Sexual Violence in Armed Conflict under International Law

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CHAPTER 1. Introduction

1.1 Historical patterns

Sexual violence in armed conflict is not a new phenomenon, for it has existed for as long as there has been war. Practically all types of military conflicts throughout history were marked with the occurrence of sexual violence. Some of them include:

- wars of religion, e.g. when knights and Pilgrims committed sexual assault as they marched toward Constantinople in the First Crusade;
- wars of revolution, e.g. based on some historical evidence from George Washington’s papers of 1780, rape was a common thing among the soldiers of the Continental Army;
- wars of independence, e.g. during Bangladesh’s nine-month war of independence from Pakistan in 1971 rape got “regrettably” out of hand on the side of the Pakistani army, which was the first case in which conflict-related rape was internationally recognized as having a political-military-strategic function\(^1\); and
- the two world wars, e.g. when Germans marched through Belgium in World War I, rape of civilian women took place “from Liege to Louvain”.\(^2\)

Explaining why individual belligerents commit sexual violence might be a subject for psychology. Yet, from a historical perspective, wartime sexual violence has served different functions.

First of all, for centuries there has been a commonly held traditional perception of women as being part of the “spoils” of war to which soldiers are entitled. Deeply entrenched in this notion is the idea that women are property - chattel available to victorious warriors.\(^3\) For instance, the infamous episode in the history of Ancient Rome – the Rape of the Sabine women in which Roman men forcefully acquired wives for themselves from the neighboring communities.\(^4\)

Another common pattern is when rape is used as a weapon of terror, primarily on the occupied territories. It is done to destroy the community pride, and humiliate the army of the enemy who

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\(^2\) Idem, p.41.


\(^4\)
failed to protect their women. The ‘Rape of Nanking’ and the use of ‘comfort women’ during World War II provide examples of such a strategy.\(^5\)

Sexual violence can also be a tool of retaliation and revenge. This was the case with the Russian Army, which sustained the worst numerical losses of any of the Allies under World War II, when it marched to Berlin in 1945.

Finally, sexual violence may also be looked upon as a means of troop mollification. This is particularly the case where victims are forced into military sexual slavery. For instance, in the Vietnamese War rape reared its head as a way to relive boredom as American GI’s searched and destroyed the highlands of Vietnam, and subsequently turned it into a large-scale prostitution business.\(^6\)

### 1.2 Current situation

Unfortunately, the situation has not improved over time. Widespread rape of civilians as a weapon of destruction is one of the most prominent features of contemporary conflicts. Moreover, wartime sexual violence is no longer considered an inevitable by-product of war, but rather a tactic of war which has gained traction as an important international security issue.

Notably, the decade of the 1990s was marked by the emergence of ethnic conflicts involving the targeting of civilians in order to eliminate particular ethnic groups or displace groups of people dwelling in resource-rich areas. In order to achieve such goals, the perpetrators of violence in Bosnia and Herzegovina, Rwanda, Kosovo and East Timor engaged in acts of rape and other forms of sexual violence.

In the 2000s, sexual violence was used as part of the military strategy of Uganda’s Lord’s Resistance Army to provoke fear and terror among civilians. In the Democratic Republic of the Congo sexual violence has been perpetrated as a military strategy by all armed groups engaged in conflict, both for ethnic-cleansing purposes and as revenge for previous acts of sexual violence\(^7\).

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\(^4\) Brownmiller, P.34.
\(^5\) UN, Women 2000, above note 3.
\(^6\) Brownmiller. P.86-114.
\(^7\) In DRC, 11,769 cases of sexual and gender-based violence were recorded by the UN Population Fund from January to September 2014 in the provinces of North Kivu, South Kivu, Orientale, Katanga and Maniema; 39 per cent of these cases were considered to be directly related to the dynamics of conflict, perpetrated by armed individuals. See: UN Secretary-General (UNSG), Conflict-related sexual violence: report of the Secretary-General, 23 March 2015, S/2015/203, para.23.
In Sudan, rape and other forms of sexual violence have been perpetrated, mainly by government forces, to destroy family and community networks and to force dwellers out of resource-rich areas by instilling fear. In our times, the world is still impaired by military conflicts in which sexual violence remains a natural consequence. In Libya, an outbreak of armed conflict in Tripoli, Benghazi and elsewhere across the country since the 2011 revolution, increased occurrence of sexual violence, which has been reported to be a driver for displacement into neighboring countries. In Syria and Iraq, the radical self-proclaimed Muslim state of ISIS claims its religious right to enslave and rape captive non-Muslim women (which was witnessed with the Yazidi religious minority) based on its interpretation of the sharia practice of spoils of war according to the Qur’an. Young women are being “sold” in open markets or “given” to ISIS fighters as gifts.

1.3 Research problem

As we see, the insight into historical evidence identifies that sexual violence in armed conflict flourishes irrespective of nationality or geographic location, and its impact is terrifying.

Sexual violence jeopardizes the moral values and the principle of human dignity which have reinforced themselves in the aftermath of World War II. Moreover, it brings overwhelming social, psychological and economic consequences for those it affects. All too often the stigma and shame associated with sexual violence remains with the victim rather than the perpetrator.

Besides, it has a devastating impact on societies traumatized by war, and by undermining reconciliation, deepening grievances and devastating communities, sexual violence feeds a cycle of conflict. It exacerbates tension between religious and ethnic groups and poses a grave threat to domestic and international peace and security.

9 See IISS Armed Conflict Database at https://acd.iiss.org/.
10 UNSG, S/2015/203, above note 7, para.32.
11 On 29 June 2014, ISIL declared an “Islamic caliphate” extending from the Aleppo province in the Syrian Arab Republic to the Diyala province in Iraq. Sexual violence has been used as part of the ISIL strategy of spreading terror, persecuting ethnic and religious minorities and suppressing communities that oppose its ideology. See: UNSG, S/2015/203, above note 7, para.28.
With all threats that wartime sexual violence poses, the evident question is how should it be addressed?

It is clear that wartime violence is to a large extent rooted in the very essence of war – the idea that killing is not only permissible but heroic behavior sanctioned by one’s government or cause. The harshness of warfare feeds on itself: the distinction between taking a human life and other forms of impermissible violence gets lost. However, rape in war is qualitatively different from impersonal looting and burning, deliberate ambush, mass murder or torture during interrogation, even though it contains elements of all of the above. Rape in war is not and should not be regarded just a symptom of war or evidence of its violent excess, but a conscious crime.\textsuperscript{13}

Modern international law agrees with this standpoint and prohibits the crime of sexual violence. Yet, it was a long path for the international community to finally address the problem and find a strategy for its regulation.

Thus, even though the problem can and should be studied from different perspectives, the thesis will focus on contemporary international law. The study will be conducted within a legal framework aimed at conducting a profound legal analysis and identifying general patterns of legal evolutions and possible gaps that might affect the implementation.

\textsuperscript{13} Brownmiller. P.32-33.
CHAPTER 2. Research design

2.1 Research question

Even though the occurrence of sexual violence in conflict might never be eradicated completely, the key to its prevention, alleviation, and most importantly, provision of justice for victims starts within the field of law. This is why the main research question of this thesis is:

*Does contemporary international law adequately address the problem of sexual violence in armed conflict?*

Before drawing the specific sub-questions, I find it necessary to provide the historical background proceeding the contemporary state of international law and to identify the research area, i.e. the relevant branches of international law.

2.1.1 Historical relevance

There is no precise moment in history when rape in war came to be considered a criminal act. However, disregarding the period of ancient times when sexual mistreatment of the conquered was seen as socially acceptable behavior well within the rules of warfare\(^\text{14}\), the historical evidence from as early as the Medieval Ages shows that prohibition of rape long became acknowledged as a customary rule of war.

Particularly, one of the earliest surviving Articles of War was proclaimed by Richard II of England in 1385, in which he decreed “That none be so hardy as to…force any woman, upon pain of being hanged”\(^\text{15}\). In the 17th century the Dutch jurist Hugo Grotius, who is considered the founding father of international law, asserted in the work ‘The Law of War and Peace’ that prohibition of rape in war is what distinguishes more civilized nations from less civilized. Grotius deems rape impermissible because it degrades the differences of men and animals, Christians and barbarians, differences and distinctions integral to the creation and maintenance of social order\(^\text{16}\).

However, such early efforts to outlaw rape in warfare, at least in scholarly writings, were an

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\(^{14}\) The ancient Greeks treated conquered women as legitimate booty, useful as wives, slave labor or battle-camp trophies. Also, the Hebrew Book of Deuteronomy permitted the use of female captives as slaves and concubines. See: Brownmiller. P.33.

\(^{15}\) Idem 34.

important challenge to its traditional impunity. The first explicit legal prohibition of rape and punishment by death appeared in the wartime conduct instruction for the US Union Forces in the Civil War, the 1863 Lieber Code\textsuperscript{17}, which drew upon customary international law.

Substantial progress in addressing wartime sexual violence did not materialize until the late 19\textsuperscript{th}– and early 20\textsuperscript{th} century, when representatives of the most powerful nations made an attempt to harmonize laws of war at a series of international peace conferences in The Hague.\textsuperscript{18} The treaties adopted during The Hague conferences of 1899 and 1907 gave a strong impetus to the development of international humanitarian law (IHL).

From an early stage, IHL treaties showed an awareness of sexual violence during armed conflict and aimed at its prevention. However, as products of their time, when sexual violence had for centuries been accepted as an inevitable reality of armed conflict, and not an easy problem to discuss openly, they did not address it in express terms.

The Hague Regulations of 1899\textsuperscript{19} and 1907\textsuperscript{20} only implicitly refer to its prohibition under military occupation, stating that “family honour … must be respected”\textsuperscript{21} and admonishing belligerents to “conduct operations in accordance with the laws and customs of war”\textsuperscript{22}, which sub silencio prohibits all conventional war crimes, including rape.\textsuperscript{23}

However, the test of time - rampant occurrence of sexual violence during World War I and II - revealed that such an indirect approach to the problem by the early Hague initiatives came at the cost of massive violations of the Hague provisions by all parties in the conflict and the impunity of most offenders.

Two multinational war-crimes tribunals established by the Allies to prosecute suspected war criminals – in Tokyo and Nuremberg, were undoubtedly an important achievement for international criminal law (ICL), most notably as matters in relation to sexual atrocities were

\textsuperscript{17} Instructions for the Government of the Armies of the United States by the Field by Order of the Secretary of War, 24 April 1863 (“Lieber Code”). Arts 44, 47.

\textsuperscript{18} First Hague Conference was held in 1899, and the Second Hague Conference - in 1907.

\textsuperscript{19} Convention with Respect to the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land. The Hague, 29 July 1899.

\textsuperscript{20} Convention Respecting the Laws and Customs of War on Land, and Annex to the Convention, Regulations Respecting the Laws and Customs of War on Land, The Hague, 18 October 1907.

\textsuperscript{21} Hague II, IV. Art.46.

\textsuperscript{22} Idem, art.1 of the Annexes to both Conventions.

addressed internationally for the first time. Despite this, the ultimate progress in prosecuting the crime of sexual violence was rather modest.

The charters of both tribunals claimed jurisdiction over conventional war crimes, namely “violations of the laws and customs of war” as well as crimes against humanity and crimes against the peace\textsuperscript{24}. No explicit reference was, however, made to the sexual crimes in either charter, even though each tribunal admitted and ruled upon evidence of rapes.

In fairness, whereas the lingering legacy of Nuremberg remains one of presumed inattention to sexual crimes\textsuperscript{25}, the Tokyo Tribunal did expressly charge sexual violence. Specifically the evidence of rape during the Japanese occupation of Nanking under General Matsui led to convictions for war crimes and crimes against humanity. The convictions were issued under the category of the war crimes of “murder, rape, and other cruelties”.\textsuperscript{26}

Regrettably, the subject of women's victimization was only given incidental attention. Tokyo prosecutors did not indict, nor present evidence on the systemic military sexual slavery conducted by the Japanese Army against thousands of Korean, Indonesian, Burmese and other women from Japanese conquered and occupied territories in Asia.\textsuperscript{27}

Consequently, this general historical overview of the period before the end of World War II serves to demonstrate the highly important role international law can and should play in addressing the issue that had for many centuries gone unnoticed and neglected as an inevitable consequence of all military conflicts. The revolutionary for its time legislation of the Hague law and subsequent Nuremberg and Tokyo trials gave a strong impulse for further elaboration of international humanitarian and criminal law in its efforts to codify wartime sexual violence as a particular crime against humanity.

