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Chair of International Law

**THE PROHIBITION OF RAPE AS A NORM
OFJUS COGENS**

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Introduction

When thinking about rape, the image coming to mind is that of a woman abused by a man or more than one. If we try to extend the perspective on a larger scale, for example, by considering more than 200.000 women raped or an entire population sexually abused, it is hard to imagine, or at least it was hard to imagine twenty-five years ago when the Bosnia and Rwanda tensions exploded. After those events, despite the reluctance of victims to report the crimes, several shreds of evidence regarding the systematic use of rape during armed-conflicts and post-conflict situations emerged, due to the extensive work of the media. Proofs, that are sadly necessary to shock the public sensitivity and “make some kind of action a moral imperative,” as History teaches us. To cite a few actions made by the international community: the establishment of Nuremberg trials, United Nations or the International Court of Justice. All of them, served the purpose of preventing atrocities from reoccurring such as genocide, slavery, aggression or the use of force, which are all recognized peremptory norms.

However, in the past decade, one of the most egregious violations of human dignity has never been condemned or readdressed in any way, silenced behind acceptance: rape. The belief of sexual abuse as a byproduct of war or as a military personnel sexual urge during armed conflicts has triumphed until the events of Bosnia and Rwanda. Thereafter, this idea of tolerance regarding rapes drastically changed. First, the abuse was deemed as a softer and inevitable crime until it became one of the most serious violation of human rights, able to threat the international peace. The development of this conception that places rape among the most severe international crimes would logically require an equally powerful legal response. In International Law, the mean that would reflect this response is a mandatory rule, better known as a norm of *jus cogens*.

The question that arises is: could the prohibition of rape be considered as a norm of *jus cogens*?

For the purpose of this paper, it is necessary to begin by clarifying what should be understood with the broad term of sexual violence and, most importantly, with a specific form of sexual violence particularly destructive for the victims: rape. Thus, an extensive analysis, through the first chapter, will be conducted on the term of rape itself and its recurrence in History.

The first section aims to put the light on the international community difficulties and unwillingness to agree on a uniform definition of rape, as well as its evolution and inclusion within the “war-rape” and “weapon of war” frameworks. Two frames that perhaps, worked as catalysts in empowering the perception of the crime as a threat to international peace and security. Hence, linking rape with the most compelling legal means of international law: peremptory norms. The term peremptory will be used interchangeably with “jus cogens” and defined as well in the First Chapter.

The subsequent sections, Chapter 2 and 3, represent the core of the paper, in which the ‘level of analysis’ method of research will be adopted. The levels analyzed are the micro/individual level and the macro/international level.

Chapter 2 will focus the attention on the micro level. Therefore, analyzing the effects of rape on victims both in armed conflict and post-conflict, as well as social aftermath. Putting the light on stigmas and gender stereotypes which constitute obstacles in the development of international laws, capable of eradicating the impunity of the crime. Furthermore, after focusing the attention on the individual sphere and the suffering of the victims, the research will attempt to underline the surprising similarities with torture, a recognized peremptory norm. Do the similitudes hinder or help the recognition of rape as a norm of jus cogens? Why is rape considered a softer crime? The aim of Chapter two is to demonstrate how the analysis of the private sphere may represent a starting point in encouraging an international response against a crime perpetrated over the centuries but rarely - or never - condemned.

Lastly, Chapter 3 addresses the way the international community paid attention to the crime. From considering rape as an inevitable collateral effect of war to deem the crime as a threat to international peace. Such change of perspectives is demonstrated by several resolutions drafted over the past twenty years and the increasing commitment of the states and NGOs.

CHAPTER 1

Mentioning and Defining Rape: The Irreducible Gap

1.1 Sexual Violence

In recent years, remarkable attention has been given to the concept of sexual violence, sensitizing the conscience of many about the atrocities perpetrated against women and men during armed conflict as well as peacetime. However, when such atrocities are discussed, the tones and definitions are hushed, the terms are generic and there is a common fear of exposing “all their horrifying and indelicate details”¹. In other words, it seems to prevail a common reluctance in facing the brutality and the dangerousness of human nature and its capability of reaching unthinkable levels. Nevertheless, sexual violence cannot be understood with mere assumptions. Details, descriptions and narratives constitute the portrait of a phenomenon silenced for many years and perceived as a taboo in many cultures, even in those cultures we consider liberal and progressive, in one word “developed”, as Western countries.

Hence, it is fundamental to adopt a different approach, as suggested by K. Barnett, based on the belief that the more narratives, definitions, and experiences are expressed accurately with all their crude details, the more reality and perception are likely to coincide². This will allow not only to spread awareness about the phenomenon of sexual violence and rape in particular - both during peacetime and wartime- but also to understand the real extent of the problem and to leave no space for ambiguities in the legal sphere. Therefore, for the purpose of our research, it is essential to clarify what should be understood with the term of sexual violence and rape, which will be used often. Notwithstanding the many definitions included in the penal codes of the majority of States, the one expressed by the International Criminal Tribunal of Rwanda, precisely in the *Prosecutor v Akayesu*, seems to be the most relevant. The Tribunal “considers sexual violence, which includes rape, as any act of a sexual nature committed under

¹ Catherine N Niarchos, "Women, War, and Rape: Challenges Facing the International Tribunal for the Former Yugoslavia," *Hum. Rts. Q.* 17 (1995).

² Hilaire Barnett, "Feminist Legal Methods," in *Sourcebook on Feminist Jurisprudence* (Routledge-Cavendish, 2012).

circumstances that are coercive”³. The judgment puts the light on two important elements. The first one is the element of coercion, which is fundamental to depict both sexual violence and rape. In fact, according to Amnesty International the use of force, threat of force or coercion lead to the incapability of the victim to preserve the full right on their mental and physical integrity as well as sexual autonomy⁴. Therefore, the presence of coercive circumstances excludes the possibility to describe the act as “sexual intercourse” which implies the ‘genuine consent’ by the victim – and thus, the perpetrator’s exclusion from the conviction. The element of consent is another controversial topic not only for what concern the definition of sexual violence, but also in regard to rape. Briefly, two are the line of thoughts drawn in regard to consent. First, it is the belief that consent is a crucial element in legal definitions. On the other hand, some are of the idea that the term sexual violence, and rape in particular, implicitly include the lack of consent. This is why according to scholars such as Anna Marie de Brower, the element of consent is not considered by the judges when sexual violence takes place in a coercive environment.⁵ The second element underlined in the definition given above, is that sexual violence is “any act of sexual nature”, thus broadening the term. Indeed, the violence includes in its definition different forms of assault such as rape, indecent harassment (i.e. touching a women’s breast), sexual slavery, forced marriage, forced impregnation and sexual

³ "The Prosecutor Versus Jean Paul Akayesu," in *Case No. ICTR-96-4-T*, ed. United Nations (International Tribunal Court For Rwanda, 2 September 1998). Jean Paul Akayesu was the first men convicted of genocide by an International Court. Akayesu became the *bourgmestre* (mayor) of his community, Taba. He held the office from 1993 to 1994, when the genocide of Rwanda had reached the peak of the tensions. At first, Akayesu kept his community apart from the massacres but eventually he realized that his political and social reputation depended on his support for those who had planned the genocide. Thus, thanks to his position as mayor he gave orders to the military apparatus to perpetrate violence and actuate a policy of search and destroy the Tutsis. Some witnesses saw him incite the people of the country to join the massacres and transform what had been safe places into places of torture, rape and murder.

⁴ Amnesty International Publications, "Rape and Sexual Violence Human Rights Law and Standards in the International Criminal Court," in *Peter Benenson House* (London, United Kingdom 11 March 2011). Furthermore, the right to sexual autonomy must be understood as “the right to have control over and decide freely and responsibly on matters related to their sexuality, including sexual and reproductive health, free of coercion discrimination and violence”, Beijing Platform for action parag 97. Beijing Declaration and Platform for action, Fourth World Conference on Women, 15 September 1995

⁵ Anne-Marie De Brouwer, *Supranational Criminal Prosecution of Sexual Violence: The Icc and the Practice of the Icty and the Ictr*, vol. 20 (Intersentia nv, 2005). At p. At p. she states “consent is not an issue when force, threat of force, coercion or coercive circumstances exists or when the person is incapable of giving consent”.

mutilation.⁶ In other words, the term sexual violence is adopted in reference of any act made by using sexual means or with the intention of targeting sexuality. Besides, the assault is not restricted to physical aggression of the human body and may include acts that do not involve penetration or even physical contact but are psychological sexual assaults instead. This variant of sexual violence occurs when the victims are forced to do a sexual act against their will, within a specific environment of violence, which prevents the victims from protecting themselves. For example, forced nakedness, induce someone to perform self- masturbation or sexual acts with others, sexual shame and even a combination of these. Indeed, it is of considerable relevance the element of authority abuse which is advanced, permitted or condoned by the state or by who is delegated of its powers such as the military and police apparatus. The aspect of authority abuse is a crucial point in understanding the link between sexual violence and torture. Two dissimilar crimes but still deeply connected. The first is often used to serve the purpose of the other as the case of Abu Ghraib has extensively documented.⁷ However, the correlation between the two crimes, its legal basis and the response of the international community, will be discussed later on. At the moment, what requires the most attention is a specific form of sexual violence: rape. Its importance is relevant not only to the purpose of our research, but also to its alarming recurrence, dangerous effectiveness and its use as a strategic weapon of war.

