 10.



Zuma and some key ministers.<sup>59</sup> This is completely unacceptable. As a member of the ICC, South Africa is obliged to cooperate with the arrest warrants of the court and if it is unwilling to do so, it should denounce the Rome Statute. It is difficult not to see the irony in the fact that at a summit of which the main theme was “Year of women empowerment and development towards Africa’s Agenda 2063”, a red carpet was rolled out for a man who was charged with the murder, rape and other forms of sexual abuse of thousands of women in Darfur. In order to develop and be empowered, women first need to be alive and free of sexual violence. In my opinion, the Al-Bashir debacle was like a slap in the faces of all the women abused in South Sudan.

**Proposal:** It is necessary to find a mechanism to enforce the duty of states to cooperate with the warrants of arrest of the ICC. In cases where states do not comply with this duty, sanctions should be imposed.

**Problem 9:** Gender equality in the composition of the tribunals

Chinkin (1994) affirms that it is extremely relevant to achieve equal participation by women in the composition of international tribunals.<sup>60</sup> Even though the designation of Judge Silvia Fernández de Gurmendi as the first woman president of the ICC was an important milestone, it continues to be far from the target of 50% female judges sought by women’s organisations.<sup>61</sup>

Chinkin (1994) believes that many of the ground-breaking advancements in the ICTR and ICTY judgements were in part because women served as judges of these tribunals. Askin (1999) argues this is tremendous progress compared to the historically insignificant role of women in international law tribunals such as the IMT and the IMTFE.<sup>62</sup> The case law of the ICTR and the ICTY echoes the involvement of women: judgements mentioned in this work, such as *Tadić*, *Akayesu*, *Čelebići* and *Furundžija*, openly include many crimes that are perpetrated entirely or mostly against women.<sup>63</sup>

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<sup>59</sup> See *Mail & Guardian*, Available at <http://mg.co.za/article/2015-06-18-how-zuma-and-ministers-plotted-omar-al-bashirs-escape> Accessed 02.09.15.

<sup>60</sup> Chinkin, *supra* n 38 at 339.

<sup>61</sup> *Ibid.*

<sup>62</sup> Askin, *supra* n 39 at 98.

<sup>63</sup> *Ibid.*

Chinkin (1994) states that it is relevant to keep in mind the importance of gender distribution in other tribunal staff, like prosecutors and investigators.<sup>64</sup> According to Askin (2003), it has been proved that women witnesses and victims feel more secure and comfortable sharing their traumatic experiences with other women.<sup>65</sup>

Brammertz and Jarvis (2010) point out that a very useful way to improve the treatment of women and to eradicate old discriminatory practices is to fully incorporate gender perspectives into the work of the international tribunals.<sup>66</sup>

**Proposal:** Authors like Askin (2003) and Chinkin (1994) stress the necessity of paying attention to this issue; the international community has to make efforts to include more women in the personnel of the tribunals, especially as judges.<sup>67</sup> There is a big chance that great advancement in sexual violence against women will happen under the leadership of Judge Fernández de Gurmendi in the ICC.

**Problem 10:** Predominance of men in the international law system

Spees (2014) affirms that although women's organisations like the Women's Caucus for Gender Justice have had a relevant role in the ICC negotiations, the prevailing opinions in the current discussions and official statements in the court are those of men.<sup>68</sup> The inclusion of rape and other crimes of sexual violence are sporadically brought up in important circles; however, the predominant voice of the ICC portrays a distant, elite body related to the laws of armed conflict that will exclusively prosecute and penalise individuals who violate the laws of war.<sup>69</sup> In the collective imagination, all the participants – offenders, prosecuting attorneys and judges – are male. However this picture contradicts the actual truth of the norms of the Rome Statute and the subjacent defence of women.<sup>70</sup>

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<sup>64</sup> Chinkin, *supra* n 38 at 339.

<sup>65</sup> Askin, *supra* n 3 at 346.

<sup>66</sup> Brammertz, Serge and Jarvis, Michelle, "Lessons learned in prosecuting gender crimes under international law: experiences from the ICTY" in *Protecting humanity: essays in international law and policy in honour of Navanethem Pillay*. Eboe-Osuji (ed) Martinus Nijhoff (2010) 117.

<sup>67</sup> Askin, *supra* n 3 at 346, Chinkin, *supra* n 38 at 339.

<sup>68</sup> Spees, Pam, "Women's advocacy in the creation of the International Criminal Court: Changing the landscapes of justice and power" *Signs* Vol. 40 No.1 (2014) 1249.