\subsection*{2.1.2 Research area}

The research area for the main question will be focused, but not limited, to relevant legislation

\begin{flushright}
\textsuperscript{25} For example, in the Nuremberg judgment the forced deportation of 500,000 females should have at least been examined as a gender-based crime of massive female enslavement, irrespective of any other sexual component.
\textsuperscript{27} Sellers, p.6.; See also, Sellars, K. Imperfect Justice at Nuremberg and Tokyo. The European Journal of
\end{flushright}
and a body of case law within three branches of contemporary international law, implicitly or explicitly addressing the crime of wartime sexual violence – humanitarian, criminal and human rights law.

**A. International humanitarian law**

Significant extension to the Hague law, the 1949 Geneva Conventions\(^{28}\) and their 1977 Additional Protocols\(^{29}\) were initiated by the ICRC. These key international humanitarian law treaties expand the scope of humanitarian law from regulating conduct of war to protecting the civilians and those who can no longer fight in an armed conflict.

Significantly, the Geneva law designates certain crimes as "grave breaches", which requires States to bring alleged perpetrators, “regardless of their nationality, before its own courts”. The effect of the grave breach system is to create a hierarchy, with some violations of the law of armed conflict considered more egregious than others.\(^{30}\)

Sexual violence is not expressly designated as a grave breach, which can be regarded as another historical failure to appreciate the seriousness of the problem\(^{31}\). At the same time, the view that sexual violence fits within other categories of grave breaches, such as "wilfully causing great suffering or serious injury to body or health", and "torture or inhuman treatment", has gained acceptance and was confirmed by the ICRC in a 1992 Aide-memoire which sought to clarify the prohibition of rape under the Geneva Conventions.\(^{32}\)

Moreover, rape is explicitly prohibited in both international and non-international armed conflicts. The Geneva Convention IV prohibits such conduct as an “attack on women’s honour”\(^{33}\), with the Additional Protocols expanding the specific range of protections and introducing gender-neutral language on broad prohibitions against sexual and gender-based

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\(^{28}\) Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Geneva, 12 August 1949 (GC I); Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Geneva, 12 August 1949 (GC II); Geneva Convention relative to the Treatment of Prisoners of War, 12 August 1949 (GC III), Geneva Convention relative to the Protection of Civilian Persons in Time of War, Geneva, 12 August 1949 (GC IV).

\(^{29}\) Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts, 8 June 1977 (AP I); Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts, 8 June 1977 (AP II).

\(^{30}\) GC I, Art.49; GC II, Art.50; GC III, Art.129; GC IV, Art.146.


\(^{32}\) ICRC, Aide-memoire, 3 December 1992, para.2.
violence as ‘fundamental guarantees’.\textsuperscript{34}

Hence, provisions of the Geneva Conventions play a groundbreaking role in establishing the legal platform for codifying the crime of sexual violence and will take a central place in the research.

\textbf{B. International criminal law}

The Nuremberg trials and the subsequent “Nuremberg Principles” issued by the UN International Law Commission (ILC) in 1950\textsuperscript{35} laid the basic foundations for the later development of ICL. Primarily, they firmly established the concept of “crimes against humanity” which has brought war crimes under a different light in international law, and under the scope of human rights. Subsequently, it determined the formation of the international war crimes tribunals starting from the 1990s.

Parallel to these developments, sexual violence has incrementally gained recognition as an international crime. Throughout the post-war period, wartime rape had been incorporated as an express form of crimes against humanity into national military codes and legislation.\textsuperscript{36}

More recently, in the last two-three decades, as a result of sexual atrocities committed during some ethnic conflicts in the world, the most serious forms of sexual violence have been criminalized at the international level. Specifically, the governing statutes of the International Criminal Tribunal for the former Yugoslavia (ICTY)\textsuperscript{37}, International Criminal Tribunal for Rwanda (ICTR)\textsuperscript{38}, and the Special Court for Sierra Leone (SCSL)\textsuperscript{39} – all list the crime of rape, together with other expressly named sexual violence crimes, and provide for the individual criminal responsibility of sexual crimes’ perpetrators.

Finally, the Nuremberg-inspired movement for the establishment of a permanent international criminal court, eventually led over fifty years later to the adoption of the Statute of the

\textsuperscript{33} GC IV, art.27.
\textsuperscript{34} AP I, art.75(2)(b). See also, Griffin, A. \textit{Development of prohibitions against sexual violence in armed conflict. International Humanitarian Law Magazine} (2) 2014. P.3-5.
\textsuperscript{35} ILC, Principles of International Law Recognized in the Charter of the Nuremberg Tribunal and in the Judgment of the Tribunal (“Nuremberg principles”). Yearbook of the ILC, 1950, vol. II.
\textsuperscript{38} Statute of the International Criminal Tribunal for Rwanda, S.C. Res. 955, 8 Nov. 1994, art.3(g).
\textsuperscript{39} Statute of the Special Court for Sierra Leone, UN Doc. S/2000/915, 16 January 2002, art.2(g).
International Criminal Court (ICC) in 1998, establishing “an independent permanent International Criminal Court in relationship with the United Nations system, with jurisdiction over the most serious crimes of concern to the international community as a whole”. It lists rape and other crimes of sexual violence as a) crime against humanity, b) violation of laws and customs of international armed conflicts, and c) of non-international armed conflicts.40

C. International human rights law

Unlike IHL treaties, most human rights treaties do not contain a specific prohibition against sexual violence. For instance, the main text of the 1979 Convention on the Elimination of Discrimination against Women41 (CEDAW) does not contain any provision to that effect. However, important recognitions concerning the gender-based violence in conflict are provided by the Committee on the Elimination of Discrimination against Women (CEDAW Committee) in its later Recommendation No.1942 of 1991.

The important thing is that the lack of explicit provisions on sexual violence is compensated by human right law’s basic principles. Specifically, the principle of respect for inherent dignity of the human being acts in complementarity with the principles of humane treatment owed to different categories of persons under IHL.

More importantly, the *jus cogens* non-derogable prohibition of torture or cruel, inhuman or degrading treatment or punishment contained in all general human rights treaties (primarily the International Bill of Human Rights43 and the Convention Against Torture44) can be deemed a strong basis to prohibit virtually all forms of sexual violence at all times.

Furthermore, the definition of torture under human rights law, and the numerous examples of human rights case law dealing with rape and other forms of sexual violence as a form of torture and other ill-treatments, are useful when interpreting these concepts not only under human rights

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42 CEDAW Committee, General Recommendation No. 19, 1992, para.7(c).
44 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), G.A.res. 39/46, 1984 (entry into force 26 June 1987).
law, but also under IHL and ICL.\textsuperscript{45}

\subsection*{2.1.3 Sub-questions}
Considering the evolving nature of the problem, the following sub-questions will guide the research:

\textit{How does the international treaty and case law define sexual violence in conflict?}

\textit{With regard to the specifics of different systems of law:}

\begin{itemize}
\item what is the legal status assigned to the prohibition of conflict-related sexual violence?
\item what is the scope of such provisions?
\end{itemize}

\textit{How does international law regulate the responsibility/criminal liability in relation to the crime of sexual violence:}

\begin{itemize}
\item on State level
\item on an individual level
\end{itemize}

\textit{What are the common trends in the three branches of law with regard to the prevention and the punishment of sexual violence in armed conflict?}

\textit{In general, is the current state of international legal regulation of the issue sufficient for providing an adequate level of protection and access to justice for women?}

\textit{If not, what are the grey areas?}

\textit{What can be improved?}

\subsection*{2.2 Methodology}

Based on the identified research question and the research area, it can be deduced that the research will be of a legal nature based on legal positivism, answering the principle question: what the law is in relation to sexual violence in international conflict.

The methodology will be typical of doctrinal research with a focus upon the law itself - analyzing the primary sources: relevant international legal sources and the recent body of case law. In this regard, the method of the research can be described as normative, non-empirical based on inferences drawn from the legal comparative analysis.

Significantly, the doctrinal research is not simply about identifying the correct legislation and the relevant cases and making a statement of the law which is objectively variable. It is a process of selecting and weighing materials taking into account hierarchy and authority as well as understanding social and political context. The nature of such research is inferential, seeking analysis and referring to historical explanations underpinning the problem.\textsuperscript{46}

Besides, the methodology will be considerably relying to various secondary sources, such as reports of international organizations, journal articles, written commentaries on the case law and legislation, etc. The principle aim here is to identify ambiguities and grey zones of the law which can affect its enforcement.

From the theoretical perspective and by reference to the system of “major methods of international legal scholarship”, identified by law professors Steven Ratner and Anne-Marie Slaughter\textsuperscript{47}, the research will be guided by the method of legal positivism. Specifically, the following perspectives will be the cornerstone of the study:

- International law is a body of rules subject to consent by the states.
- States are the primary subjects of international law, however in the context of humanitarian law, the role of non-state actors (i.e. non-state military groups) is crucial and cannot be disregarded.
- Law is described as it is, with reference to formal criteria, independent of moral or ethical considerations.

2.3 Research data

The research will use the following primary sources from international law:

- International human rights law: ICCPR, CAT, CEDAW, CRC\textsuperscript{48};
- Regional human rights law: American Convention on Human Rights\textsuperscript{49}, European


- International criminal law: Rome Statute of the ICC, statutes and relevant judgments of the ICJ, ICTY, ICTR, SCSL, as well as the Law on the Establishment of Extraordinary Chambers in the Courts of Cambodia\textsuperscript{52}.

Secondary sources for the research will include:

- UN reports and resolutions issued by: the General Assembly, the Security Council, the Human Rights Committee, the Office of the United Nations High Commissioner for Human Rights.
- Reports and studies by international organizations, primarily the International Committee of the Red Cross (hereinafter ICRC).
- Scholarly articles from relevant academic journals.

2.4 Research plan

The Third chapter starts off the research with the basic question of definitions. This refers to the evolution of legal approaches to defining the term sexual violence in an armed conflict context. The Fourth, Fifth and Sixth chapters analyze the provisions related to the prohibition and criminalization of sexual violence under three branches of international law – humanitarian, criminal and human rights law respectively. The special focus is given to the systems of State responsibility and the individual criminal liability, which the criminalization of sexual violence entails.

\footnotesize
\textsuperscript{50} Council of Europe (CoE), Convention for the Protection of Human Rights and Fundamental Freedoms, entered into force 3 September 1953.
\hfill
\hfill
CHAPTER 3. Defining the subject-matter

3.1 Sexual violence and rape

3.1.1 International treaty law

Contemporary international law treaties prohibit sexual violence, in both international and non-international armed conflicts, but none of them offers a direct definition thereof.

Some clarification of the crime of sexual violence is apparent in the text of the treaties and over the years there has been a certain pattern of evolution in defining the scope and elements of the crime. This has laid grounds for international tribunals to subsequently develop their own tailored definitions – the process which in turn has also been undergoing evolution.

A. Through notion of honour

In tune with the approach taken by the preceding Hague law, the 1949 GC III relevant to the treatment of prisoners of war applies a rather generalist notion of “honour” to address the issue of sexual violence. Particularly, it provides that prisoners of war are “in all circumstances entitled to respect for their persons and honour” and that “women shall be treated with all regard due to their sex”\(^{53}\). The old-fashioned wording resembles the provisions of the earlier Hague Conventions of 1899 and 1907 as well as the Geneva Convention on prisoners of war of 1929\(^{54}\).

The notion of “honour” had a specific connotation at the time and was considered a highly important constraint in war.\(^{55}\) In its 1960 Commentary, the ICRC clarified that “honour” along with “weakness”, “modesty”, “pregnancy and child-birth”, are the “points” that need to be considered regarding the status accorded to women. Thereby “honour” is intended to “defend women prisoners against rape, forced prostitution and any form of indecent assault”\(^{56}\).

However, nowadays this wording can be interpreted in the paternalistic tone with emphasis on gender perspective, implying that honour can be something lent to women by men, whereby a raped woman is seen as dishonoured. Another interpretation can refer to the human dignity of the person, shifting focus from the violation of physical and psychological well-being.

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\(^{53}\) GC III, art.14.

\(^{54}\) Convention relative to the Treatment of Prisoners of War, Geneva 27 July 1929. Art.3.

\(^{55}\) Gaggioli, p.512.

From this perspective, it can be argued that such generic approach reinforces the trivialization of sexual violence crimes, and does not reflect the seriousness of the offence. Besides, it is sustained by the fact that the provisions appear to be of a protective rather than a prohibitive nature. 57

**B. Through exemplification**

A more explicit approach is taken in the GC IV - the first treaty designated to the protection of the civilian population during armed conflict.