1.2 Issues in Defining Rape and Legal Framework

The crime of rape is mentioned in several Conventions and statutes of International Courts. It is recorded in 1899 Hague Convention on the Law and Customs of War, in the

⁶ Agnès Callamard, *Documenting Human Rights Violations by State Agents: Sexual Violence* (Amnesty International, 1999).

⁷ In 2004, Abu Ghraib prison was the center of international attention due to the atrocities committed within it by US soldiers. In prison several Iraqi and Afghan detainees were physically and psychologically abused, tortured, sodomized, raped and killed. All this was taken up by the soldiers with video cameras and photographs which, following numerous investigations, came into the hands of CBS news, which published them in April 2004. The United States was condemned by the whole world and even if President Bush declared that this was an isolated event, later it was discovered that the authorization to torture came from very high up in the military hierarchies, even the defense minister, Donald Rumsfeld was involved. Furthermore, it was discovered that the vast plan of brutalizing torture extended to the prisons in Afghanistan and Guantanamo.

article 27 of the fourth Geneva conventions, in article 76 of the Additional Protocol I and it is also noted in the Charter of Tokyo. Nevertheless, it was not listed and thus prosecuted, in the London Charter institutive of Nuremberg Tribunal. Despite the London Charter, the crime has also been classified both as a crime against humanity and as a crime of war and such conclusions were considered by the Rome Statute of the International Criminal Court, signed in 1998. In fact, in the Statute rape is listed both in Article 7 as a crime against humanity and in Article 8 as a war crime, adding that a violation of the articles constitutes “a serious violation of Article 3 common to the four Geneva Conventions”⁸. Therefore, rape is mentioned in many International conventions and Statutes over the century until 1998. However, between mention and definition, there is a huge difference and a huge gap that has never been reduced.

In 1994, the UN Security Council (UNSC) published a final report, in regard to the UNSC resolution in 780/1992, called “*Rape and Sexual Assault: a legal study*”. In this report the UNSC underlines how unlike the majority of codified penal laws, "rape" is not precisely defined in international humanitarian law”⁹. As a consequence, the international community found itself divided in what concerns the definition of rape. Thus, through the same year the International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR) became pioneers in trying to define the crime of rape internationally, overcoming the existing cultural and ideological barriers amongst 196 States¹⁰. From their attempt three distinct lines of thought emerged in what concerns the definition of rape, chronologically distinct from the judgements in which they were advanced. Namely, *Akayesu v Prosecutor* , *Furundzija v Prosecutor*, and

⁸ *Rome Statute of the International Criminal Court* , available at: <https://www.icc-cpi.int/resource-library/Documents/RS-Eng.pdf>

⁹ "Final Report of the United Nations Commission of Experts Established Pursuant to Security Council Resolution 780 (1992) Annex II Rape and Sexual Assault: A Legal Study," in *S/1994/674/Add.2 Vol I*, ed. UNITED NATIONS (Security Council 28 December 1994). Available at http://www.icty.org/x/file/About/OTP/un_commission_of_experts_report1994_en.pdf [Access date 31 March 2019]

¹⁰ 206 is the accurate number of states in the world. However, more than 10 have a limited or any recognition from the International Community such as Kosovo, North Cyprus or Transnistria. Thus, the number of states generally recognized by the international community, and the number considered, is 196. Further information can be found in Natalino Ronzitti, *Introduzione al Diritto Internazionale*, G. Giappichelli Editore, 2016

Kunarac, Kovač and Vuković v Prosecutor. The three trials will further be developed followingly.

1.2.1 Akayesu trial

On September 2nd, 1998, The Chamber of ICTR, after having established the non-existence of a standard definition of rape in International Law, defines the crime as "...a physical invasion of a sexual nature committed on a person under circumstances that are coercive"¹¹. The Chamber has reached this definition after rejecting the interpretation in which the crime is explained in minute details, namely including the penetration of the female sexual organ. Thus, concluding that "the crime of rape cannot be captured in a mechanical description of objects and body parts"¹². Many reasons lead to this conclusion.

In the first place, the Chamber underlines how the need for describing the crime and its brutality in details is unnecessary. Same as other crimes against humanity such as torture which, in its definition given by the Convention against torture and inhuman and degrading act, is not defined through an accurate description. It is nevertheless unthinkable to describe torture in terms such as "ripping pieces of skin," "burning" or "chopping limbs". Secondly, the Chamber decided to use the word 'invasion' rather than 'penetration' not only to avoid dangerous gender stereotypes and to look at the crime from a male perspective, but also to avoid excluding other forms of physical invasion that are equally degrading and outrageous for the dignity of the person¹³.

Lastly, The Chamber with such definition had preserved "the cultural sensitivities involved in public discussion of intimate matters" and has avoided the victims to "recall the painful reluctance and inability of witnesses to disclose graphic anatomical details of sexual violence they endure."¹⁴ Moreover, the element of consent is omitted for an objective reason, as Anne-Marie Browner noticed. In a context of genocide, crimes against humanity and war crimes, the act of sexual violence is unavoidably made with the

¹¹ "The Prosecutor Versus Jean Paul Akayesu.", supra note 2

¹² Ibid.

¹³ De Brouwer, 20. Supra note 5.

¹⁴ "The Prosecutor Versus Jean Paul Akayesu."

use of force. Questioning whether there is consent or not becomes redundant¹⁵. The definition given in the *Akayesu* judgement, regardless its inclusive nature will not be adopted in the research. However, the attempt to define the crime in *Akayesu* was largely taken into account in the last definition of rape, subscribed in the Elements of Crime, a document which supports the Rome Statute in identifying the elements of genocide, crime against humanity and war-crime. The document defines rape as

1. The perpetrator invaded the body of a person by conduct resulting in penetration, however slight, of any part of the body of the victim or of the perpetrator with a sexual organ, or of the anal or genital opening of the victim with any object or any other part of the body.
2. The invasion was committed by force, or by threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power, against such person or another person, or by taking advantage of a coercive environment, or the invasion was committed against a person incapable of giving genuine consent.
3. The conduct was committed as part of a widespread or systematic attack directed against a civilian population.
4. The perpetrator knew that the conduct was part of or intended the conduct to be part of a widespread or systematic attack directed against a civilian population¹⁶

Such definition includes many aspects that have been disputed, modified and rejected over the years following Bosnia and Rwanda. In light of this, it is considered as an international final compromise in the definition of rape for those states which recognized the jurisdiction of the International Court of Justice and it is important to understand and take into consideration the developments around the definition of this crime, with particular regard to all the controversial aspects contested by other International Courts, such as ITCY. The *ratio* behind the analysis of the definition's development attempts to underline all those aspects based on human convictions, stereotypes and neglected legal areas that perhaps hindered the evolution of an unanimously accepted definition of rape for centuries.

However, for the purpose of this work, the definition adopted will be the one given in the Statute of Rome due to its inclusive and innovative character.

¹⁵ Ibid, 20.

¹⁶ "Elements of Crime," in *ISBN No. 92-9227-232-2* (The Hague, The Netherlands: International Criminal Court (ICC), 2013).

1.2.2 Furundzija trial

Later on, the definition given in the *Akayesu* trial was considered too general by the judges who found themselves processing Furundzija in the ITCY¹⁷. In the same way as the past trial, the Court again consulted national penal codes¹⁸ to draw a more accurate and detailed definition that would be internationally accepted. Concluding that the forcible penetration of the human body by male sexual organ or other objects of any kind, is an essential characteristic to add into the definition.¹⁹ Hence, on the 10th of December 1998 the Chamber defines the crime of rape as follows:

- i. sexual penetration however slight
 - a. of the vagina or anus of the victim by the penis of the perpetrator or by any other object used by the perpetrator, or
 - b. of the mouth of the victim by the penis of the perpetrator
- ii. by coercion or force or threat of force against the victim or a third person²⁰

The mechanical definition put forward by the ICTY, is a rejection of the broad definition given in the *Akayesu* judgement. However, many questions arise in regard of such detailed description. In the first place, it seems that the definition excludes other forms of penetration that can be equally outrageous for human dignity such as the penetration with fingers or with the tongue²¹. Secondly, by describing rape in detail it automatically induces the victim to testify and describe in particulars the trauma suffered. As a

¹⁷ On 10 November 1995, A. Furundzija, commander of a local unit of the armed forces, known as the Croatian Defense Council, was accused by the Tribunal of the commission of violations of the laws and customs of war pursuant to article 3 of the Court Statute. In particular, acts of torture and contempt of personal dignity, including rape. See "Prosecutor V. Anto Furundzija," in *Case No: IT-95-17/I-T*, ed. UNITED NATIONS (International Tribunal Court for the former Yugoslavia 10 December 1998). available at: : <http://www.icty.org/x/cases/furundzija/tjug/en/fur-tj981210e.pdf>

¹⁸ The Court consulted Section 361 POWER TO WOMEN IN PEACE PROCESSES and Women's Organisations Cooperating in Realising Resolution 1325, "Who Is Accountable?." of the Chilean Code; Art. 236 of the Chinese Penal Code (Revised) 1997; Art. 177 of the German Penal Code (StGB); Art. 177 of the Japanese Penal Code; Art. 179 of the SFRY Penal Code; Section 132 of the Zambian Penal Code. Art. 201 of the Austrian Penal Code (StGB); French Code Pénal Arts. 222-23; Art. 519 of the Italian Penal Code (as of 1978); Art. 119 of the Argentinian Penal Code. Section 375 of the Pakistani Penal Code 1995; Art. 375 of the Indian Penal Code and many others. For further information consult the Prosecutor v Furundzija *Case No: IT-95-17/I-T*

¹⁹ "Prosecutor V. Anto Furundzija.", supra note 15

²⁰ Ibid.