<sup>69</sup> *Ibid.*

<sup>70</sup> *Ibid.*

**Proposal:** According to Spees (2014), feminist critiques advocate “broader conceptualisations of justice, a more empowered role for victims, mandates relating to the placement of women and gender experts throughout all organs of the Court, and, not least, the insistence of the independence of the Court from traditional power structures.”<sup>71</sup> The researcher agrees with this feminist vision; the contribution of the ICTR and ICTY are proof the incorporation of women in decision-making positions can make a difference. Spees (2014) believes that only in the future will we see if the ICC will modify the typical administration of justice so far; nonetheless women have changed and will continue to change the path of the ICC.<sup>72</sup>

**Problem 11:** The proliferation of sexual violence against women in armed conflict According to Senier (2010), in the last 60 years there has been a growth in the range and extent of sexual violence against women: appalling abominations have been inflicted upon women in the name of ethnic cleansing and political domination. The consequences in the lives of these women are physical, psychological, pecuniary and social.<sup>73</sup> The reparation system that was implemented after the conflict has not been adequate to alleviate the pain caused collectively or individually – to either men, women or children.<sup>74</sup>

**Proposal:** Senier (2010) believes this problem needs immediate action, including a “revised and gender-sensitive approach to reparations”, specially focused on the extensive range of female suffering in armed conflict.<sup>75</sup> There is also a need to promote awareness of the rights of women to restitution and it is fundamental to include women in all the phases of planning and applying the reparations mechanisms.<sup>76</sup> Examples of these mechanisms are the Nairobi Declaration on Women’s and Girls’ Right to Remedy and Reparation, which is a guide on how to deal with women’s needs and include their capabilities;<sup>77</sup> and the Trust Fund of the ICC, which gives the victims the possibility of

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<sup>71</sup> *Ibid.*

<sup>72</sup> *Ibid.*

<sup>73</sup> Senier, Amy, “The Nairobi Declaration: a gendered paradigm for post-conflict reparations” in *Protecting humanity: essays in international law and policy in honour of Navanethem Pillay Eboe-Osuji* (ed.) Martinus Nijhoff (2010) 227.

<sup>74</sup> *Ibid.*

<sup>75</sup> *Ibid.*

<sup>76</sup> *Ibid.*

<sup>77</sup> *Ibid.*

requesting and being awarded reparations, something that the ICTY and ICTR never did.<sup>78</sup>

De Brouwer (2005) explains that the reparations granted by the Trust Fund can be either individual or collective. In the case of collective reparations, the court will be more inclined to the view that national or international organisations (which are used to dealing with women victims of sexual violence) are the ones that administer the rehabilitation programmes by establishing, for example, treatment clinics.<sup>79</sup> Also, it is important to find ways to benefit the indirect victims of crimes of sexual violence, like setting up schools for the children of women raped during armed conflicts.<sup>80</sup> Moreover, to complement compensation and rehabilitation, it is fundamental that restitution of property takes place. To enable women who were victims of sexual violence to start over with their lives, restitution of stolen real estate and access to appropriate housing are crucial.<sup>81</sup>

De Brouwer *et al.* (2013) maintain there are also other means than judicial remedies that can help victims to obtain justice and reparations, for example: truth and reconciliation commissions, cultural manifestations of recognition (e.g. theatre and music), victims' tribunals (like the 2000 Women Tribunal in Tokyo, which was established to deal with Japanese sex slaves during the Second World War), media expressions (e.g. films, documentaries, journalism, campaigns in social media), symbolic reparations (e.g. commemoration memorials), the creation of support groups within the community, and education tools (e.g. museums, schools, books, university lectures and courses).<sup>82</sup> I believe the existing mechanisms of reparation and other forms of compensation have to be improved and new mechanisms need to be created after every conflict ends. The devastation that sexual violence creates in the lives of women can never be erased; nevertheless, through reparations some amelioration of their terrible situation can be achieved.

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<sup>78</sup> De Brouwer, *supra* n 26 at 447–448.

<sup>79</sup> *Idem* at 451.

<sup>80</sup> *Ibid.*

<sup>81</sup> *Ibid.*

<sup>82</sup> De Brouwer *et al.*, *supra* n 9, at 385.

**Problem 12: Cultural sexism**

De Brouwer (2005) states that many cultures still believe that it is the woman's fault that she was a victim of sexual violence and often little is done to make the offender accountable in national courts.<sup>83</sup> Injustice, shame and stigmatisation are the general rule in the lives of these women.

**Proposal:** De Brouwer (2005) correctly states that “[t]he shame and stigmatisation attached to sexual violence needs to be shifted to the perpetrators once and for all”.<sup>84</sup> To achieve this cultural change it is essential that impunity ends.<sup>85</sup> In this matter the role of the ICC is essential, because the precedents set by its jurisprudence can significantly influence national jurisdictions.<sup>86</sup>

Inder (2013) believes that the ICC has to set the correct path in the prosecution of sexual violence against women in armed conflict. By doing so, the court will acknowledge the legitimate rights of women, including cases where the national laws and customary practices refuse these rights.<sup>87</sup>

De Brouwer (2005) concludes that “[t]he standard set by the ICC on supranational criminal prosecutions of sexual violence may well become the standard on the basis of which national courts will deal with sexual violence as well.”<sup>88</sup> Inder (2013) states that these prosecutions may also encourage the creation of national legislation for gender-based and sexual violence and motivate reforms of the security and judicial sectors.<sup>89</sup> Finally, Inder concludes that if the ICC becomes “empowered by its mandate ... it can be an important partner in addressing violence against women and modelling gender-inclusive justice.”<sup>90</sup>

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<sup>83</sup> De Brouwer, *supra* n 26 at 453.