It specifies an “attack on honour” of civilian women through examples of concrete acts that fall under the category, namely “rape, enforced prostitution, or any form of indecent assault”.58 On the one hand, it demonstrates a progress in being more explicit and naming the specific acts exemplifying the crime. On the other hand, it does not move away from the generic notions of “honour” and “indecency” which makes it difficult to identify what constitutes the crime.

In this regard, more recent extensions to the Geneva treaties, the AP I and AP II59 of 1977 protecting the victims of international and non-international armed conflicts respectively, demonstrate a fundamental change of values and societal norms. They shift away from the notion of “honour” and towards basic human rights principles in addressing sexual violence.

Specifically, AP I prohibits “outrages upon personal dignity, in particular humiliating and degrading treatment, enforced prostitution and any form of indecent assault…at any time and in any place whatsoever, whether committed by civilian or by military agents”60. In the 1987 Commentary61, the ICRC underlines that the provisions are not gender-specific and apply to “everybody covered by the article, regardless of sex”.

At the same time, it does not go further than the GC IV in specifying the crime of sexual violence and, again, only guarantees protection to women “against rape, forced prostitution and any other form of indecent assault”62 and children “against any form of indecent assault”63.

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57 UN, Women 2000, above note 3.
58 GC IV, art.27.
59 AP II, art.4(2)(e).
60 AP I, art.75(2)(b).
62 AP I, art.76(1). In this regard, the ICRC Commentary to AP I states: “the rule applies quite generally and therefore covers all women who are in the territory of Parties involved in the conflict... to women protected by the GC IV and to those who are not”. Above note 61, para.3151.
63 Idem, art.77(1). The ICRC Commentary underlines: “This is a welcome supplement to Article 27 of the GC IV, as
Finally, the Statute of the ICC of 1998 extends the list of prohibited acts of sexual violence by criminalizing “rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization or any other form of sexual violence of comparable gravity”. 64

This raises the question of the required threshold of gravity to qualify as a crime. After all, the list of examples of sexual violence acts can be very broad. Case law and legal writings provide a wide range of such examples: for instance, trafficking for sexual exploitation65, mutilation of sexual organs66, sexual exploitation (such as obtaining sexual services in return for food or protection)67, forced abortions68, enforced contraception69, forced marriage70, sexual harassment (such as forced stripping)71, forced inspections for virginity72 and forced public nudity73 etc. have been qualified as sexual violence. 74

At the same time, even though the ICC prosecutes only sexual violence of certain gravity, this does not mean that forms of sexual violence which may not reach that gravity cannot be considered an international crime under other treaties or national legislations. This is evidenced by the fact that, for instance, the Statute of the Special Court for Sierra Leone criminalizes – under crimes against humanity – “rape, sexual slavery, enforced prostitution, forced pregnancy and any other form of sexual violence”75.

3.1.2 Practice of international criminal courts and tribunals

The lack of an explicit sexual violence definition in the treaty law created a challenge for the international criminal tribunals which have, in their jurisprudence, developed their own definitions for each particular case. In this connection, the crime of rape, which is commonly

experience has shown that children, even the very youngest children, are not immune from sexual assault”. Above note 61, para.3181.

64 Rome Statute of the ICC, arts 7(1)(g) and 8(2)(b)(xxii).
66 ICTR, Prosecutor v. Théoneste Bagosora, Case No. ICTR-96-7 (Trial Chamber), 18 December 2008, para.976.
68 Ibid.
70 WHO, above note 67, p.149.
71 ICTR, Prosecutor v. Jean-Paul Akayesu, Case No.ICTR-96-4 (Trial Chamber), 2 September 1998, para.693.
72 WHO, above note 67, p.150.
73 ICTR, Akayesu, para.688.
74 Gaggioli, p.506.
75 SCSL Statute, above note 39, art.2 “Crimes against Humanity”.
referred to by treaty law only as part of a broader category “sexual violence”, has undergone its own development within the case law and received its own definition. The below section will deal with some of the main elements of sexual violence, as developed in the case law of international courts.

A. Through element of coercion

Akayesu case

Particularly, the ICTR Trial Chamber held in 1998 in the Akayesu case, that sexual violence is “any act of a sexual nature which is committed on a person under circumstances which are coercive”.

As demonstrated above, the term “act of a sexual nature” is very broad and can be of various gravity. In this regard, the Chamber underlined that “sexual violence is not limited to physical invasion of the human body and may include acts which do not involve penetration or even physical contact”\(^76\).

In this regard, the Trial Chamber took an attempt at formulating a separate operative definition of rape. In doing so, it departed from the assumption that “the central elements of the crime of rape cannot be captured in a mechanical description of objects or body parts”. It went on to point out that the more useful approach to identifying rape shall be similar to the one taken by the UN Committee against Torture where it does not “catalogue specific acts in its definition of torture, focusing rather on the conceptual frame work of state sanctioned violence”\(^77\).

In this regard, rape (as an act of sexual violence) is defined as “a physical invasion of a sexual nature, committed on a person under circumstances which are coercive”.

The term “coercion” which can also be understood broadly is defined by the Chamber as including not only a show of physical force but also “threats, intimidation, extortion and other forms of duress which prey on fear or desperation”. The case law of international criminal courts and tribunals underlines that “coercion may be inherent in armed conflict or military presence”. \(^78\)

Thus, the Akayesu case marks the first attempt to define sexual violence and rape within international case law through elements of crime by applying a rather broad term of “coercion” as

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\(^{76}\) ICTR, Akayesu, para.688.

\(^{77}\) Idem, para.687.
a denominator.

It can be argued, that the Akayesu judgment enunciated a rather broad definition not limited to forcible sexual intercourse. This is why this time the question of minimum threshold of gravity rises in relation to coercion. How grave should coercion be (i.e. physical, verbal or mental) to constitute a crime?

It is implied that case-to-case evaluation and individual assessment by a trial are an only obvious solution. Particularly, in the Akayesu case, the Trial Chamber regarded the incident of a student ordered to undress and forced to do gymnastics naked in public, a crime of sexual violence.\(^\text{79}\)

*Furundžija case*

The Trial Chamber of the ICTY in its judgment of 1998 in the *Furundžija* case took a more thorough approach to defining rape by conducting a comparative analysis in order to extrapolate the “common denominators” of rape in the criminal law of major legal systems.\(^\text{80}\)

The survey concluded that most legal systems consider rape as a forcible sexual penetration of the human body by the penis or a forcible insertion of any other object into either the vagina or the anus. However, the discrepancies were revealed regarding “forced oral penetration”, which some states treat as sexual assault, and other states categorize as rape.

To resolve this discrepancy, the Trial Chamber resorted to general principles of international law, namely the principle of respect for human dignity, as relevant to categorize forceful oral penetration as rape.

The ICTY Trial Chamber held that charging a person with forcible oral sex as rape does not violate the principle of *nullum crimen sine lege*\(^\text{81}\). Particularly, because the nature of the Tribunal’s subject-matter jurisdiction invariably regards forced oral sex as an aggravated sexual assault as it is committed in time of armed conflict on defenseless civilians, hence it is not simple sexual assault but sexual assault as a war crime or crime against humanity.\(^\text{82}\)

In light of these findings the Chamber concluded that the objective elements (actus reus) of rape

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\(^{78}\) ICTR, Akayesu, para.688.

\(^{79}\) Ibid.


\(^{81}\) lat. “no penalty without a law”.

\(^{82}\) ICTY, *Furundžija*, paras 183-184.
are:

“i) sexual penetration, however slight: a) of the vagina or anus 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 third person”.\(^8^3\)

Thus, it can be concluded that ICTY took a step forward in the *Furundžija* case by offering a more precise definition of rape by, on the one hand, following the approach of the *Akayesu* case, and, on the other hand, identifying additional details on the constituent elements of acts considered to be rape.

**B. From coercion to lack of consent**

*Kunarac case*

In the 2001 *Kunarac* case, the ICTY considered that the *Furundžija* definition was too narrow than it is required by international law.\(^8^4\)

The first part of the definition did not raise objection by the Trial Chamber, but second part required additional analysis of domestic legislation practices.

Markedly, the point of discussion by the Chamber is that an act of sexual penetration constitutes rape not only if accompanied by “coercion or force or threat” of whatever gravity, but also if there are “other factors which would render the act non-consensual or non-voluntary on the part of the victim”.\(^8^5\) The key criterion is therefore the lack of consent or voluntary participation.

In this connection, the Chamber conducted a study of relevant law in different jurisdictions around three main factors:

i. force or threat of force,

ii. force or other circumstances which made the victim vulnerable or unable to make an informed refusal, and

iii. lack of consent.\(^8^6\)

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\(^8^3\) ICTY, *Furundžija*, para.185.


\(^8^5\) Ibid.

\(^8^6\) ICTY, *Kunarac*, para.441.
Subsequently, it concluded that force, threats of force, or taking advantage of a person who is unable to resist can actually be seen as an evidence of the absence of genuine and freely given consent or voluntary participation. Moreover, in certain cases, the victim’s consent can simply not be given freely, for instance when “the victim is subjected to or threatened with, or has reason to fear, violence, duress, detention or psychological oppression or reasonably believes that if he or she did not submit, another might be so subjected, threatened or frightened”. In other words, these factors are not elements of the crime of rape, but rather evidence of the lack of genuine consent.

The Chamber recognized that in the Furundžija case the terms coercion or force or threat of force are not meant to be interpreted narrowly and encompass “most conduct which negates consent”. Yet, in its final interpretation of actus reus of the crime of rape in the Kunarac case it “replaced” the second part of the Furundžija definition with “where such sexual penetration occurs without the consent of the victim”. The Appeals Chamber of the ICTY confirmed this definition the following year and added that “force or threat of force provides clear evidence of non-consent, but force is not an element per se of rape”. Besides, a narrow focus on force or threat of force can permit perpetrators to take advantage of coercive circumstances without relying on physical force.

Thus, the Appeals Chamber affirmed a more specific interpretation defining the material element of rape as a non-consensual act, which is therefore a crime against humanity.

Bagosora, Brima, and Muhimana cases

The second part of the Kunarac definition based on the absence of consent rather than on the coercive circumstances was endorsed in subsequent jurisprudence by the ICTR and the Special Court for Sierra Leone (SCSL).

In the 2005 Muhimana case the ICTR found the comparative analysis in Kunarac case persuasive and took the view that the Akayesu definition and the Kunarac elements are not incompatible or substantially different in their application, with the Kunarac definition articulating the parameters

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87 ICTY, Kunarac, para.458.
89 ICTY, Kunarac, paras 459-460.
90 ICTY, Kunarac case, Case No.IT-96-23/1-A (Appeals Chamber), 12 June 2002, para.129.
of the broad Akayesu definition.  

The Chamber adopted the definition approved by the ICTY Appeals Chamber. Importantly, it recognized that other acts of sexual violence that do not satisfy this narrow definition may be prosecuted as other crimes against humanity such as torture, persecution, enslavement, or other inhumane acts.

Particularly, in the 2008 Bagosora case, the ICTR Trial Chamber interpreted rape as a crime against humanity which requires proof of non-consensual penetration, however slight, of the vagina or anus of the victim by the penis of the perpetrator or by any other object used by the perpetrator, or of the mouth of the victim by the penis of the perpetrator. Consent for this purpose must be understood as given voluntarily and freely and assessed within the context of the surrounding circumstances. Once again, force or threat of force constitute clear evidence of non-consent, but are not an element of rape per se. In this regard, the mens rea for rape as a crime against humanity is the intention to effect the prohibited sexual penetration with the knowledge that it occurs without the consent of the victim.

In the 2007 Brima, Kamera and Kanu case, the Trial Chamber of the SCSL supported this argument adding that in situations of armed conflict or detention, coercion is almost universal, whereby continuous resistance by the victim, and physical force, or even threat of force by the perpetrator are not required to establish coercion.

### 3.1.3 ‘Elements of Crimes’ of the ICC Statute

The ‘Elements of Crimes’ of the ICC Statute, adopted in 2002 and revised in 2010, offer explicit definitions/clarification of the crime of sexual violence along with other five crimes classified under this category by the Rome Statute, namely rape, sexual slavery, enforced prostitution, forced pregnancy and enforced sterilization.

They define the crime of sexual violence as “an act of a sexual nature” committed by perpetrator against victims either directly or by the use of “force, threat of force or coercion, such as that

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91 ICTR, Prosecutor v. Mikaeli Muhimana, Case No. ICTR-95-1B (Trial Chamber), 28 April 2005, para.550.
92 Idem, para.546.
93 ICTR, Bagosora, above note 66, paras 2199-2200.
caused by fear of violence, duress, detention, psychological oppression or abuse of power … or by taking advantage of a coercive environment or …person’s or persons’ incapacity to give genuine consent”.  