²¹ De Brouwer, 20. Supra note 5.

consequence, putting the witness in an uncomfortable position that can eventually hinder them from speaking or even show up in Court. In support to this argumentation it is helpful to consider that, an exiguous number of victims actually denounce the endured violence, by reporting to the police or through surveys redacted by non-governmental organizations.²² By affirming so, it is fundamental to clarify that the mechanical definition is not the main factor capable of inhibiting the victim from speaking, but could be one - amongst many other factors such as cultural stereotypes - that can discourage the victim from testifying. Thus, many scholars have questioned whether a detailed definition is truly helpful to narrow the violence or if it induces the opposite effect.

Regardless of the observations made, the above definition will not be adopted in our research.

1.2.3 Kunarac, Kovač and Vuković: The First International Conviction For Rape

Although the definition given in the Furundžija trial was rejected by many subsequent trials, during *Kunarac, Kovač and Vuković* judgments the definition was partially adopted with an amendment.²³ After the announcement of the Chamber that “in most common law systems, it is the absence of the victim’s *free and genuine consent* to sexual penetration which is the defining characteristic of rape”, the *judges* expressed that adding the aspect in the definition was necessary and in line with the national penal codes consulted.²⁴ In light of such considerations, emerges a third definition of rape which gives particular attention to the element of consent. Describing the crime as:

“...the sexual penetration, however slight: (a) of the vagina or anus of the victim by the penis of the perpetrator or any other object used by the perpetrator; or (b) of the mouth of the victim

²² E.G. Krug et al., *World Report on Violence and Health* (World Health Organization, 2002). p. 147-181. Although there have been many developments in measuring the phenomenon, it is still hard to make global esteems due to the multiple abstract variables to take into account such as culture or women status in some societies. Therefore, caution with figures is needed.

²³ Dragoljub Kunarac, Radomir Kovač, and Zoran Vuković were brought before the ICTY for their atrocities committed against Bosnian Muslim civilians between April 1992 and February 1993. The three leaders of the Bosnian Serb Army were condemned for crimes of war and crime against humanity respectively 28, 20 and 12 years in prison. The case is particularly important for our research due to the fact that it is the first time in History that perpetrators of war rape are convicted.

²⁴ "Prosecutor V. Dragoljub Kunarac, Radomir Kovac and Zoran Vukovic (Trial Judgment)," in *IT-96-23-T & IT-96-23/1-T*, ed. UNITED NATIONS (Montenegro | Serbia: International Criminal Tribunal for the former Yugoslavia (ICTY), 22 February 2001). paragraph 438-453.

by the penis of the perpetrator; where such sexual penetration occurs without the consent of the victim. Consent for this purpose must be consent given voluntarily, as a result of the victim's free will, assessed in the context of the surrounding circumstances. The *mens rea* is the intention to effect this sexual penetration, and the knowledge that it occurs without the consent of the victim.”²⁵

The element of consent has been contested in numerous sources.²⁶ One document in particular, the Special Rapporteur to the UN Commission for Human Rights, clearly expresses the irrationality in mentioning consent in the definition of rape, which its absence can be logically inferred from the term itself of rape. Indeed, in the rapporteur, submitted by Ms. Gay J. McDougall, she notices that “the manifestly coercive circumstances that exist in all armed conflict situations establish a presumption of non-consent and negates the need for the prosecution to establish a lack of consent as an element of the crime” ²⁷. Therefore, many sociologists believe that the need to express the element of consent hide a form of gender stereotype on its basis. It alludes that women are always sexually available unless they explicitly refuse to give the consent ²⁸.

Furthermore, the question itself could also indirectly give the impression of the unreliability of the witnesses, which could compromise the right to have a fair trial. To support this argumentation, it is helpful to look at the testimony of witness 95 during the Kunarac, Kovac, Vucovic. In such circumstance, once the definition of rape was established, the Prosecutor asked to witness 95 if she was raped against her will ²⁹. Such question was extensively humiliating for the victim. Previously she said she was raped “more than 150 times in the course of those 40 days.”³⁰

Moreover, to fully understand the dangerousness of stereotypes and its capabilities in jeopardizing women to have a fair trial, a further confirmation can be found in the words expressed by the Committee on the Elimination of All Forms of Discrimination Against

²⁵ Ibid. paragraph 460.

²⁶ See Susan Brownmiller, *Against Our Will: Men, Women, and Rape* (Ballantine Books, 1993), *ibid.*, “The Prosecutor Versus Jean Paul Akayesu.”

²⁷ Gay J McDougall, “Contemporary Forms of Slavery: Systematic Rape, Sexual Slavery and Slavery-Like Practices During Armed Conflict,” *Geneva: UNHCR* (1998).

²⁸ Amnesty International, *supra* note 3.

²⁹ On April 25th, 2000. The Prosecutor heard witness 95. Her testimony is documented in the following link (<http://www.icty.org/x/cases/kunarac/trans/en/000425ed.htm>) p 2236

³⁰ Ibid, paragraph 2208

Women, in the *Karen Tayag Vertido v the Philippines* case³¹, in 2010, which act “[S]tereotyping affects women’s right to a fair and just trial and that the judiciary must take caution not to create inflexible standards of what women or girls should be or what they should have done when confronted with a situation of rape based merely on preconceived notions of what defines a rape victim or a victim of gender-based violence, in general.”³² Although the full written form of this realization came in 2010, it is interesting to notice how also in 1998 there has been a similar intention to narrow the crime. In the Rules of Procedures and Evidence (1998), a document supporting the Statute of Rome, rule 70 can be interpreted as an attempt to address this delicate issue a decade earlier.³³ Thus, demonstrating how the international justice made a big effort in moving toward this direction.

In conclusion, for the considerations made above, our research will not adopt the third definition given.

1.3 Rape as A Weapon of War

For a long time, rape has been considered a byproduct of war, as an unfortunate event during a conflict or, in a more accurate way, as a tool to satisfy the sexual urge of male soldiers. Luckily, the conceptualization of the crime has changed thanks to the contribution of survivors, legal advocates, and those who have thwarted the barrier of silence behind the violence. Thus, proving otherwise.

³¹ Karen Tayag Vertido is a Filipino woman who served as Executive Director of the Davao City Chamber of Commerce and Industry in Davao City, the Philippines. She was raped on 29 March 1996 by the former 60-year-old President of the Chamber.

³² Karen Tayag paragraph 8.4

³³ Rule 70 states:

In cases of sexual violence, the Court shall be guided by and, where appropriate, apply the following principles: (a) Consent cannot be inferred by reason of any words or conduct of a victim where force, threat of force, coercion or taking advantage of a coercive environment undermined the victim’s ability to give voluntary and genuine consent; (b) Consent cannot be inferred by reason of any words or conduct of a victim where the victim is incapable of giving genuine consent; (c) Consent cannot be inferred by reason of the silence of, or lack of resistance by, a victim to the alleged sexual violence; (d) Credibility, character or predisposition to sexual availability of a victim or witness cannot be inferred by reason of the sexual nature of the prior or subsequent conduct of a victim or witness.