<sup>84</sup> *Ibid.*

<sup>85</sup> *Ibid.*

<sup>86</sup> *Idem* at 454.

<sup>87</sup> Inder, Brigid, “Partners for gender justice” in *Sexual violence as an international crime: interdisciplinary approaches* De Brouwer *et al.* (eds) Antwerp: Intersentia (2013) 322.

<sup>88</sup> De Brouwer, *supra* n 26 at 454.

<sup>89</sup> Inder, *supra* n 87 at 322.

<sup>90</sup> *Ibid.*

According to De Brouwer (2005), and also as has been seen throughout this research, the ICL system offers enough opportunities to try crimes of sexual violence.<sup>91</sup> But to accomplish this objective it is essential to take into consideration some fundamental issues, such as: “the realities of the crimes, the respectful treatment of victims of sexual violence in the proceedings, the seriousness of the crimes and the needs of victims of sexual violence.”<sup>92</sup> I would add to this the need to handle witnesses of sexual violence correctly and the obligation to grant them sufficient protection. I believe all the necessary tools are in place; now it is important that the relevant players know how to use them.

**Problem 13:** Non-recognition the prohibition of sexual violence as *Jus Cogens*

According to Askin (2003), crimes against humanity, war crimes, genocide, torture and slavery are considered contraventions of *Jus Cogens*, and therefore originate universal jurisdiction.<sup>93</sup> When they comply with the elements of the crimes, several types of sexual violence can amount to crimes against humanity, war crimes, genocide, torture and slavery; however, only then is universal jurisdiction originated. Askin affirms that “there is now a strong indication that rape crimes may be subjected to universal jurisdiction in its own right.”<sup>94</sup> The problem is that this is only a possibility, not a certainty.

**Proposal:** Crimes of sexual violence are so serious they should be considered *Jus Cogens* in their own right and become subject to universal jurisdiction. Askin (2003) believes there are several signs that the international community is moving in this direction, for example: the milestone case law of the ICTY and ICTR that identified sexual violence as an international crime such as crimes against humanity, war crimes and genocide; the entry into force of the Rome Statute that incorporated several types of sexual violence and even certain crimes that were never previously laid down in an international treaty; the growing recognition of sexual violence in resolutions, statements in the Secretary General’s reports and other United Nations official documents and other international instruments; the latest actions from international or hybrid tribunals and from truth and reconciliation commissions focusing on sexual

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<sup>91</sup> De Brouwer, *supra* n 26 at 465.

<sup>92</sup> *Ibid.*

<sup>93</sup> Askin, *supra* n 3 at 349.

<sup>94</sup> *Ibid.*

violence; the most recent acknowledgment of gender crimes by regional human rights courts or commissions; and the progressively more successful legal actions in national courts that have ruled on sex crimes.<sup>95</sup> All of these examples have been thoroughly reviewed in this research. Askin (2003) concludes that this is evidence that sexual violence, or at best rape and sexual slavery, have reached the status of *Jus Cogens*.<sup>96</sup> If the status of *Jus Cogens* is finally recognised, this will be very positive, because it will translate into improved means of protecting women and girls, encourage action to enforce infractions of the laws, and defy the usual stereotypes of gender crimes being regarded as less serious.<sup>97</sup>

### III. Personal appreciation

I would like to conclude this work by citing one of the women who without a doubt has made a significant contribution to international law in the prosecution of sexual violence against women in armed conflict: the South African jurist Navanethem “Navi” Pillay, former judge of the ICC and President of the ICTR, former United Nations High Commissioner for Human Rights from 2008 to 2014 and the first non-white female judge of the High Court of South Africa:<sup>98</sup>

At the outset, let me say that I am heartened by the progress made so far regarding the prosecution of sexual violence. The jurisprudence and methodology developed by international justice mechanisms, as well as national tribunals or regional courts, has made great strides. Yet we are still wanting in our capacity to fully describe, understand, and address the real experience of sexual violence from the victim’s perspective.<sup>99</sup>

Finally in relation to this quote, I would like to add a personal insight. As a woman, investigating, reading and analysing the history of sexual violence against women in armed conflict has been an emotionally exhausting and heart-breaking task. In my worst nightmares I can imagine myself being a victim of sexual violence, but if that were the

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<sup>95</sup> *Ibid.*

<sup>96</sup> *Ibid.*

<sup>97</sup> Askin, *supra* n 3 at 349.

<sup>98</sup> See [http://www.un.org/sg/management/senstaff\\_details.asp?smgID=139](http://www.un.org/sg/management/senstaff_details.asp?smgID=139) Accessed 08.09.2015.

<sup>99</sup> Pillay, Navanethem, Address given at the Interdisciplinary Colloquium on Sexual Violence as International Crime: “Sexual violence: Standing by the victim.” June 16 (2009).

case, I would have a lot more opportunities and resources to overcome the trauma than most of these women ever had. I think it has helped me to grasp, at some level, the real experience of sexual violence from the victim's perspective. I do sincerely hope that this work can be a contribution, in even the smallest way, to solving the tragedy of sexual violence against women in armed conflict.



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