Thus, on the one hand, the ICC maintains its rather broad definition of sexual violence as “an act of sexual nature”, applying it to all other acts within the same category. On the other hand, it integrates the case-law evolutions and refers to coercion, coercive environment and the lack of consent as guiding elements in identifying the crime of sexual violence. The same reference with identical wording is applied in relation to the crimes of rape and enforced prostitution.

Rape is defined also in tune with the case law developments as “invasion of 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”.  

The definition appears explicit and all-embracing, with the broader term “invasion” used instead of “penetration”.

The international community generally accepts these definitions as the most authoritative. A number of national legislations have been adopted or modified to include the crime of rape and other sexual crimes as defined by the ICC.

### 3.2 Gender-based violence

Another relevant term, often referred to in international law in a synonymous fashion, is “gender-based violence”. Whether this term is used interchangeably with “sexual violence” or contains different elements of crime, is not always evident, since there is no agreed-upon definition of “gender-based violence” in international law. Hence, this term has been subject to different interpretations and has been a hot bed for discussions.

For instance, the CEDAW Committee defines “gender-based violence” in its General Recommendation No. 19 as “violence that is directed against a woman because she is a woman or that affects women disproportionately. It includes acts that inflict physical, mental or sexual harm or suffering, threats of such acts, coercion and other deprivations of liberty.”

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96 Idem, arts 7(1)(g)-1 and 8(2)(b)(xxii)-1.  
97 CEDAW Committee, GR No. 19, para.6.
In other words, the definition covers only a limited group of victims – women, which is understandable considering the scope of CEDAW’s mandate. At the same time, there exists a strong perception in many societies that women and girls are most affected by gender-based violence in armed conflict situations because of the subordinate status of women and girls vis-à-vis men and boys. Under this interpretation, the term can be used interchangeably with “violence against women” to specifically focus on power inequalities between two genders.  

However, such interpretation should not be understood as suggesting that gender-based violence against men does not exist. Contrarily to the fact, reports of sexual violence against men have been emerging from numerous conflicts, ranging in time from Ancient Persia and the Crusades to the conflicts in Iraq and the DRC. Just like women, men can become targets of both physical (e.g. rape, enforced sterilization, enforced nudity, enforced masturbation, genital violence) and verbal attacks (e.g. when homosexuals are insulted for transgressing predominant concepts of masculinity). Under-reporting by victims and lack of detection on the part of authorities are the evident obstacles as to why the issue is perceived as less urgent than that with women.

The same idea was raised by the Inter-Agency Standing Committee (IASC), which emphasized that although the term “gender-based violence” is often used to refer to women, men and boys may also be victims of gender-based (including sexual) violence based on socially determined roles, expectations and behaviors linked to ideas about masculinity. Thus, IASC’s definition serves as “an umbrella term for any harmful act that is perpetrated against a person’s will, and that is based on socially ascribed differences between males and females”.

In its 2001 “Women Facing War Study”, the ICRC offers a similar interpretation of “gender-based violence”. This study defines “gender” as culturally expected behaviour of men and women based on roles, attitudes and values ascribed to them on the basis of their sex, whereby the term “sex” refers to biological and physical characteristics of a person. Thus, gender-based violence is understood as an “overall term, including sexual violence and other types of gender-

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98 Gaggioli, p.509.
100 The Committee was established following the UN GA Resolutions 46/182 and 48/57 in 1992 as an inter-agency forum of UN and non-UN humanitarian partners, to strengthen humanitarian assistance.
specific, not necessarily sexually-based, violence".  

Rather contradictory conclusions can be made as regards the scope of the term in question.

On the one hand, “gender-based violence” can be seen as being broader than sexual violence, since it includes not only sexual acts (e.g. rape, sexual mutilation and other forms of sexual abuse), but also acts of a non-sexual nature (e.g. honour killings).

On the other hand, the main distinguishing characteristic of gender-based violence is not its actus reus, i.e. acts of physical or verbal abuse, but its mens rea, namely the fact that it is “gender-specific”, i.e. based on socially ascribed gender differences or just a specific gender of the victim. For instance, a murder of a person because he/she is transgender or homosexual, constitutes a gender-based crime. In this regard, sexual violence can be seen as broader than gender-based violence.  

In practice, however, the links between sex and gender can be too intricate to be distinguished, which is why different terms might be more appropriate depending on the specifics of each case.

3.3 Conflict-related violence

Even when committed in armed conflict, sexual violence is not always necessarily “conflict-related”. The term “conflict-related sexual violence” is not defined in international treaties, but it is however sometimes referred to as a synonym of the crime of sexual violence which falls under the scope of IHL regulation.

Specifically, the 2012 Report of the UN Secretary-General describes “conflict-related sexual violence” as sexual violence that … occurs in conflict or post-conflict settings or other situations of concern (e.g. political strife) and… has a direct or indirect nexus with the conflict or political strife itself, that is, a temporal, geographical and/or causal link”.  

From this definition, it is clear that not all conflict-related sexual violence amounts to a violation of IHL, because IHL applies only to those acts that have a direct, or at least sufficient, link or nexus to an armed conflict.

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103 Gaggioli, p.510.
104 UNSG, Conflict-related sexual violence: report of the Secretary-General, 13 January 2012, A/66/657 S/2012/33, para.3. Available at: refworld.org/pdfid/4fbf5b382.pdf.
Notably, IHL treaties do not cover the notion of nexus. It has been therefore mainly developed within the international criminal case law in order to determine the jurisdiction of the tribunal and to establish whether a war crime has been committed.\textsuperscript{105}

In this connection, the \textit{Kunarac} case is quite exemplary in terms of defining the nexus requirement by an international tribunal.

Specifically, the ICTY Appeals Chamber in this case held that an armed conflict environment is what distinguishes a war crime from a purely domestic offence. Thus, “the existence of an armed conflict must, at a minimum, have played a substantial part in the perpetrator’s ability to commit it, his decision to commit it, the manner in which it was committed or the purpose for which it was committed”.\textsuperscript{106}

Additionally, the Appeals Chamber identified a number of factors to determine whether an alleged offence is sufficiently related to the armed conflict to constitute a war crime, including:

a) the perpetrator is a combatant;
b) the victim is a noncombatant;
c) the victim is a member of the opposing party;
d) the act may be said to serve the ultimate goal of a military campaign; and
e) the crime is committed as part of or in the context of the perpetrator’s official duties.\textsuperscript{107}

For example, if in a situation of a non-international armed conflict, a military commander rapes a subordinate soldier in the military barracks as a form of punishment without this act having any link to the armed conflict itself, IHL would not be applicable. The rape should be subject to domestic criminal law or military law and possibly also constitute a human rights violation (in case the military commander committed the rape in his official capacity by using his position of state authority).

However, if in the same armed conflict, the military commander rapes a person detained for reasons connected to the armed conflict, such an act clearly constitutes a violation of IHL (as well as human rights law). Consequently, in this context the nexus derives from: the identity of the

\textsuperscript{105} Gaggioli, p.514.
\textsuperscript{106} ICTY, \textit{Kunarac} (Appeals Chamber), above note 90, para.58.
perpetrator (a military commander), the identity of the victim (a person detained for reasons related to the armed conflict), and the context (situation of vulnerability of detainees to the Detaining Power).  

In practice, however, it might not always be easy to detect the nexus, and the criteria established in the Kunarac case do not offer an adequate response to all possible scenarios.

In this light, the authoritative ICC Elements of Crimes provide a broader interpretation: for a war crime to exist, it must be committed “in the context of and associated with” an armed conflict. The wording “in the context of” refers to the existence of an armed conflict, and “associated with” refers to the nexus requirement. Consequently, in order for an act of conflict-related sexual violence to amount to a war crime under the Rome Statute, it must be committed by a person (whether combatant or civilian) in the context of and associated with an armed conflict.

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107 ICTY, Kunarac (Appeals), para.59.
108 Gaggioli, p.515.
109 ICC, Elements of Crimes, art.8(c).
CHAPTER 4. Regulation of sexual violence under international humanitarian law

The IHL regulation of conflict-related sexual violence derives from the following regulatory perspectives:

- Type of armed conflict: international and non-international armed conflict
- Type of law regulating the offence: treaty law and customary international law
- The ‘grave breaches’ system (applicable to international armed conflicts) which entails State responsibility.

4.1 International armed conflict

In situations of international armed conflict, the four Geneva Conventions of 1949 and their two Additional Protocols of 1977 address rape and other forms of sexual violence both implicitly and explicitly.

Specifically, Article 12 of GC I and Article 12 of GC II stipulate general protection for the wounded, sick and the shipwrecked of the armed forces from, inter alia, violence and torture. In doing so, they, on the one hand, emphasize the gender-neutral non-discriminative approach to all those subjected to protection. On the other hand, they include a special reference to women who shall “be treated with all consideration due to their sex”.

Similarly, Articles 13 and 14 of the GC III protect prisoners of war from violence or intimidation, and guarantee their right to “respect for their persons and honor”. Again, women are singled out and demanded not only to “be treated with consideration due to their sex” but also “to benefit from treatment as favorable as that granted to men”.

The GC IV on the protection of civilians is more explicit. Article 27(2) renders general protection to all civilian persons, subject to the Convention, from violence and inhumane treatment without prejudice to their “health, age and sex”, and also protects women specifically “against any attack on their honour… rape, enforced prostitution, or any form of indecent assault”.

AP I provides in Article 75(2)(b) that civilians and military agents are prohibited from inflicting, “outrages upon personal dignity, in particular humiliating and degrading treatment, enforced prostitution and any form of indecent assault”. Two additional provisions, Article 76(1) and Article 77(1) respectively, protect specifically women “against rape, enforced prostitution and
any other form of indecent assault” and children “against any form of indecent assault”.

As a consequence, the GCs I, II and III do not name sexual violence or acts it encompasses directly. However, each of these treaties establish protective regimes to the groups falling under the scope of their subject-matter, prohibiting thereby violence to person, torture and against treatment – all of which, depending on the circumstances, can include rape and other forms of sexual violence.

The GC IV and AP I identify rape, enforced prostitution and indecent assault explicitly as offences serious enough to be protect enemy civilians against.

Finally, all of the treaties emphasize additional protection towards the most vulnerable categories of victims, primarily women and children, against what is either implied or explicitly identified as acts of sexual violence.

4.2 Non-international armed conflict

In situations of non-international armed conflict, Article 3 common to all four Geneva Conventions is of primary relevance. It has been described by the International Court of Justice (ICJ) as reflecting “elementary considerations of humanity” applicable in all types of armed conflicts.110

Even though the article contains no explicit prohibition against rape or other forms of sexual violence, it prohibits them implicitly when it outlaws “violence to life and person, in particular … mutilation, cruel treatment and torture” as well as “outrages upon personal dignity, in particular humiliating and degrading treatment”. Rape and other forms of sexual violence, depending on the circumstances, can be presumed to fall under one or more of those prohibitions.

Importantly, the provision applies to all persons not (or no longer) taking active part in hostilities and in all circumstances, without any adverse distinction based inter alia on sex. Thus, both women and men are protected equally.

The important addition followed in the Additional Protocol II, which, within the scope of its applicability, prohibits, in the provision on fundamental guarantees, “outrages upon personal dignity, in particular humiliating and degrading treatment, rape, enforced prostitution and any

110 ICJ, Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. USA), Judgment, ICJ Reports 1986, para.218.
form of indecent assault” for “all persons who do not take a direct part or who have ceased to take part in hostilities”\textsuperscript{111} (e.g. civilians, persons hors de combat, etc.). \textsuperscript{112}

Thereby, AP II’s Article 4, rooted in Common Article 3, enlarges the proscribed acts prohibited under internal armed conflicts and prohibits rape explicitly without distinction between women and men.

AP II has not, in its entirety, been accepted as customary international law by all States. Nevertheless, the Common Article 3 provisions that cover gender-based violence may be argued to have attained the status of customary law.\textsuperscript{113}

Further, prohibition of rape and other forms of sexual violence qualifies as customary law by itself. Notably in 2005, mandated by the States convened at the 26th International Conference of the Red Cross and Red Crescent, after nearly 10 years of research and consultation, the ICRC presented the Customary Law Study which analyzed a vast body of national and international practice (military manuals, domestic legislations, international and national case law, and UN resolutions) in order to establish what rules of customary international law can be found inductively.\textsuperscript{114} Volume I of the study contains 161 rules assessed to be of customary status, most of them applicable in both international and non-international armed conflicts. Rule 93 states that rape and sexual violence are prohibited. \textsuperscript{115} The prohibition has been found to apply both in international and non-international armed conflicts and protect women, girls, boys and men.