Rape is systematically used not against an individual within a community but against any civilians. It is used as “an act of aggression from one nation or a faction against another.”³⁴ In one word, it is used as war rape. A phenomenon which has been extensively documented in any continent. From the rape of 200,000 Chinese women, called “comfort women” during the Second World War, to the rape of Vietnamese women by U.S. troops which documented in the My Lai massacre, Myanmar, the rape camps in Bosnia-Herzegovina exploited by Serbian soldiers, the Rwanda genocide carried on through rapes, Somalia, Democratic Republic of Congo (DCR) and many others³⁵. After collecting more and more evidences, the UN Commission on Human Rights believed it was a reasonable initiative to begin a study on the phenomenon. Only in 1998, the crime was accurately defined and portrayed as war rape. The definition is given in the rapporteur “*Contemporary Forms Of Slavery: Systematic Rape, Sexual Slavery And Slavery-Like Practices During Armed Conflict*” elaborated by McDougall³⁶ who describes the crime as “a deliberate and strategic decision on the part of combatants to intimidate and destroy ‘the enemy’ as a whole by raping and enslaving *women* who are identified as members of the opposition group.” McDougall highlights two important elements in her definition of war rape. First, she puts the light on the fact that the targets are mostly women. Although men are also victims of the brutality of any kind of sexual violence including rape, women are more likely to be targeted for their role in some societies or simply for their gender. Societies characterized by a strong presence of patriarchy and where the female body is nothing but the curdle of male honor and as such considered “their” property. The representation of women in certain cultures is indeed assumed to be sacred and fundamental to the demographic proliferation of an ethnic group.³⁷ Thus, the female body becomes the arena in which the war is fought, to humiliate the enemy, instill terror and destroy the ethnic identity of the opposition group³⁸. Perhaps, rewriting the words of the Major General of the former UN Peacekeeping Operation commander in DRC can

³⁴ Farwell Nancy, "War Rape: New Conceptualizations and Responses," *Affilia* 19, no. 4 (2004).

³⁵ Maria Amelia Odetti, "Jūgun Ianfu (Comfort Women)."; Antonio Guterres, "Report of the Secretary-General on Conflict-Related Sexual Violence," (2017).; Sara Meger, "Rape of the Congo: Understanding Sexual Violence in the Conflict in the Democratic Republic of Congo," *Journal of Contemporary African Studies* 28, no. 2 (2010).; Herbert C. Kelman and V. Lee Hamilton, *Crimes of Obedience : Toward a Social Psychology of Authority and Responsibility* (New Haven, Conn.: Yale University Press, 1989).

³⁶ McDougall. Supra note 23.

³⁷ Niarchos.

³⁸ Ibid.

give us a first understanding of the extent of the problem, *“it is now more dangerous to be a woman than to be a soldier in conflict.”*³⁹

Secondly, McDougall accurately mentions the political achievements behind the act of raping, by using the word “strategy”. In the Collins dictionary the definition of strategy during an armed conflict, is “the science of planning and directing large-scale military operations, specif. (as distinguished from tactics) of maneuvering forces into the most advantageous position prior to actual engagement with the enemy.”⁴⁰ Planning, designing or premeditated large scale actions are generally considered to be elements of a prosecution for crimes against humanity. Inaction or abetment can be equally considered as an element to establish the element of plan or design.⁴¹ In conclusion, rape during an armed conflict is deemed as an attack against the enemy, in order to achieve political goals – as ethnic cleansing. It is an attack conducted largely against women not because they are the enemy but mostly because they *are* women. It is an attack which conceals a crude misogyny⁴². Lastly, it is an “attack [against]women’s physical and emotional sense of security while simultaneously launching an assault, through women’s bodies, upon the genealogy of security as constructed by the body politic.”⁴³ In light of this, according to McDougall gender should also be recognized as an element of persecution under the field of crime against humanity⁴⁴.

From here, emerges the concept of rape as a weapon of war due to the fact that an attack inherently involves the use of any tool to defeat the enemy, or in the words of ICTY an attack is “conduct involving the commission of acts of violence”, and rape can be largely -perhaps unquestionably- considered as such. The weapon of war frame requires an extensive analysis that will further be developed in Chapter 3.

³⁹ Major General of the former UN Peacekeeping Operation commander in DRC, Amnesty International.

⁴⁰ Harper Collins, "Collins English Dictionary," *Glasgow: HarperCollins* (2004).

⁴¹ McDougall. Supra note 23.

⁴² Niarchos., supra note 29.

⁴³ Nancy. and (Koo, 2002, p. 525)

⁴⁴ McDougall. Supra note 23.

1.4 Norm of Jus Cogens

The term of *jus cogens* is deemed as the norm that holds the highest status among all other laws and principles within the corpus of International Law, although an official hierarchy has not yet been given⁴⁵. However, different international treaties recognize the superior position of the norm of *jus cogens* due to its particularities. Above all, the norm of *jus cogens* is defined under article 53 of the Vienna Convention on the Law of treaties which highlights two important elements⁴⁶.

- i. Universal acceptance, which implies that the norm exists on the basis of a recognition applied by a majority of States beyond the political and ideological positions. The element constitutes a particular *opinion iuris* which characterizes *jus cogens*.
- ii. Non-derogability of *jus cogens* by norms that are not equally powerful. The disposition excludes the possibility of a norm of *jus cogens* to be derogated by any treaty or custom law.

The concept of *jus cogens* dates back to the 19th century. Since then, two points of view have emerged regarding the concept of *jus cogens*. The first tends to believe that these norms have originated directly from international law, regardless other principles. The second point of view instead considers the norms of *jus cogens* as an evolution of pre-existing norms. The latter explanation is adopted by the majority of scholars, and it attributes the birth of *jus cogens* to pre-existing customary laws "evolved" in imperative norms that today constitute the founding bases of the current international community⁴⁷. In other words, the principle behind *jus cogens* is based on the idea that certain rights and customs are so integrated amongst states that they have developed a particular *opinio*

⁴⁵ Lecture of Professor Elena Sciso, 28.02.2018, Luiss University.

⁴⁶ Article 53 act "A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law. For the purposes of the present Convention, a peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character"

⁴⁷ Natalino Ronzitti, *Introduzione Al Diritto Internazionale* (G Giappichelli Editore, 2016).

*iuris*⁴⁸ which has elevated them as peremptory norms, or “compelling laws”⁴⁹. In light of this, there are many similitudes with a customary law, but the main difference is the universal acceptance by the international community which give to the norms of *jus cogens* a higher position. This broadened acceptance takes over from many international pronouncements, such as the UN or the jurisprudence, ad hoc tribunals convictions, treaties ratified by a consistent number of states, and also any act central or peripheric of a state. All of them had the final scope to both condemn those conducts or state policy – whether commission or omission - capable of threatening the peace and security of mankind and those crimes capable of shocking the conscience of humanity.⁵⁰ Some norms of *jus cogens* have been disclosed by the legal literature over the years such as the prohibition of the use of force, aggression, norms prohibiting genocide, apartheid, torture, maintenance by the force of a colonial domination, war crimes and crimes against humanity⁵¹.

Although such peremptory norms are largely recognized as a principle within the body of international law, the term is still surrounded by uncertainties. The doubts raised by many scholars are based on their disagreement on the way *jus cogens* norms are ascertain – which makes them notoriously difficult to identify - and in the way how such norms determine their priority over other international laws. Lastly, and more importantly, many scholars have found themselves divided in whether those norms impose a duty upon States – such as prosecute or extradite the perpetrator of such crimes – or if such norms give to the State particular rights and facilitations to advance accusation and condemn those who have committed the aforementioned crimes⁵². Above all, it is important to consider that the element of *universal acceptance* mentioned in the article 53 of the Vienna Convention, necessarily imposes an absolute duty upon states, namely to prosecute or extradite the perpetrator to avoid such crimes can going unpunished.⁵³ An absolute duty creates state responsibility toward anyone without distinction, in one word,

⁴⁸ In International Law the *opinion iuris ac necessitatis* is deemed the psychological element of a customary law. More precisely, is the general conviction that a certain behavior complies with the law.

⁴⁹ M Cherif Bassiouni, "International Crimes: "Jus Cogens" and "Obligatio Erga Omnes", " *Law and Contemporary Problems* 59, no. 4 (1996).

⁵⁰ Ibid.

⁵¹ Ronzitti. Supra note 36

⁵² Bassiouni. Supra note 39

⁵³ David S Mitchell, "The Prohibition of Rape in International Humanitarian Law as a Norm of Jus Cogens: Clarifying the Doctrine," *Duke J. Comp. & Int'l L.* 15 (2004).

toward the international community. This type of responsibility is better known as *obligatio erga omnes* as the ICJ has accurately defined in the *Barcelona Traction Case*⁵⁴. In practice, as professor Bassiouni highlights it seems that “the gap between legal expectations and legal reality is therefore quite wide”. In a sense that, although *jus cogens* is universally accepted and it might imply obligations *erga omnes*, the doubts behind the true meaning of the word hinder the States from applying their duties. Regardless of the many issues concerning the term, this research aims to demonstrate how the prohibition of rape has become a norm of *jus cogens* due to the support of many legal basis which lead us to reach such conclusion. The notion of *jus cogens* that will be considered is the one given by the Vienna Convention, in article 53. Moreover, our research will attempt to demonstrate how the prohibition of rape constitutes a norm of *jus cogens* also because such crime is capable of threatening the peace and security of humankind and shocking the conscience of humanity as many episodes during the past century have demonstrated. Finally, a large repertory from History itself can be cited to support our research’ conclusions.

1.4 Historical Treatment of Rape

War rape is not a new phenomenon and its recurrence dates back through many centuries, since Roman and Greek literature, as many ancient scholars tell us. The term rape itself originates from the Latin word *rapere* which means to seize or take with violence. The noun for the act of rape is *raptum* which expresses the idea stealing something from someone else. In Latin literature one of the most ancient incidents – shrouded by legend - related to the birth of Rome and its Empire, is the Rape (or *raptum*) of Sabine Women. Nevertheless, although a careful approach must be adopted in the readings of the events handed down by Latin or Greek Authors, their literature perhaps portrays a culture which constitutes a valid example on how sexual violence and war were surprisingly linked since the history of humanity.