\textbf{4.3 System of “grave breaches” and State responsibilities}

As mentioned earlier, the significant achievement of the so-called ‘Geneva Law’ was the introduction of the “grave breaches” provisions in each of the four conventions.

Particularly, the GCs I-IV and AP I contain lists of what offences constitute ‘grave breaches’ of their provisions\textsuperscript{116}. The lists commonly include: wilful killing, torture or inhuman treatment, wilfully causing great suffering or serious injury to body or health. Importantly, AP I defines the status of these offensive acts by proclaiming that “without prejudice to the application of the

\begin{footnotesize}
\textsuperscript{111} AP II, Art. 4(2)(e).
\textsuperscript{112} Gaggioli, p.513.
\textsuperscript{113} Sellers, p.10.
\textsuperscript{114} ICRC Customary Law Study, Customary IHL Online Database available at: \url{icrc.org/customary-ihl/eng/docs/v1_rul}.
\textsuperscript{115} Idem, Rule 93.
\textsuperscript{116} GC I, Art.50; GC II, Art.51; GC III, Art.130; GC IV, Art.147; AP I, Arts 11 and 85.
\end{footnotesize}
Conventions and of this Protocol, grave breaches of these instruments shall be regarded as war crimes”.\textsuperscript{117} This also corresponds with the principles of customary IHL which states that serious violations of IHL, whether committed in international or non-international armed conflict, constitute war crimes\textsuperscript{118}.

In this connection, it is notable that an express prohibition of sexual violence is omitted from each Conventions’ grave breaches provisions. The lack of express reference might be an indication that States at the time did not consider rape and other forms of sexual violence as belonging to the most horrendous crimes that required specific criminalization.\textsuperscript{119}

However, in 1992, post the ratification of the Additional Protocols to the Geneva Conventions, the ICRC issued an Aide-memoire in which it stated that the grave breaches enumerated in Article 147 of the GC IV, especially the breach of wilfully causing great suffering or serious injury to body or health, “obviously covers not only rape, but also any other attack on a woman’s dignity”.\textsuperscript{120}

In the ICRC’s Customary IHL Study, the Commentary to Rule 156 sustains this position by explaining that “although rape was not explicitly listed as a grave breach either in the Conventions or in Additional Protocol I … it would have to be considered a grave breach on the basis that it amounts to inhuman treatment or wilfully causing great suffering or serious injury to body or health”.\textsuperscript{121}

Thus, such interpretation reveals the legal breadth of “grave breaches” prohibitions under the Geneva Conventions. This is to say that when an act of sexual violence amounts to one of the grave breaches listed (such as torture, inhuman treatment, or wilfully causing great suffering or serious injury to body or health), it must follow the grave breaches system regulating penalty and suppression of the crime.

Specifically, Contracting parties to GC I-IV and AP I have an obligation to “enact any legislation necessary to provide effective penal sanctions for persons committing, or ordering to be

\textsuperscript{117} AP I, Art.85(5).
\textsuperscript{118} ICRC, above note 114, Rule 156.
\textsuperscript{120} ICRC, Aide-memoire, 3 December 1992, para.2. See also, Sellers, p.9.
\textsuperscript{121} ICRC, above note 114, Rule 156.
committed, any of the grave breaches” of the treaties. 122

In addition, every State Party must “search for persons alleged to have committed, or to have ordered to be committed, such grave breaches, and shall bring such persons, regardless of their nationality, before its own courts. It may also, if it prefers, and in accordance with the provisions of its own legislation, hand such persons over for trial to another State party concerned.” Thereby, the obligation to prosecute, where nationality of the alleged offender as a traditional basis for jurisdiction is not given, yet not of a customary law status123, marks the principle of universal jurisdiction as one of the important features of the grave breaches system.124

Customary IHL, as identified under Rules 157 and 158 of the ICRC study125, sustains this scope of obligations and adds that States must also investigate other war crimes over which they have jurisdiction and, if appropriate, prosecute the suspects, and have the right to vest universal jurisdiction in their national courts over war crimes.

However, “grave breaches” obligations do not limit the scope of the State parties’ responsibilities. They must also “take measures necessary for the suppression of all acts contrary to the provisions of the Conventions other than the grave breaches”126, which can, for example, take the form of penal or disciplinary sanctions. Besides, every State must ensure respect for IHL through dissemination of its provisions127. Such dissemination should take place both during peace and war time, and should target, among others, military personnel, civil servants and law enforcement agents. The prohibition against rape and other forms of sexual violence should also be taken into account in military training and included in military and police manuals or their equivalent.128

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124 Gaggioli, p.526.
125 ICRC, above note 114, Rules 157, 158.
126 See above note 122.
127 GC I, Art.47; GC II, Art.48; GC III, Art.127; GC IV, Art.144; AP I, Art.83; and AP II, Art.19.
CHAPTER 5. Prohibition of sexual violence under international criminal law

5.1 Codification of the crime

In tune with the post-World War II developments of IHL, the crime of rape and sexual violence became recognized as international crimes within the system of international criminal law.

The codification of the crime on the international level took a long time, since rape was for the first time included into the list of crimes against humanity by the post-Second World War Control Council Law No. 10\textsuperscript{129}. What followed this development at the international level was the progressive evolution of numerous states’ national legislations, which incorporated rape and sexual violence as forms of both the crimes against humanity\textsuperscript{130} and war crimes\textsuperscript{131}.

The ICRC’s Customary Law Study\textsuperscript{132} offers a detailed summary of the relevant national practices throughout the world. For instance, in 1973, Bangladesh, in anticipation of prosecuting Pakistani prisoners of war held by India, published an act\textsuperscript{133} which stated that the “violation of any humanitarian rules applicable in armed conflicts laid down in the Geneva Conventions of 1949” constitutes a crime and listed rape as a crime against humanity. Another example is China’s Law Governing the Trial of War Criminals adopted as early as in 1946 to establish rape and “kidnapping females and forcing them to become prostitutes” is a war crime.\textsuperscript{134}

Subsequently, in the period of the 1990s, the recognition of rape and sexual violence as international crimes developed naturally, primarily due to the activity of the two UN ad hoc tribunals established the UN Security Council respectively in 1993 and in 1994, namely the International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Criminal

\textsuperscript{129} Control Council Law No. 10, Punishment of Persons Guilty of War Crimes, Crimes Against Peace and Against Humanity, 20 December 1945, available at: avalon.law.yale.edu/imt/imt10.asp.

\textsuperscript{130} ICC Rome Statute Article 7(1) defines “crimes against humanity” as an act when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack. The ICC ‘Elements of Crimes’ clarifies that “crimes against humanity” should be understood as among the most serious crimes of concern to the international community as a whole, warrant and entail individual criminal responsibility, and require conduct which is impermissible under generally applicable international law, as recognized by the principal legal systems of the world.

\textsuperscript{131} ICC Rome Statute Article 8(2)(a) defines “war crimes” as “grave breaches of the Geneva Conventions of 12 August 1949”.


Tribunal for Rwanda (ICTR). The declarations, resolutions, reports, commissions, preparatory meetings and other precursors of the upcoming international criminal courts and tribunals foresaw that their jurisdiction would include crimes of sexual violence as central violations to IHL and ICL.\textsuperscript{135} For instance, in contemplation of the creation of the ICTY, Security Council Resolution 820 of 1993\textsuperscript{136} condemned “all violations of international humanitarian law, including … “ethnic cleansing” and the massive, organized and systematic detention and rape of women” and reaffirmed that “those who committed or ordered the commission of such acts will be held individually responsible in respect of such acts”.

As a result of the significant development of ICL, the constitutive instruments establishing the subject-matter jurisdiction of the international tribunals have included the following provisions criminalizing acts of sexual violence:

i. The Statute of the ICTY – Article 5 (g) lists rape as a crime against humanity.

ii. The Statute of the ICTR – Article 3 (g) lists rape as a crime against humanity, and Article 4 lists rape, enforced prostitution and indecent assault of any kind as a serious violation of CG’s Common Article 3 and AP II.

iii. The Special Panels for Serious Crime – Section 6(1)(b)(xxii) and 6 (1)(e)(vi) lists rape, sexual slavery, enforced prostitution, forced pregnancy … enforced sterilization or any other form of sexual violence as constituting a grave breach of the Geneva Conventions, and serious violations of Common Article 3.

iv. The Statute of the Special Court for Sierra Leone – Article 2 (g) lists rape, sexual slavery, enforced prostitution, forced pregnancy and any other form of sexual violence as a crime against humanity, and Article 3(e) lists outrages upon personal dignity, in particular humiliating and degrading treatment, rape, enforced prostitution and any form of indecent assault as serious violations of the GCs’ Common Article 3 and AP II.

v. Law on the Establishment of Extraordinary Chambers in the Courts of Cambodia – Article 5 lists rape as a crime against humanity.

\textsuperscript{134} China, \textit{Law Governing the Trial of War Criminals} (1946), Article 3(3) and (17).

\textsuperscript{135} Sellers, p.11.

\textsuperscript{136} UN Security Council, Resolution 820. Adopted by the Security Council at its 3200th meeting, on 17 April 1993, S/RES/820, para.6. Available at: refworld.org/docid/3b00f21b10.html.
This corpus of international and domestic law instruments as well as relevant case law has been codified in an organic way in a single instrument, the Rome Statute of the ICC\textsuperscript{137}, adopted by a UN diplomatic conference on 17 July 1998. Its Article 7(1)(g) lists rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity as a crime against humanity; Article 8(2)(b)(xxii) lists rape, sexual slavery, enforced prostitution, forced pregnancy… enforced sterilization or any other form of sexual violence as serious violations of the laws and customs applicable in international armed conflict; and Article 8(e)(vi) lists rape, sexual slavery, enforced prostitution, forced pregnancy… enforced sterilization or any other form of sexual violence as a serious violation of the GCs’ Common Article 3.\textsuperscript{138}

5.2 Scope of application

The legal breadth of these provisions is not limited. First of all, acts of sexual violence can be constituent elements of other sub-categories of crimes. This is to say that the legal breadth of such provisions as, for example: genocide, torture, persecution, enslavement, inhumane acts as crimes against humanity or cruel treatment, inhumane treatment, outrages upon personal dignity and slavery as war crimes, - can also proscribe acts of sexual violence.\textsuperscript{139}

This is particularly recognized within the case law of the international tribunals.

For instance, the ICTR Trial Chamber, in the Akayesu case, held that sexual violence could fall within the scope of inhumane acts, outrages upon personal dignity and serious bodily or mental harm, thereby violating the GCs’ Common Article 3. It also recognized that sexual violence could constitute genocide “when committed with the intent to destroy wholly or in part a national, ethnic, racial or religious group”.\textsuperscript{140}

In the Kunarac case, the ICTY recognized that sexual violence could constitute an outrage upon

\textsuperscript{137} By virtue of the principle of complementarity, the jurisdiction of the ICC is intended to come into play only when a State is genuinely unable or unwilling to prosecute alleged war criminals over which it has jurisdiction. To benefit from this principle, States must already have adequate legislation enabling them to prosecute such criminals.

\textsuperscript{138} Sellers, pp.11-12.

\textsuperscript{139} Ibid.

\textsuperscript{140} ICTR, Akayesu, above note 71, para.12.
personal dignity, as well as enslavement and torture.\textsuperscript{141}

In the \textit{Tadic} case, the ICTY, held that acts of male sexual assault, including mutilation, fellatio, and indecent assault constituted inhumane treatment, cruel treatment as war crimes and inhumane acts as crimes against humanity.\textsuperscript{142}

In the \textit{Brima} case, the SCSL Appeals Chamber recognized that the abduction of women by members of the armed forces to turn them into ‘bush wives’ constituted a crime against humanity and amounted to an act of terror prohibited by IHL.\textsuperscript{143}

Second of all, subsequent judicial interpretations of the international tribunals, as well as explanatory paragraphs of the ICC Statute and ‘Elements of the Crimes’, further provide that other sexual assault crimes than those explicitly proclaimed can also form the basis for adjudication.

Particularly, the drafting of the multilateral Rome Statute of the ICC contributed to the expansion of the list of sexual assault crimes within the subject matter jurisdiction of the international forum.

The Statute recognizes as war crimes any other forms of sexual violence that constitute a grave breach of GC I-IV or a serious violation of Common Article 3.\textsuperscript{144} Thereby, even though rape and other forms of sexual violence are not mentioned among the crimes that can be prosecuted when committed in a non-international armed conflict, i.e. in Common Article 3, it did not impede the ICTY\textsuperscript{145}, for instance, from considering sexual violence as constituting war crime in non-international conflicts.\textsuperscript{146}

In other words, the crime “sexual violence” by the ICC (as well as the SCSL\textsuperscript{147}) presumably functions as a residual clause:\textsuperscript{148} it allows courts to exercise jurisdiction over any other, un-

\begin{itemize}
\item \textsuperscript{141} ICTY, \textit{Kunarac}, above note 84, paras 554-557.
\item \textsuperscript{142} ICTY’s first case, \textit{Prosecutor v. Tadic}, Judgment, Case No. IT-94-1-T (Trial Chamber), 7 May 1997, para.303.
\item \textsuperscript{143} SCSL, \textit{Brima}, above note 94, para.202.
\item \textsuperscript{144} ICC Rome Statute, Article 8(2)(e)(vi).
\item \textsuperscript{145} The ICTY Statute Article 3 (“Violations of the laws or customs of war”) reads: “The International Tribunal shall have the power to prosecute persons violating the laws or customs of war”.
\item \textsuperscript{146} In the \textit{Kunarac} case the three accused were charged with and found guilty notably of violations of the laws and customs of war in the form of rape and torture and outrages upon personal dignity (for other forms of sexual violence) in the context of the non-international armed conflict in Bosnia and Herzegovina between 1992 and 1993.
\item \textsuperscript{147} SCSL Statute, Art.3(e).
\item \textsuperscript{148} The residual clause of sexual violence potentially prohibits sexual assault conduct, such as a sexual mutilation, that is not specifically listed as crimes, but that is of comparable gravity.
\end{itemize}
enumerated serious sexual assaults of comparable gravity to the named sex based crimes in both international and non-international armed conflicts. 149

This also enables a broader coverage of all serious sexually abusive conduct. For instance, rape can be implicitly regarded as a type of criminal conduct that underpins such international crimes as trafficking or slavery, that are, on their face not of a sexual nature, but crimes whose actus reus could certainly include acts of sexual violence. Same way, an act of sexual mutilation might constitute sexual assault conduct covered by the residual crime of sexual violence. Thereby, the required threshold of gravity to constitute a crime remains open-ended, leaving some room for jurisprudential interpretations.150

In this connection, the later released ‘Elements of Crimes’ document complements the Statute and sets out the agreed upon elements - the mens rea and the actus reus - of each crime contained in the ICC subject matter jurisdiction. It thereby indicates that the conduct is what defines the threshold for gravity. Thus, acts of sexual violence not reaching this threshold might still constitute an international crime, but of a different category, for instance as “outrages upon personal dignity”.151

Importantly, this plays a significant role for the judicial proceedings of the international trials. Unlike defendants who at early trials in the ICTY, ICTR or SCSL only learned the precise elements of the charged crimes from the judges’ pronouncement of their conviction or acquittal, under the ICC jurisdiction, defendants are aware of the legal elements of each charge at the issuance of the charging documents. 152

5.3 Individual criminal liability

An important achievement of contemporary international criminal law is the crystallization of the concept of “individual criminal responsibility”. This can be regarded as a significant step forward, especially considering that the Geneva Conventions under their “grave breaches” provisions do not specify the scope of ratione personae. Particularly, the Conventions establish

149 The conditions for determining which violations fall within Article 3 of the ICTY were elaborated in the Tadić case. ICTY, Prosecutor v. Tadic, case No.IT-94-1-A (Appeals Chamber), 15 July 1999, para.94: “In order for irregulars to qualify as lawful combatants, it appears that international rules and State practice therefore require control over them by a Party to an international armed conflict and, by the same token, a relationship of dependence and allegiance of these irregulars vis-à-vis that Party to the conflict.”

150 Sellers, p.13.

151 ICC Rome Statute, Article 8(2)(b)(xxi). See also, Gaggioli, pp.529-530.
the responsibility of the direct authors of those grave breaches and that of their superiors. The scope of the rules is, however, very wide as they can be apply to both civilians and combatants, whether the latter are members of official or unofficial forces.153

The ambiguity of the regulation results in the lack of judicial redress based on inability to identify physical perpetrators and to charge non-physical perpetrators, such as persons, geographically removed from the criminal scene, but who were responsible as political leaders or military commanders.154 This is why the codification and further legal evolution of the criminal individual liability is vital.

The concept has arguably originated from the jurisdictional experience of the Nuremberg155 and Tokyo156 tribunals, followed by a gradual process of formulation and consolidation of principles and rules under legal initiatives from the States and international organizations.157

For instance, in 1948, the Convention on the Prevention and Punishment of the Crime of Genocide established the obligation to punish not only “rulers” or “public officials”, but also “private individuals”158 under the competence of both domestic and international tribunals159.

In 1950, the ILC adopted a report on the “Principles of International Law Recognised in the Charter of the Nuremberg Tribunal and in the Judgment of the Tribunal” also commonly known as the “Nuremberg Principles”, in which it stated that “any person who commits an act which constitutes a crime under international law is responsible and therefore is liable to punishment”.160

Eventually, it was the establishing of the two ad hoc Tribunals for the prosecution of crimes committed in the former Yugoslavia and Rwanda in the early 1990s, namely the ICTY161 and the

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152 Sellers, p.13.
155 Nuremberg Charter, above note 24, art.6.
156 Tokyo Charter, above note 24, art.5.
157 Greppi, above note 153.
159 Idem, art.6.
ICTR, which marked a breakthrough in the lengthy process of developing rules on individual criminal responsibility under international law.

5.3.1 Direct liability

The texts of Article 7(1) of the ICTY Statute and Article 6(1) of the ICTR Statute, respectively, read: “A person who planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of a crime referred to in article … of the present Statute, shall be individually responsible for the crime.”

The case law of the ad hoc tribunals has interpreted and further developed ICL on sexual violence in armed conflict.

For instance, in the Kunarac case, the ICTY Trial Chamber concluded that the three accused, were not just following orders to rape Muslim women, but that the evidence showed free will on their part. In the Nikolic case, the accused Dragan Nikolic pleaded guilty and was convicted of aiding and abetting rape by personally facilitating the removal of the female detainees from the hangar for purposes of rapes and other sexually abusive conduct by camp guards, special forces, local soldiers and other men. In the Gacumbitsi case, the ICTR Trial Chamber convicted the accused, Sylvestre Gacumbitsi, of publicly instigating the rape of Tutsi women and girls, by attackers who heeded the rape was a direct consequence of the instigation.

Thus, case law demonstrates how direct criminal liability does not necessarily equate with physical perpetration. This has been eventually captured in the ICC Rome Statute under Article 25, which inter alia provides for criminal responsibility and liability for punishment when: a) the commission of the crime is either individual or joint (even when the other is not criminally responsible), b) the commission is ordered, solicited or induced, c) the commission either occurred or was only attempted, d) the commission was aided, abetted, assisted, e) when the commission did not occur but the substantial step towards it was taken.

“Joint criminal enterprise” doctrine

Council has reaffirmed in a number of resolutions that persons committing serious violations of international humanitarian law in the former Yugoslavia are individually responsible for such violations”.

ICTY, Kunarac (Appeals Chamber), above note 90, para.592.


Separate attention shall be given to another important development by the international tribunals, and particularly the ICTY, namely the notion of joint criminal enterprise, which has had important implications for the adjudication of sexual assaults. Joint criminal enterprise refers to a situation where the perpetrators undertook to participate in criminal conduct with a plurality of actors.

For instance, in the Tadic case, joint criminal enterprise derived from the notion of ‘common criminal purpose’ (as distinct from that of aiding and abetting) and its consistency with Article 7(1) of the ICTY Statute which explicitly addresses individual criminal responsibility only of one person. 165

The central issues of this contra-balance are therefore two-fold: (i) whether the acts of one person can give rise to the criminal culpability of another where both participate in the execution of a common criminal plan; and (ii) what degree of mens rea is required in such a case. 166

The analysis of the relevant case law and legal interpretation of the Statute led the Appeals Chamber in the case to the conclusion that “accomplice liability” derives from customary international law and does not contradict, and is even implied by, the ICTY Statute. Moreover, it recognized three categories of the joint criminal enterprise:

a) co-perpetration: all participants in the common design, possess the same criminal intent to commit a crime, and one or more of them actually perpetrate the crime, with intent;

b) “concentration camp” cases: the requisite mens rea comprises knowledge of the nature of the system of ill-treatment and intent to further the common design of ill-treatment;

c) “common purpose”: the following requirements concerning mens rea are fulfilled:
   (i) the intention to take part in a joint criminal enterprise and to further – individually and jointly – the criminal purposes of that enterprise;
   (ii) the foreseeability of the possible commission by other members of the group of offences that do not constitute the object of the common criminal purpose. 167

The latter notion was developed in the Krstic case, where General Krstic was found guilty of the “incidental murders and rapes, beatings and abuses” that resulted from the humanitarian crisis.

165 ICTY, Tadic, above note 142, para.536.
166 ICTY, Tadic (Appeals Chamber), above note 149, para.185.
The Trial Chamber opined that General Krstic must have been aware that an outbreak of these crimes would be inevitable given inter alia the lack of shelter, the density of the crowds and the vulnerable condition of the refugees. Consequently, the rapes were regarded as “natural and foreseeable consequences of the intended joint criminal conduct”.

In other words, the Trials Chamber ruled that sexual violence can in principle be a natural and foreseeable consequence of wartime violations, thereby reversing the conventional and gender discriminatory belief that wartime sexual abuse is inevitable, isolated deviate conduct of soldiers whose abuses do not inure to their military superiors.

Accordingly, crimes of sexual violence create individual criminal liability through joint common enterprise when they are committed as part of the original common criminal plan, or as a foreseeable consequence of another common plan or as subsequently evolved crimes that adhere to the original common purpose.

This approach has been to some extent reflected under the aforementioned Article 25 of the ICC Rome Statute, which provides that commission of the crime “by a group of persons acting with a common purpose” constitutes individual criminal liability based on such elements as: a) intentional contribution of a particular member of the group, b) aim of furthering the criminal activity or criminal purpose of the group, c) knowledge of the intention of the group to commit the crime.

All in all, the joint liability approach provides a useful framework, which can especially be applicable to participant/perpetrators who are physically not present in the locations of sexual assault crimes, including military and political leaders.

### 5.3.2 Indirect liability through command or superior responsibility

Another important form of individual criminal liability is indirect, which imputes liability to a person in a position of superior authority (i.e. of military, political, business, or any hierarchical status) for acts directly committed by his subordinates.

Specific for the wartime context, such crimes normally involve military personnel in a chain of command. Thereby, persons who reside higher in command than direct perpetrators can be easier

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167 ICTY, Tadic (Appeals), para.220.
to reach through the indirect liability approach.\textsuperscript{170}

The ICC Statute addresses “responsibility of commanders and other superiors” as applicable under the following condition: effective command and control by a military commander, or person effectively acting as such, over forces who committed the crime, based on: (i) awareness that the forces were committing or about to commit such crimes; and (ii) failure to prevent or repress their commission or to submit the matter to the competent authorities.\textsuperscript{171}

Within the case law, the ICTY’s \textit{Blaskic} case, for instance, demonstrates how superior responsibility was the cornerstone of the conviction. Sexual violence was deemed “foreseeable” because Colonel Blaskic had barracked HVO soldiers in a school where civilian females were detained. The Trial Chamber opined that the Colonel “could not have been unaware of the atmosphere of terror and rape which occurred at the school.”\textsuperscript{172}

Thus, though similar to the \textit{Krstic} case, yet under a different form of liability, the \textit{Blaskic} judgment reaffirmed that gender-based violence, in particular rape, can be characterized as foreseeable crimes that military superiors are required to prevent or punish so as not to run foul of IHL and ICL.\textsuperscript{173}

In another example in the ICTR’s \textit{Nahimana} case, superior indirect responsibility was also the basis for individual liability. Namely, the three accused were convicted for the crime of “public incitement to commit genocide” based upon their employment relationship with persons who during the Rwandan genocide broadcast on the public airways and wrote in the press to urge the infliction of gender-based violence, resulting in multiple rapes on Tutsi women.\textsuperscript{174}

Notably, even though joint criminal enterprise and superior responsibility approaches can be seen as having common grounds, it is important to distinguish the cases when military or civilian leaders fail to ensure the discipline of their subordinates, thereby violating the basic principles of the superior responsibility doctrine.

Altogether, the evolution of the individual criminal responsibility under international law should serve the purpose of ensuring measures of redress for victims of sexual violence.