⁵⁴ In the *Barcelona Traction* case, 1970, in the paragraph 33 the ICJ stated “An essential distinction should be drawn between the obligations of a State towards the international community as a whole, and those arising vis-à-vis another state in the field of diplomatic protection. By their very nature the former are the concern of all States. In view of the importance of the rights involved, all States can be held to have a legal interest in their protection; they are obligations *erga omnes*.”

In Greek mythology, the relation between sex and war is remarkably accentuated in many sources, beginning from the most notorious, the *Iliad*.

Homer's habit of playing with sex and war emerges significantly in the conflict between Achilles and Hector. During the duel, many were the adjectives used to turn the opposite soldier into a female, or merely provoking with feminine characteristics to "dehumanize" the enemy. For example, in verse 142 (XVII) Achilles acts: "Oh handsome Hector, but not much infighting."⁵⁵ Another example and the efficiency of the sexual reference is given by the fear of Hector which emerges in this words: "[Achilles] will kill me out of hand like a woman, naked and unarmed...I cannot see Achilles and myself as a pair of trysting lovers."⁵⁶ Elisabeth Vikman argues that female qualities are often used in the duel to provoke the adversary, an exchange of words that resemble a "love struggle" between two warriors.⁵⁷ More significantly, the allusion to sexual violence appears in verses 137- 139 when Agamemnon promises Achilles to reward many women. "if the gods permit us to sack the great city of Priam, let him...pick out twenty Trojan women for himself...".⁵⁸ The citations operate not only as a solid structure for the work but also reveal cultural aspects in which sex and violence proceeded hand in hand — two sides of the same coin.

Typical behavior is also found in Roman literature, witnessed by many authors. However, in Roman culture, there is a remarkable difference compared to Greek culture in regard to the extent of the violence. It reaches unthinkable levels. The brutality used by Roman troops was not only handed down over the centuries but also connoted by its characteristics in an exclusive category, namely the *bellum Romanum*. A particular type of war characterized by the ruthless behavior of soldiers shown during the sack of cities in which sexual violence - rape in particular- was largely permitted. As Tacitus's testimony suggests, when "a grown up maiden or youth of marked beauty fall in their way, they were torn in pieces by the violent hands of ravishers; and in the end the destroyers themselves were provoked into mutual slaughter."⁵⁹ Also, Livius puts the

⁵⁵ I.C. Johnston, *The Iliad* (Richer Resources Publications, 2007).

⁵⁶ Ibid. Book XXII, verse 126

⁵⁷ Elisabeth Vikman, "Ancient Origins: Sexual Violence in Warfare, Part I," *Anthropology & Medicine* 12, no. 1 (2005).

⁵⁸ Johnston.

⁵⁹ Cornelius Tacitus et al., *The Complete Works of Tacitus* (New York: Modern Library, 1942). Book III, paragraph 3.33

accent on the troops, on how these were greedy of their booty both regarding the material goods and the repayment under the form of sexual slavery: “fields are laid waste, farmhouses ransacked, mothers of families and unmarried girls and boys of free birth torn away and handed over to the soldiery”. The violence of soldiers against the defeated rather than being ordered was condoned or encouraged. It was a deserved reward for their service in the war, considered fair and necessary to satisfy their needs, thus not prosecuted as a crime.⁶⁰

The ancient perspective on women as the booty of war, corresponded to their lower hierarchic position in society. Women were viewed as property, and their abuse committed by other was deemed as an injury to male pride, an ultimate coup de grace to the community, but it was not seen as violence against women.⁶¹ Presumably, this concept is strictly related to the etymological meaning of the term rape which is considered as the stealing of something by someone else, as mentioned above. This conceptualization remained intact for centuries. Little was done legally to adjust the increasing recurrence of the crime both in peacetime and wartime. Some scholars are of the idea that the crime perpetrated during peacetime, and how is legally counteracted lays the basis on the extent of its occurrence during wartime. In other words, the less it is opposed during peacetime, the more is its exacerbated in armed conflicts.

By the middle age, the first legal protection seemed to be advanced, at least on the written form. Henry V in 1419 attempted to protect the non – combatants during the Hundred Years Wars by promulgating an ordinance in which rape was explicitly prohibited with the death penalty.⁶² Regardless the legal presence of the prohibition combined with the lack of concrete applications led to the “ [inevitably] violation of women because soldiery could not be controlled in the heat of battle”⁶³. However, women must have waited until 1863 to see an improvement of legal protection against rape, when the military code for the Union Army, made rape a capital offense. Such code was called the Lieber Code, which took the name from its writer Francis Lieber. In article 44 the code held “[...] all pillage or sacking, even after taking a place by main force, all rape, wounding, maiming,

⁶⁰ Vikman.

⁶¹ Niarchos.

⁶² Theodor Meron, "Rape as a Crime under International Humanitarian Law," *American Journal of International Law* 87, no. 3 (1993).

⁶³ Ibid. p 11

or killing of such inhabitants, are prohibited under the penalty of death, or such other severe punishment as may seem adequate for the gravity of the offense.” The article concludes with “soldier, officer, or private, in the act of committing such violence, and disobeying a superior ordering him to abstain from it, may be lawfully killed on the spot.”⁶⁴

After the Lieber Code, no following improvements were advanced toward this direction and with the beginning of 1900 women became the prime target. A century of world wars with no precedents in history. A century of genocides in Armenia (1915- 1917)⁶⁵, in Europe (1941-1945), Rwanda (1994), former Yugoslavia (1992-1995). A century in which the body of women became the arena of many conflicts.

Before World War I, rape was indirectly mentioned just in the Hague Conventions of 1899 and 1907, specifically in article 46.⁶⁶ Still, many are the evidences such as newspapers, propaganda, and public opinion in general that testify the brutality of German troops during the occupation of Belgium and France. The war crimes perpetrated in Belgium against civilians were so notorious that historians attributed a name to the case, namely the “Rape of Belgium.” According to Antoine Rivièr, the environment of fear and powerless installed by the occupants created a dominant-submissive condition with the victims⁶⁷. Thus, allowing soldiers to obtain sex with the use of force or by merely exchanging food or other primary goods.

Nevertheless, the extent of the rapes has never been reported due to the sense of shame of the victim and the taboo surrounding the topic, although the crimes did not pass unnoticed. After the war, the Commission on the responsibility of the Authors of the War and Enforcement of Penalties was settled to investigate the background of the Great War and to identify those responsible. The work of the commission ended with a report presented to the Preliminary Peace Conference, the 29th of March 1919, in which rape and forced prostitution were listed as primary crimes.⁶⁸

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⁶⁵ Although it must be highlight that the full recognition of the Armenian Genocide is still on progress.

⁶⁶ Article 46 of Hague Convention, 1899 and 1907, held “Family honors and rights, individual lives and private property, as well as religious convictions and liberty, must be respected. Private property cannot be confiscated.

⁶⁷ Antoine Rivièr, “Rape,” (International Encyclopedia of the first World War 2015).

⁶⁸ Conference Peace, “Report Presented to the Preliminary Peace Conference, March 29, 1919,” *American journal of international law*. 14 (1920). (NOTE: At p 114, after mentioning a series of crimes, the Commission states that those “constitute the most striking list of crimes that has ever been drawn up to

In World War II rape was committed from any side of the conflict. United States Army, Japanese soldiers, Germans, British troops, Soviet Red Army, and many others. To cite some examples, in the USA, the Advocate General's office reports that there were 971 convictions for rape in the U.S. military from January 1942 to June 1947.⁶⁹ Several condemned to death - according to the Lieber Code where rape is a capital offense - and 18 were executed later on with the accuse of rape and murder.⁷⁰ Japanese soldiers stained their uniforms and their history with the Nanking Massacre. Between 1937-1938 in six weeks a vast number of women were kidnapped, raped and many of them murdered. A number close to 2,000 institutionalized rape camps with 200,000 women were established to allow male soldiers to satisfy their sexual needs⁷¹. After the occupation, the troops dismantled the camps and executed the women. Many of them founded in mass graves.⁷² However, shocking data come from the Soviet Zone occupation of Berlin between 1945 to 1949, where an estimated number of 2.000.0000 of German women were raped by the Red Army⁷³. The hard-political truth is that each army, that predicts whatsoever ideology committed rape with any distinction.

As Brownmiller noticed, rape or sexual assaults committed by the Allies might not have been perpetrated with the intention of ethnic cleansing or “destruction of inferior people,” but it was a grave humiliation and dehumanization of female victims howsoever . Yet, rape is not mentioned once in the 179 pages judgment of International Military Tribunal. After all, Nuremberg IMT was an institution established by the Allies and as such many are of the ideas that their own crimes passed unnoticed, covered behind the victory, or from a more positive perspective, punished at the national level. Unlike Nuremberg, during the Tokyo trials approximately thirty people were convicted for rape, mentioned

the eternal shame of those who committed them. The facts are established. They are numerous and so vouched for that they admit of no doubt and cry for justice.”