\textsuperscript{169} Sellers, p.16.
\textsuperscript{170} Idem, p.17.
\textsuperscript{171} ICC, \textit{Rome Statute}, art.28.
\textsuperscript{173} Sellers, p.17.
CHAPTER 6. Addressing sexual violence under international human rights law

Even though, on both international and regional levels, most human rights treaties do not contain explicit prohibitions of sexual violence, it is however evident the basic human rights principles prohibit sexual violence and can be applied to the context of armed conflicts, providing necessary guidance on the interpretation and application of IHL provisions.

6.1 Explicit prohibition

6.1.1 International level

Surprisingly, even the CEDAW of 1979 explicitly prohibits only “traffic in women and exploitation of prostitution of women”, thus containing no specific provisions on sexual violence against women. 175

However, in 1992, CEDAW’s General Recommendation No. 19 made an important clarification stating that “gender-based violence, which impairs or nullifies the enjoyment by women of human rights and fundamental freedoms under general international law or under human rights conventions, is discrimination within the meaning of article 1 176 of the Convention” which among other includes “the right to equal protection according to humanitarian norms in times of international or internal armed conflict”. 177

In can be presumed that the right to equal protection as an element of the basic human rights principle of non-discrimination is correlated with the IHL principle of humane treatment without adverse distinction. At the same time, the recommendation does not specify what “humanitarian norms” shall not be undermined. Most likely, they encompass IHL doctrines, rules, regulations, prohibitions and breaches, covering war crimes, crimes against humanity and acts of genocide – those that had evolved before and emerged after 1992.

All in all, the General Recommendation No. 19 unambiguously interprets that the Convention accords women and girls the right to equal protection and non-discriminatory application of

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175 CEDAW, art. 6
176 CEDAW, article 1 reads: “For the purposes of the present Convention, the term "discrimination against women" shall mean any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.”
177 CEDAW Committee, General Recommendation No.19, para.7(c).
humanitarian norms in times of both international and internal armed conflict, and thus, reaffirms that the redress of war-related gender-based violence has a human rights dimension.\textsuperscript{178}

Another crucial international human rights instrument, the Convention on the Rights of the Child of 1989, provides that Contracting Parties shall protect children from all forms of sexual exploitation and sexual abuse, including through the adoption of appropriate legislative, administrative, social and educational measures.

States must particularly prevent: “(a) The inducement or coercion of a child to engage in any unlawful sexual activity; (b) The exploitative use of children in prostitution or other unlawful sexual practices; (c) The exploitative use of children in pornographic performances and materials.” \textsuperscript{179}

In other words, the CRC prescribes States an obligation to prevent and protect children from being sexually abused not only by State actors, but also by private actors.

\textbf{6.1.2 Regional level}

On the regional level, the Protocol to the African Charter on Human and Peoples’ Rights of Women in Africa (Maputo Protocol)\textsuperscript{180} of 2003 prohibits violence against women and contains a number of provisions aimed at protecting women from sexual violence.

Specifically in relation to armed conflicts, it provides that State 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.\textsuperscript{181}

In the European legal system, no treaty deals with the issue of sexual violence in particular. However, in 2002, the Council of Europe adopted a recommendation on violence against women which covers rape and other forms of sexual violence and which recommends States to “penalize rape, sexual slavery, forced pregnancy, enforced sterilization or any other form of sexual violence of comparable gravity as an intolerable violation of human rights, as crimes against humanity

\begin{itemize}
\item \textsuperscript{178} Sellers, p.28.
\item \textsuperscript{179} UNGA, CRC, above note 48, arts 19(1) and 34.
\item \textsuperscript{180} Maputo Protocol, 2003, above note 51. Articles 3(4), 4(2), 11(3), 12(1)(c)(d), 13(c), 14(2)(c), 22(b), 23(b).
\item \textsuperscript{181} Idem, Article 11(3).
\end{itemize}
and, when committed in the context of an armed conflict, as war crimes”.\textsuperscript{182}

The Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women of 1994 prohibits “violence against women”, which includes not only physical and psychological, but in addition sexual violence, whether it is committed in the public or private sphere.\textsuperscript{183}

\textbf{6.1.3 Non-binding documents}

The Beijing Declaration and Platform for Action of 1995, adopted at the Fourth World Conference on Women, also addressed the situation of women and girls in armed conflict.

The Platform noted that “massive violations of human rights, especially in the form of genocide, ethnic cleansing as a strategy of war and its consequences, and rape… are abhorrent practice”. Consequently, genocide, rape and ethnic cleansing were proclaimed human right violations.

It further identified “violence against women” and “women and armed conflict” as critical areas of concern, and highlighted that “acts of violence against women include violation of the human rights of women in situations of armed conflict, in particular … systematic rape, sexual slavery and forced pregnancy”. It also noted that these violations are against “the fundamental principles of international human rights and humanitarian law as embodied in international human rights instruments and in the Geneva Conventions of 1949 and the Additional Protocols thereto.” \textsuperscript{184} In other words, the Declaration refers to human rights violations and the respect for humanitarian norms as two separate regimes.

In 2000, the UN Security Council adopted Resolution 1325 on Women Peace and Security which reaffirmed the Beijing Declaration’s principles and the “need to implement fully, international humanitarian and human rights law that protects the rights of women and girls during and after conflicts”. It also called “upon all parties to armed conflict to take special measures to protect women and girls from gender-based violence, particularly rape and other forms of sexual

\begin{footnotes}
\item[184] UN, Beijing Declaration and Platform for Action, 1995, paras 112–130 on “Violence against Women” and paras 131–149 on “Women and Armed Conflict”. Available at:
\end{footnotes}
abuse”.  

Moreover, the Resolution specified the IHL basis of protection and the human rights law basis of rights to be extended to females during armed conflict, attaching particular importance to the Rome Statute of the (then pre-operative) ICC.  

The resolution gave a strong impulse to further discussions within the UN.  

In 2006, the General Assembly adopted Resolution 61/143, which, referring to the Resolution 1325, implicitly urged States to ensure the human rights’ protection of “women and girls in situations of armed conflict, post armed conflict settings and refugee and internally displaced settings, where women are at a greater risk of being targeted for violence, and where their ability to seek and receive redress is often restricted”, and to eliminate impunity for gender-based violence in situations of armed conflict”.  

In 2007, the OHCHR Expert meeting convened by the Women’s Rights and Gender Unit, further discussed whether the Resolution 1325 can constitute a future mechanism to ensure redress of war-related gender-based violence committed against women and girls.  

In 2008, the UN Security Council passed Resolution 1820 in which it recognized that sexual violence is a security concern. Particularly, sexual violence, targeted primarily at women and girls, can represent “a tactic of war to humiliate, dominate, instill fear in, disperse and/or forcibly relocate civilian members of a community or ethnic group”. The Resolution stressed that such violence could significantly exacerbate conflicts and impede peace processes. In doing so, the Council affirmed its readiness to, where necessary, adopt steps to address systematic sexual violence deliberately targeting civilians, or as a part of a widespread campaign against civilian populations.

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185 Security Council Resolution, S/RES/1325, 31 October 2000, Preamble and para.10  
186 Idem, para.9.  
188 Sellers, p.29.  
190 Idem, art.1.
6.2 Implicit prohibition

6.2.1 International treaties

The lack of explicit prohibition of sexual violence in most human rights instruments is, however, compensated through the common, non-derogable principle of prohibition of torture or cruel, inhuman or degrading treatment or punishment, which is contained in major human rights treaties and provides a strong basis to prohibit virtually all forms of sexual violence under all circumstances.

Primarily, the UN Convention against Torture defines torture as 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.

Based on this definition, sexual violence is presumed to cause “severe pain or suffering” and be “intentionally inflicted”. It may also follow a specific purpose, including obtaining information, and have the purpose of coercing the victim. Not to forget that the coercive element is often viewed as inherent in armed conflict situations.

As for the involvement of a public official in committing an act of torture, it cannot be a constant element of wartime sexual violence. However, even the Human Rights Committee in its General Comment 20 on the ICCPR’s torture-prohibiting Article 7 stated that “it is the duty of the State party to afford everyone protection through legislative and other measures as may be necessary against the acts prohibited by Article 7, whether inflicted by people acting in their official capacity, outside their official capacity or in a private capacity”.

Thus, torture by a private individual cannot be ignored by human rights concerns, and States have a duty to protect individuals from torture by private individuals. The CAT explicitly obligates

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191 ICCPR, art.7; CAT, art.1.
192 CAT, art.1.
193 ICTY, *Kumarac* (Appeals Chamber), above note 90, para.150.
195 Human Rights Committee (HRC), General Comment 20/44: Prohibition of Torture, 3 April 1992, para.2.
States to proceed to a prompt and impartial investigation wherever there are reasonable grounds to believe that an act of torture has been committed.  

Moreover, the Special Rapporteur against Torture reported in 1986 that sexual aggression, encompassing rape, insertion of objects into the orifices of the body, chevalet, is one of the methods of physical torture.  

6.2.2 Case law by regional human rights courts and commissions

The legal reasoning adopted by regional human rights courts in adjudicating cases provides a number of concrete examples where sexual violence has been considered as amounting to torture or cruel, inhuman or degrading treatment or punishment.

A. The Inter-American System of Human Rights Protection

The Inter-American Commission on Human Rights (hereinafter IACHR), exercising jurisdiction over the rights protected by the American Convention on Human Rights, held in de Mejía v. Peru case that the rape by a Peruvian soldier of a woman who was suspected of belonging to a subversive group and whose husband had been abducted by the Peruvian army amounted to torture defined by the Inter-American Convention to Prevent and Punish Torture. The following three elements of torture were thereby fulfilled: 1) intentional act through which physical and mental pain and suffering is inflicted on a person; 2) commission with a purpose of punishment or intimidation; and 3) commission by a public official or by a private person acting at the instigation of the former. The State was assigned responsibility for torture.

Consequently, other forms of sexual abuse were also judged by the IACHR as amounting to torture and inhumane treatment. In the Pérez v. Mexico case, the Commission considered that

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196 CAT, art.12.
197 Placing the prisoner naked, on an iron bar (the prisoner is unable to touch the ground) that is moved violently, causes severe tearing of the perineum.
200 Article 2 reads: “For the purposes of this Convention, torture shall be understood to be any act intentionally performed whereby physical or mental pain or suffering is inflicted on a person for purposes of criminal investigation, as a means of intimidation, as personal punishment, as a preventive measure, as a penalty, or for any other purpose. Torture shall also be understood to be the use of methods upon a person intended to obliterate the personality of the victim or to diminish his physical or mental capacities, even if they do not cause physical pain or mental anguish”.
forcing someone to witness the rape of close relatives constitutes “a form of humiliation and degradation that is a violation of the right to humane treatment”.

Notably, in the Mejía case, the IACHR also made a reference to the IHL in support of the argument that “current international law establishes that sexual abuse committed by members of security forces, whether as a result of a deliberate practice promoted by the State or as a result of failure by the State to prevent the occurrence of this crime, constitutes a violation of the victims’ human rights, especially the right to physical and mental integrity”.

B. The European System of Human Rights Protection

In Europe, the relevant case law has been developing within the jurisprudence of the European Court of Human Rights (ECtHR), exercising jurisdiction over all matters of interpretation of the European Convention for Human Rights. The European Convention, like its American counterpart, never explicitly provides for the freedom from sexual violence, which is why the Court’s jurisdiction over rape has been evolving over time.

Initially, in X & Y v. Netherlands case, the ECtHR held that rape violates the right to privacy under Article 8, which protects the “physical and moral integrity of the person, including his or her sexual life”. Thereby the elements of rape were not defined.

Later, following the progression of the IACHR’s jurisprudence, the European Court recognized that rape can also constitute a violation of Article 3, which prohibits torture, inhuman or degrading treatment or punishment.

In the Aydin v. Turkey case, concerning the rape of a 17-year old girl illegally detained by security forces on the basis of suspicion of collaboration with members of the PKK, the Court noted that the rape (together with other ill-treatments: the applicant was blindfolded, beaten, stripped and placed inside a tyre and sprayed with high-pressure water), served the purpose of obtaining information and hence amounted to torture.

Importantly, besides rape, other acts of sexual violence, are also primarily considered by the

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201 IACHR, Ana, Beatriz and Celia González Pérez v. Mexico, Case No.11.565 (2001), para.53.
202 IACHR, Mejía v. Peru, para.185.
203 Sellers, p.32.
ECtHR under Article 3. For instance, in the *Valasinas v. Lithuania*\(^{206}\) case, regarding strip-searching of a male prisoner in the presence of a female prison officer, the ECtHR held it was an act of degrading treatment.