⁶⁹ Brownmiller.

⁷⁰ Ibid.

⁷¹ Odetti.

⁷² Ibid.

⁷³ Lucy Ash, "The Rape of Berlin," *BBC News*, 1 May 2015. available at <https://www.bbc.com/news/magazine-32529679>

as a class B crime, more precisely in the category of war crimes. Indeed, rape was charged under “failure to respect family honor and rights” ⁷⁴

Mass rape in armed conflicts did not stop after the Second World War, and women kept suffering during the entire Cold War as well. However, with the end of the bipolar balance, the war rape reached an unprecedented degree in History in the former Yugoslavia. The whole world was shocked by the cruelty of mankind and from that moment on, precisely from 1998 with the Rome statute, rape was recognized both as a crime against humanity and a war crime for the first time.

⁷⁴ International Military Tribunal for the Far East, Bernard Victor Aloysius Röling, and C. F. Rüter. 1977. The Tokyo judgment: The International Military Tribunal for the Far East (I.M.T.F.E.), 29 April 1946-12 November 1948. Amsterdam: APA-University Press Amsterdam. p 601-03

CHAPTER 2

Rape as A Violent Crime, Crime of Honor and as A Form of Torture

2.1 A Softer Crime

Norm of *jus cogens* such as the prohibition of piracy nowadays has been eradicated⁷⁵ practices due to an evolution of the society which has led the international community to become disinterested in some problems and turn the attention to other issues. The priorities have changed following the evolving society, and so has done the International Law.

This section will attempt to demonstrate how gender stereotypes, cultural beliefs, and customs are vital issues to consider in our analysis. In this regard, some have argued that social norms contribute to overshadow the extent of the brutality of rape. At times, rape is deemed as outrageous for the family rather than painful for the victim, generating a cycle of silence and impunity. At times, rape is a violence often used to pursue the purpose of slavery (in the form of sexual slavery), torture, genocide (ethnic cleansing rapes) and many offenses but never readdressed separately with its treaty. Perhaps, subscribing the crime under its own Convention would be capable of providing evidence of acceptance and recognition, elevating the crime as a norm of *jus cogens* as Dire Tladi suggests in his Special Rapporteur.⁷⁶ However, it might not be an easy task due to the difficulties in even agreeing in the definition itself of rape, as demonstrated in the previous chapter. Furthermore, rape is not only a particular form of violence that is present in many international crimes, but it also resembles torture for its devastating effects on the victim and its strong degree of suffering. In this regard, Hannah Pearce has accurately defined rape as “a cheap form of torture while being brilliantly effective”.⁷⁷

⁷⁵ Although today we are witnessing a slow reappearance as Enrica Lexie case demonstrates.

⁷⁶ "Second Report on Jus Cogens by Dire Tladi, Special Rapporteur," (General Assembly UN: International Law Commission, 2017).

⁷⁷ Hannah Pearce, "An Examination of the International Understanding of Political Rape and the Significance of Labeling It Torture," *International journal of refugee law* 14, no. 4 (2002).

However, several questions arise spontaneously such as: is the lack of legal development on rape caused by cultural divergence? Is there a blurred line between torture and rape that hinder the crime from having its unanimous international recognition?

This section aims to demonstrate the different perspectives adopted when examining the crime of rape, both as a *crime of honor* and as a *violent crime*. Subsequently, our research will attempt to analyze the thin line which separates the crime of rape and torture — two different crimes, equally outrageous for human dignity. Yet rape was, and still is, considered a softer crime.⁷⁸

2.2 Magnitude of The Problem

Data on conflict or post conflict-related sexual violence are gathered by surveys, non-governmental organization researches and clinical reports. The relationship between figures and reality can be interpreted as corresponding to an iceberg floating in water.⁷⁹ The small visible peak represents the cases reported, of which a very exiguous part of them are punished or condemned by domestic tribunals or international community. However, the most consistent part of cases of rape remains beneath the surface, silenced. Hidden by layers of cultural convictions, lack of human rights or gender stereotypes capable of entitling women as "expendable resources" or "wages of war"⁸⁰. Indeed, it is for the differences across cultures, and thus willingness in revealing the violence endured, that caution with figures must be adopted. As Amnesty International underlines "the use of rape in conflict reflects the inequalities women face in their everyday lives in peacetime. Until governments live up to their obligations to ensure equality, and end discrimination against women, rape will continue to be a favorite weapon of the aggressor."⁸¹ Such inequalities, unquestionably depend on different society beliefs.

To this end, cultural, social and legal norms depict the portray of what is acceptable and what is not during peacetime, but when a conflict occurs, and the law fails, violence is exacerbated. In conclusion we consider the act of rape having a double nature, both as a social crime and as a violent act.

⁷⁸ Mitchell.

⁷⁹ Krug et al.

⁸⁰ Guterres.

⁸¹ Amnesty International USA., *Human Rights Are Women's Right* (Amnesty International, 1995).

2.3 Rape as A Social Crime

In the Democratic Republic of Congo women's economic activity is confined to the agricultural or informal sectors and they have limited access to health services or education. Statistics demonstrate that 42% of women do not finish primary school, and consequently, 41.1% are illiterate (compared to 14% of men)⁸². In other contexts, their condition is even more serious such as within Afghanistan. Despite the efforts to enhance the condition of women in the last two decades, in 2009 the Kabul government enacted a law which prohibits women from getting out of their homes without the permission of their husband. The new law also legitimizes the criminalization of marital rape allowing the husband to have sex with the wife at least four times per week, independent of her consent. Moreover, women cannot ask for a divorce, and adultery is punishable with lapidation. In Myanmar the condition of women is analogous, and the society itself is built on the pillar of the family where women are deemed nurtures intended to feed the children and complete household chores while men provide the income. In some cultures, such a dynamic is carried so far to the extreme that evolves in a culture inherently misogynist and militaristic. Audrey Thompson, in her UN report, noticed a strong relationship between military environments and sexual abuse. According to his research in an army context, sexual violence works as a mean to reinforce male sexuality and as a mean of conflict resolution⁸³. Indeed, contemporary scholars, such as Betty Reardon, have found a strict connection between militarist societies and sexism, noticing that the more a society is oppressed by the military apparatus the more sexist it is likely to be.⁸⁴ In other words, such environment tends to amplify the notion of masculinity and virility fostering a culture of patriarchy in which a man is indisputably the protector of the 'gentile sex.' However, this consideration is not limited only in the social sphere, as mentioned above, but it has also been reflected internationally in some treaties. In particular, the article 76 of the Additional Protocol I of 1977, follows the same conception in acting that "women

⁸² Jane Freedman, "Explaining Sexual Violence and Gender Inequalities in the Drc," *Peace Review* 23, no. 2 (2011).

⁸³ Audrey Thompson, *15 Years of the United Nations Special Rapporteur on Violence against Women, Its Causes and Consequences (1994-2009): A Critical Review* (UNITED NATIONS, 2009).

⁸⁴ Betty Reardon, *Sexism and the War System* (Syracuse University Press, 1996). and Niarchos.

shall be the *object* of special respect and shall be *protected* in particular against rape, enforced prostitution and any other form of indecent assault."⁸⁵ The article not only enforces gender stereotypes perpetuating a culture of submission, dominance, and control toward women but it also "suggests that women are perceived as *an object of law* rather than *the subject in law*".⁸⁶

Another example of the misrepresentation of the crime as a social act rather than a violent act is demonstrated in the article 4(e) of the Additional Protocol II which prohibits "outrages upon *personal dignity*, in particular, humiliating and degrading treatment, rape, enforced prostitution and any form of indecent assault"⁸⁷. Although the article explicitly prohibits rape, by linking rape as a crime of personal dignity, many scholars argue that it obscures the gravity and the real nature of the crime, preserving the connotation as a crime against 'honor'. Precisely, a violation of the dignity and the reputation of women within the community.

Regarding the reputation of women, it is constructive to consider the impact that the abuse has on the victims in their social life. The majority of them are doubly victimized. On one hand by the perpetrator who might have caused injuries to internal organs, transmitted venereal disease or caused pregnancy⁸⁸. Sometimes victims commit suicide due to the post-traumatic stress disorder (PTSD) they suffer from afterward⁸⁹. On the other hand, women are victimized by the community. They may face ostracism and stigma by their people or even divorce from their original partners due to a sense of shame. The main reason behind the accusation of the victims from the community is due to their loss of chastity, and the man – or family in general- have failed in protecting it. Thus, family' honor has been compromised and its members – or the community as a whole- tend to reject the victim due to a sense of shame mixed with contempt. In the worst case, when stereotypes are extreme, a woman is considered "guilty" of the violence suffered, and

⁸⁵ "Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I)," (International Committee of the Red Cross (ICRC), 8 June 1977).

⁸⁶ Mitchell. P. 239

⁸⁷ "Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II)," (International Committee of the Red Cross (ICRC)).

⁸⁸ Colette Braeckman, *L'homme Qui Répare Les Femmes: Violences Sexuelles Au Congo. Le Combat Du Docteur Mukwege* (Renaissance du Livre, 2012).

⁸⁹ Callamard.

such consideration is so rooted that even in the domestic justice she might be thwarted from having a fair trial.

Likewise, the aftermath for a male victim of rape committed by male soldiers can be particularly suffered. In some societies, where homosexual acts are illegal, male victims face real persecutions, and their life may be at risk. Moreover, health services often deny access to male victims of sexual violence and hinder them from having the necessary care needed⁹⁰. All these stigmas inherent to some societies contribute in shaping an environment where silence is the best choice for the victim, causing not only further suffering but also inhibition of justice and triumph of impunity.

In conclusion, many are of the ideas that the articles mentioned in the Protocols and even the Geneva Conventions regarding the prohibition of rape should be amended to avoid perpetuating harmful gender stereotypes⁹¹.

2.4 Rape as A Violent Crime

Violent crimes are generally considered more serious than crimes to property or nonviolent crimes. Furthermore, violent offenses are nowadays deemed as grave branches of the Geneva convention, and once considered as such these norms usually gain the status of *jus cogens*.⁹² However, rape has been historically seen by the international community as a byproduct of war or a crime against the honor. Even in the Geneva convention itself states in article 27 that

"Protected persons are entitled, in all circumstances, to respect for their persons, their honor, their family rights, their religious convictions and practices, and their manners and customs. They shall at all times be humanely treated and shall be protected especially against all acts of violence or threats thereof and against insults and public curiosity.

Women shall be especially protected against any attack on their honor, in particular against rape, enforced prostitution, or any form of indecent assault."⁹³

⁹⁰ Ibid.

⁹¹ Additional Protocol II clearly prohibits rape. However, the protocol has not been as widely ratified. United States for example do not recognize its legal value.

⁹² Meron.

⁹³ Geneva Convention, 1949

The second paragraph, as mentioned in the Commentary of the Geneva Convention, was intended to protect "family rights" rather than the physical integrity of women⁹⁴. Moreover, in Article 32, which prohibits violence capable of compromise physical integrity and "shock the conscience of the world", rape is not even explicitly mentioned once.⁹⁵ The article lists, murder, torture, corporal punishment, mutilation, medical or scientific experiments and many other ruthless behaviors, but not rape. Nevertheless, on one side it would be counterproductive to analyze articles without considering the historical context in which these had been redacted. On the contrary, it is also necessary to underline the importance of the Geneva Conventions nowadays, considered by many as the pillars of International Law as well as a codification of customary norms⁹⁶. Thus, although rape was not mentioned in article 32, today's reality shows an increasing attention to the crime seen as a potential threat to international peace. Indeed, there is also a growing line of thought that tends to consider rape as violent as torture, a recognized peremptory norm. Many legal advocates, judges, doctors and scholars are of the idea that rape reflects all the characteristics of torture. In support of such statement, perhaps the work of Dennis Mukwege narrated by C. Brakeman in regard to the rapes perpetrated in the Congo over twenty years of internal conflicts, constitutes a valid introduction to the issue.

"I note anomalous lesions, sores that can only derive from very particular positions in which women have been immobilized. Women who have not only been raped but mutilated with the help of different tools. Collective rapes have been committed; husbands, neighbors, children forced to attend operations. Cut clits, dissected breasts."⁹⁷

The gynecologist shared his experience in multiple international forums until 2018 when his work was reassessed with the Nobel Peace Prize. He concluded his speech at Oslo by saying that the Nobel Prize will be worth it only if it leads to concrete change. Finally

⁹⁴ Niarchos.

⁹⁵ Ibid.

⁹⁶ Its importance can be demonstrated by the security council actions, which usually recall the Geneva Convention. The last example that serve the purpose of our analysis can be given by resolution 2467, published in April 23, 2019. In the preamble the SC states "further recalling the obligations applicable to parties to armed conflict under the Geneva Convention of 1949 and the Additional Protocols thereto of 1977". Nevertheless, such decision will be further analyzed in subsequent sections.

⁹⁷ Braeckman. p. 90

putting the light on the devastating nature of the crime, not only as a threat for female bodies but for the international security.

2. 5 The Blurred Line with Torture:

In the UN Convention Against Torture and Other Inhuman, or Degrading Treatment or Punishment, Article 1 defines rape 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 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 and suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or any other person acting in an official capacity.

The vital elements of torture, also listed in the Element of Crimes, are i) severe pain or suffering whether physical or psychological, ii) reason based on any discrimination iii) the actor who committed the crime. The act of rape when it comes under crimes against humanity or a war crime - namely when it is a systematic attack towards any civilians or an isolated act during an armed conflict - mirrors all the elements of torture. Therefore, according to many sources such as International judgments, Un Rapporteurs, Human Rights Watch and Amnesty International, the crime must be charged as torture.

There is undoubtedly some legitimacy in the consideration that all acts of rape are a form of torture. However, such argumentation would run the risk to incorporate in the Western perspective, thousands of different points of views from all over the world, acting as a form of cultural imperialism. Thus, the question is, therefore, *when* rape and torture are equally deemed serious crimes at the international level and if rape is associated with torture does it *help or hinder* its recognition as a norm of jus cogens.

2.6 Serious Crimes: Issues in Comparison

There are two significant obstacles which constitute a solid barrier from equalizing the seriousness of the two crimes. One is conceptual, while the other is practical. The first

one is the idea that torture *is purposive and premeditate* crime and it targets specific individuals for their knowledge or suspected knowledge or discriminations of any kind. Such consideration is an important part of how and why torture appears in the eyes of many as a serious crime.⁹⁸ Therefore, the treatment of the victims is characterized by compassion, understanding, and care⁹⁹. By contrast, acts of rape are deemed as an inevitable and inescapable part of a conflict, a natural result of sexual urge, rather than an intentional act. Stereotypes are exacerbated when rape is committed amongst strong patriarchic cultures, in which violence assumes the characteristics of crime against honor. Thus, women are indirectly or directly excluded by the community because they are "worthless" or "dishonored" - as mentioned in the previous section. As a consequence, the crime of rape has been downgraded for many decades as less important, or simply a softer crime.¹⁰⁰

On the other hand, the practical obstacle is that the act of rape can be committed by any individual who participates in the conflict, whether belonging to the militias, army, peacekeeping forces, any deployment of forces, or even simple citizens. Therefore, in some circumstances, it is not easy for the judges to distinguish whether the perpetrator acted in an official capacity or not, especially in armed conflicts when the state might lose its powers. Indeed, the crime of torture in order to be convicted as a serious violation of human rights as well as a serious violation of a *jus cogens* norm, it must be committed by the state or who acts in an official capacity. Otherwise, it does not fall under the body of International Law but in the domestic penal code. For example, the *Akayesu v Prosecutor* judgment is a valid example not only because rape is placed at the same level of torture, but also because the Chamber emphasizes the importance of the perpetrator. Indeed, the Chamber stated that "like torture, rape is a violation of personal dignity, and rape, in fact, constitutes torture *when it is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.*"¹⁰¹ Thus,

⁹⁸Callamard.

⁹⁹ Ibid.

¹⁰⁰ Ibid.

¹⁰¹ "The Prosecutor Versus Jean Paul Akayesu."

the practical obstacle makes the crime of rape challenging to equate with that of torture for the difficulties encountered in identifying the perpetrator.¹⁰²

These obstacles must be considered in order to proceed with our analysis and in particular the conceptual obstacle. Indeed, what is considered morally wrong, as premeditating an act of torture, sadly attracts more attention and is more condemned, compared to what is considered inevitable – in an armed conflict- such as rape. To support such statement, the Abu Ghraib case constitutes a valid example. Acts of torture committed mostly through sexual violence against detainees aroused outcry, created a scandal and gained the attention of the whole world. While the rapes in Darfur, Sudan, of thousands of women during the same year passed relatively unnoticed.

Nevertheless, as the *Akayesu* and *Kunarac* judgements highlight, rape is also a matter of collective accountability. More specifically, looking at the issue from solely moral or practical point of view can be redundant. Indeed, it is fundamental to consider the collective responsibility of each of us, namely that rape is mirrored in the disparity that exists between men and women in the international law system itself.¹⁰³

Despite the obstacles, several sources have equalized the seriousness of the crimes due to the presence – within rape- of all three vital elements of torture mentioned above.