However, depending on the circumstances, sexual violence can also be encompassed into other human rights violations. For instance, the problem of sex trafficking was addressed by the ECtHR in the *Rantsev v. Cyprus and Russia* case\(^{207}\), as falling within the scope of Article 4 of the ECHR which prohibits slavery and forced labor.

Another important fact regarding state duties to protect and prevent, is that human rights case law clarifies that, by virtue of the fundamental nature of the prohibition of torture or cruel, inhuman or degrading treatment or punishment, the States have inherent positive obligations to establish and apply effectively a criminal-law system punishing all forms of rape and sexual abuse.\(^{208}\) Failure to do so, may give rise to a separate violation of the prohibition against torture or other ill-treatment under its procedural limb and/or of the right to an effective remedy.

### 6.3 Interpretative value of human rights principles

Human rights treaties and case law can be used as important grounds for interpretation when it comes to the concepts of torture, slavery or discrimination that can also be found under IHL and ICL.

Human rights law complements IHL by providing for additional rights/prohibitions such as the prohibition of human trafficking or the right to privacy or to a private life that have no real equivalent under IHL.

An exemplary case in this regard is the ICTY’s *Kunarac* case, where the Trial Chamber recognized that IHL does not contain any definition of torture which had been alleged against the accused as both a violation of the laws or customs of war (under Article 3 of the ICTY Statute) and a crime against humanity (under Article 5 of the ICTY Statute)\(^{209}\).

The Trial Chamber therefore highlighted that the recourse to instruments and practices developed in the field of human rights law is necessary to determine the content of customary international law.

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\(^{208}\) See Rule 93 of the ICRC Customary Law Study; See also, CEDAW GR No. 19, para.9.

law in the field of IHL based on resemblance of their goals, values and terminology.\textsuperscript{210}

This does not imply, however, that a definition given in the context of human rights law must apply under a different body of law in its exact form. Contrarily, certain translation and transposition is necessary. \textsuperscript{211}

For instance, in the \textit{Furundžija} case\textsuperscript{212}, where such approach was applied, the Trial Chamber emphasized that it should only identify some specific elements that pertain to torture as considered from the specific viewpoint of international criminal law relating to armed conflicts. In the \textit{Kunarac} case, the Trial Chamber identified two aspects of compatibility: a) the role of the state as an actor, as regards the level of its responsibility, and b) adoptability of human rights norms to the penal law regime based on the “prosecutor vs defendant” formula, inherent into the criminal law practice. \textsuperscript{213}

For instance, when the ICTY Trial Chamber had to determine whether the criterion of the involvement of a public official belongs to customary international law (for the purpose of IHL and Article 3 of the ICTY Statute), it concluded that while this criterion is required under human rights law, it is not required under IHL because of the crucial structural differences as regards the role and position of the State as an actor in these two bodies of international law, namely the fact that IHL applies to all parties to an armed conflict, while human rights law binds de jure only States. \textsuperscript{214}

In other words, the specificity of each body of law must be kept in mind.

\textsuperscript{210} ICTY, \textit{Kunarac}, para.467.
\textsuperscript{211} Gaggioli, p.524.
\textsuperscript{212} ICTY, \textit{Furundžija}, above note 80, para. 162.
\textsuperscript{213} ICTY, \textit{Kunarac}, para. 470.
\textsuperscript{214} Gaggioli, p.525.
CHAPTER 7. Conclusion

This thesis has analyzed the legal development of the concept of sexual violence and the prohibition thereof in three inter-related fields of international law, namely international humanitarian law, international human rights law and international criminal law. The following conclusions can be safely drawn.

First of all, even though it has not been an immediate process, at the modern stage of its development, all three branches of law have come to prohibit sexual violence in its different forms and in different contexts, including under an armed conflict.

IHL expressly prohibits rape and other forms of sexual violence along with or in connection with outlawing outrages upon personal dignity, indecent assault and enforced prostitution. Importantly, it requires respect for persons and their honour, subsequently reflecting the historical value of prohibition from the times when IHL originated. The prohibition applies to both international and non-international armed conflicts, which is sustained by the rules and principles of customary IHL. Furthermore, in the context of the international armed conflict, sexual violence is implied to constitute a “grave breach” of the IHL as, inter alia, an act of “wilfully causing great suffering or serious injury to body or health”. From this perspective, IHL qualifies sexual violence as a war crime entailing State responsibility.

International criminal law, relying on the contemporary developments of the international jurisprudence, and namely within the framework of international tribunals and the ICC, codifies rape and sexual violence as international crimes. Primarily, they are referred to as “war crimes” and “crimes against humanity”, but can also be addressed as other categories of crimes, e.g. acts of genocide, when the conditions for such crimes (including the contextual elements) are fulfilled. As such, the crime of sexual violence entails individual criminal responsibility, in its direct and indirect forms, which shall be established based on the ICC’s Statute and “Elements of the Crimes”.

International human rights law prohibits sexual violence as such, on both international and regional levels. A crucial role in this process belongs to the non-binding initiatives by the UN bodies, which not only propose a more up-to-date perspective to the issue and the scale of its affect (e.g. recognition that sexual violence can constitute as a weapon/tactic of war aimed at
undermining peace processes and forcing relocation of population) but also provide useful comments to the already existing instruments (e.g. CEDAW). Another approach to prohibiting sexual violence by human right law is through the non-derogable prohibition of torture or cruel, inhuman or degrading treatment or punishment, which extends to the context of an armed conflict. This approach is widely used within international and regional case law, thus emphasizing the absolute value of human rights principles for addressing the issue of sexual violence under a military context.

Second of all, it can be safely stated that all three branches of international law go in the same direction, complementing and reinforcing each other, in prohibiting rape and sexual violence. The practice of exchange and cross-reference when human rights bodies and international criminal tribunals cite each other and appeals to the IHL principles and doctrines, reveals how international law is aiming at reinforcing analysis and increasing the level of expertise (based inter alia on efficient domestic practices) to guarantee the responsive right to equal access to justice for the victims. For instance, it is reflected in the still-evolving approach to defining the crime of sexual violence and establishing its commission by moving from the specific elements of crime (i.e. coercion and lack of consent) towards a case-by-case oriented approach encompassing context of coercive circumstances, the status of victim/perpetrator, the extent of power abuse, and possibly towards further integration of human rights norms (i.e. victims inherent sexual integrity, sexual autonomy, sexual equality and right to human dignity) into the judicial process. This is supposed to increase the level of investigation and persecution to redress impunity for sexual violence in armed conflict.

In other words, sexual violence is one of those areas where the different branches of international law do not contradict each other but essentially complement and reinforce common effect.

As a result, it can be concluded that in the modern stage of its evolution international treaty and case law provided an adequate foundation in addressing, prohibiting and criminalizing rape and other forms of sexual violence. However, this is not to say that there are still no ambiguities.

Prominently, some questions appear to leave too broad room for interpretation:

*Should the notion of honour referred to in the Geneva Conventions be replaced by the human rights norm of sexual and bodily integrity, or the concept of human dignity?*
Should prohibition of sexual violence committed in the context of a non-international armed conflict entail established military groups responsibility?

In the ICC Statute, should the threshold of gravity for an act to amount to sexual violence and thereby constitute an international crime be more clearly defined?

Should the ICC Statute provide a broader clarification of ‘nexus’ that amounts acts of sexual violence committed during an armed conflict to a war crime?

Should the notion of torture encompassing sexual violence be interpreted equally under human rights law, IHL and ICL?

Shall sexual violence be implicitly mentioned under the provisions of “bodily or mental harm” as constituting the crime of genocide under the ICC Statute?

And finally, considering the evolution of the sexual violence regulation and the importance attached to by the UN Security Council as constituting a threat to peace and security, should the crime of sexual violence in general and particularly in armed conflict, be explicitly codified in its own treaty law (similar for example to the 1948 Convention on Genocide\(^\text{215}\) or the 1973 Convention on Apartheid\(^\text{216}\))? 

As for the latter question, a binding international treaty reflecting the latest evolutions of all three branches of law with regard to the regulation of sexual violence, integrating criminal and human rights case law practices and providing clarification for the grey zones, would definitely be crucial for the modern international society facing severe armed conflicts around the globe.

This initiative might, however, entail a number of inherent risks. First of all, the process involving multilateral negotiations on the provisions might undermine the achievements of the existing case law framework. Besides, many States might express unwillingness to commit to yet another package of obligations, especially when they might be involved or are facing a possibility of a non-international armed conflict on their territory. Such hesitation traditionally results in protracted periods of adoption and ratification.

Another valid argument against such a legal instrument would be that it is not law but the implementation thereof that can considerably have an impact on reality. True to the fact, the

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\(^{216}\) UNGA, International Convention on the Suppression and Punishment of the Crime of Apartheid, 30 November...
discrepancy between criminalization of sexual violence under international law and the level of occurrence of the crime “on the ground” and the impunity of perpetrators, is enormous.

There is no arguing against the fact that implementation of the provisions and prosecution of the crime need to be strengthened on both domestic and international levels to fill the gap between the law and the reality. The UN, international organizations and some national governments have recently been very active at initiating non-binding instruments suggesting specific guidelines on implementation of the international law that go beyond traditional requirements for ratification and dissemination of the IHL treaties.

For instance, on the issue of access to justice for victims, the UN Security Council “encourages Member States to include the full range of crimes of sexual violence in national penal legislation to enable prosecutions for such acts”.217 The ICRC “calls upon States to put in place specific training for their police, prosecutors, judiciary and relevant supporting personnel to enable them to investigate, prosecute and try acts of sexual violence in an effective, impartial and appropriate manner” and “particularly in situations of post-conflict, to consider addressing sexual violence in truth and reconciliation processes”.218

In regards to the problem of evidence collection and identification of perpetrators, the ICRC emphasizes “the utility of internationally recognized tools”.219 Such tools can be applied to both domestic and international judicial processes and might include, inter alia: “reporting requirements on incidents of sexual violence” in the military, proposed by the ICRC220; or specific guidelines on documentation/investigation planning, identification of survivors and witnesses, testimonies, interviewing, and storing of information, developed under the UK initiative.221

This is why, because of the abundance of new approaches within the treaty and case law and

219 Idem, para.17.
initiatives on the implementation of the law, it can be argued that a separate international treaty on the prohibition and punishment of sexual violence could serve as a crucial assembling platform reflecting how far the international community has progressed in addressing the issue and how serious it is about eliminating it. Even if this currently might sound like a utopian idea.
Table of references

*Treaties and other legal instruments*

*International humanitarian law (chronological order):*


Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Geneva, 12 August 1949. Available at: https://www.icrc.org/applic/ihl/ihl.nsf/Treaty.xsp?documentId=4825657B0C7E6BF0C12563CD02D6B0B&action=openDocument.


International criminal law:


International human rights law:


Regional human rights law:


**National law:**

China, Law Governing the Trial of War Criminals (1946). Quoted in ICRC Customary Law Study, Volume II.


** Relevant case law**


ICTY, Prosecutor v. Dragoljub Kunarac and Others, Case No.IT-96-23/1-A (Appeals Chamber), 12 June 2002.


ECtHR, Rantsev v. Cyprus and Russia, Application no. 25965/04, Judgment, 7 January 2010.

Acts issued by organs of international organizations

UN Security Council, Resolution 820. Adopted by the Security Council at its 3200th meeting, on 17 April 1993, S/RES/820, para.6. Available at: refworld.org/docid/3b00f21b10.html.


UN Human Rights Committee, CCPR General Comment No. 20: Article 7 (Prohibition of Torture, or Other Cruel, Inhuman or Degrading Treatment or Punishment), 10 March 1992, available at: http://www.refworld.org/docid/453883fb0.html.

ICRC, Aide-memoire, 3 December 1992. Quoted by Sellers, P. V. The Prosecution of Sexual Violence in conflict: The Importance of Human Rights as Means of Interpretation. OHCHR.
2007.


**Books and book chapters**


**Articles**


Reports and studies


UN Secretary-General (UNSG), Conflict-related sexual violence: report of the Secretary-General, 13 January 2012, A/66/657 S/2012/33, para.3. Available at: refworld.org/pdfid/4fbf5b382.pdf.


Bastick M., Grimm K. and Kunz R. Sexual Violence in Armed Conflict: Global Overview and Implications for the Security Sector. Geneva Centre for the Democratic Control of Armed Forces, 2007. Available at:


**Internet resources**


International Institute for Strategic Studies (IISS), Armed Conflict Database. Available at https://acd.iiss.org/.