2.6.1 Severe Pain or Physical/Psychological Suffering

Ann Wolbert Burgess in her work “Rape Trauma Syndrome” (1983) discusses the magnitude of the suffering of rape victims. From intrusive recollection of the trauma memories in any circumstance of the day to a complete blackout of the memory, or recurrence of nightmares four or five times per week over the first year after the violence. Furthermore, the victim reported feeling irritable, having suicidal thoughts, and in a

¹⁰² However, there are some exceptions regarding the identification of the perpetrator. For example the Inter American Court of Human Right, in the *Velasquez Rodríguez* case at 172 the Court stated “An illegal act which violates human rights and which is initially not directly imputable to a State (for example, because it is the act of a private person or because the person responsible has not been identified) can lead to international responsibility of the State, not because of the act itself, but because of the lack of due diligence to prevent the violation or to respond to it as required by the Convention.” The judgement suggests how the standard of due diligence is widely recognized and adopted also in treaties such as the Declaration on the Elimination of Violence Against Women. *Velasquez-Rodriguez Case*, in *Inter-Am.Ct.H.R. (Ser. C) No. 4 (1988)* (Honduras: Inter-American Court of Human Rights (IACrHR), 29 July 1988).

¹⁰³ Pearce.

constant hyper-alertness status. The gynecologist Dennis Mukwege, in his autobiographical work, explained how he witnesses injuries on internal organs of unimaginable scale.¹⁰⁴ Damages so cruel that are hard to see or even believe. Practically, clinic examinations from many of the most brilliant doctors have ascertained that the trauma suffered from rape victims both physically and psychologically is akin to that of other torture victims .

The acknowledgement gained over the years on the effect of rape on victims and on its similitudes with torture was undoubtedly taken into consideration by many international Courts. Indeed, in 1992, Pieter Kooijmans, stated in the first UN Special Rapporteur on Torture that “since it was clear that rape or other forms of sexual assault against women *in detention* were a particularly ignominious violation of the inherent dignity and right to physical integrity of the human being, they accordingly constituted an act of torture” (1992). He puts the light on the fact that rape committed against women under detention constitutes rape. However, such a concept has been gradually extended in a form where gender is unspecified in order not to exclude men from the violence and the context is broader. In other words, rape committed by officials *always* constitutes torture, at both the national and international level.¹⁰⁵

Another example to support this argumentation is given by *Raquel Martí de Mejía v. Perú case*¹⁰⁶. In March 1996, the Inter American Commission on Human Rights stated the following: “having established that the three elements of the definition of torture are present in the case under consideration, concludes that the Peruvian State is responsible for violation of Article 5 of the American Convention.”¹⁰⁷ The year after, the European Courts of Human Rights also followed the same line, in regard of *Aydin v Turkey* judgement stating that “the Court is satisfied that the accumulation of acts of physical and

¹⁰⁴ Braeckman.

¹⁰⁵ Callamard.

¹⁰⁶ "Raquel Martí De Mejía V. Perú," in *Case 10.970* (Inter-Am.C.H.R., 1996).. In 1989 a terrorist attack occurred in Posuzo, Perú. A few days later many soldiers were sent to Oxampa – just outside Posuzo to conduct counterinsurgency operations. The 15th of June they entered into Raquel's and Fernando's house. She was a teacher and the head of a school who take care of disabled children, and he was a lawyer. The soldiers suspected Fernando to be a member of the subversive movement and ordered him to get into their truck. After 15 minutes they came back, and they raped Raquel many times while her daughter was asleep in the next room. Raquel went to the police station to report Fernando's kidnap, but the policeman told her she should have waited four days to make a missing report. The 18th of June Fernando's body was found dead on the edge of a river after being tortured.

¹⁰⁷ Ibid.

mental violence inflicted on the applicant and the especially cruel act of rape to which she was subjected amounted to torture in breach of Article 3 of the Convention.”¹⁰⁸

In conclusion, such examples attempt to demonstrate how there is a part of the jurisprudence that is committed to interpreting the mental and physical suffering of rape equally outrageous as torture without making any distinctions on the gravity of the two crimes.

2.6.2 Discrimination of any kind

It is constructive to highlight the reasons behind rapes, often committed as an act of ethnic cleansing. Examples can be recalled from Rwanda, Former Yugoslavia, Congo and many other countries where figures are sufficient to understand without the need of any digression. Indeed, ethnicity seems to be the principal cause of rape accredited by many reports and proper pronouncements. However, a growing part of the jurisprudence is of the idea that discrimination is often based on gender, where perpetrators tend to choose their target based on victims’ sexual identity – whether they are men or women. Although females are more exposed to violence due to their lower status in many societies. Indeed, Niarchos brilliantly notice analyzing the case of Former Yugoslavia conflict, that rape is used as “torture, mutilation, femicide, and genocide. *It is a war fought on and through women's bodies*. It is rape as a military strategy”.¹⁰⁹ In other words, gender is becoming an essential element to take into consideration amongst multiple forms of discrimination, and its relevance is recently gathering attention due to the evolution of gender and the concept of masculinity and femininity in many societies.

The importance of gender is concretely embraced in the *Prosecutor v Delic et al.* judgment.¹¹⁰ In this case, the Chamber confirmed that "the violence suffered by Ms. Cecez in the form of rape was inflicted upon her by Delic because she is a woman"

¹⁰⁸ Aydin v. Turkey, 57/1996/676/866, Council of Europe: European Court of Human Rights, 25 September 1997, paragraph 86

¹⁰⁹ Niarchos. p. 651

¹¹⁰ International Tribunal for the former Yugoslavia (ICTY); Trial Chamber, "Prosecutor V. Zdravko Mucic Aka "Pavo", Hazim Delic, Esad Landzo Aka "Zenga", Zejnil Delalic (Trial Judgement) ," in *IT-96-21-T* , ed. International Criminal Tribunal for the former Yugoslavia (ICTY) (Bosnia and Herzegovina | Serbia : International Criminal Tribunal for the former Yugoslavia (ICTY) , 1998).

concluding that "this represents a form of discrimination which constitutes a prohibited purpose for the offense of torture"¹¹¹. Such example, combined with further research on gender advanced by many scholars and academic institutions, suggests that an extensive legal literature is growing concerning discriminations based on gender. Perhaps, those studies will eventually be fully incorporated into the International Law.

2.6.3 Perpetrators

During an armed conflict, many actors are involved, and the coercive environments are fertile soil for perpetrators of any faction to commit rape. Even those delegates to protect civilians. Even civilians themselves are guilty of rape against a woman of any age. Mukwege said his youngest patient was six months old.¹¹²

Congo constitutes a solid case of how sexual exploitation has been made by civilians and peacekeepers as well. Indeed, on the 23rd of December 2004 the Times published an article in which it accused 11,000 blue helmets¹¹³ and 1,000 civilians of recording porn videos and taking pictures of sexual abuses.¹¹⁴ It has been called the UN's Abu Ghraib.

However, even though many perpetrators do not act on their official capacities, there is an evolving jurisprudence that holds states accountable for rape when a private individual commits the crime. The state is deemed responsible for giving the acquiescence, condoning or failing to fulfill its human rights obligations. Such practice is defined as due diligence and it finds its legal basis in many resources. To cite a few, on Article 4(c) of Declaration on the Elimination of Violence Against Women where it is explicitly mentioned that states should condemn violence against women whether it is perpetrated by state agents or private actors.¹¹⁵ In the Inter American Convention on Violence Against Women, the principle of due diligence is listed in article 7(b), and the

¹¹¹ Ibid. parag. 941

¹¹² Braeckman.

¹¹³ The blue helmets are the UN peacekeeping forces provided and trained by the member states.

¹¹⁴ Jonathan Clayton and James Bone, "Sex Scandal in Congo Threatens to Engulf Un's Peacekeepers," *The Times* (2004). (NOTE: Available at <https://www.thetimes.co.uk/article/sex-scandal-in-congo-threatens-to-engulf-uns-peacekeepers-kzxdggljslp> [Access date 29 April 2019])

¹¹⁵ Article 4 of Declaration on The Elimination of Violence Against Women declares: States should condemn violence against women and should not invoke any custom, tradition or religious consideration to avoid their obligations concerning its elimination. States should pursue by all appropriate means and without delay a policy of eliminating violence against women and, to this end, should: [...] (c) Exercise due diligence to prevent, investigate and, in accordance with national legislation, punish acts of violence against women, whether those acts are perpetrated by the State or by private persons.

failure in fulfilling such rule makes the state responsible for the violence.¹¹⁶ The same line has been followed by the Inter- American Court of Human Rights in Velasquez Rodriguez v. Honduras judgment. Here, the Court remarks an interesting concept,

An illegal act which violates human rights and which is initially not directly imputable to a State (for example, because it is the act of a private person or because the person responsible has not been identified) can lead to international responsibility of the State, not because of the act itself, but because of the lack of due diligence to prevent the violation or to respond to it as required by the Convention.¹¹⁷

In conclusion, it is disconcerting to notice how sexual acts of violence often work and are recognized as a form of torture. Yet, it is even more astonishing to notice how rape has not been condemned until recently like any other severe violence.

2.7 Associate Rape with Torture

Despite the many obstacles, there is a growing number of cases that tend to recognize the equal gravity of the two crimes. A greater awareness of rape crime has spread especially when it has been combined with crimes such as genocide, slavery but above all torture. However, several scholars like McGlynn have advanced numerous criticisms in treating rape and torture similarly. One of the strongest criticisms is that concerning gender. That is the fear that by associating rape with torture, which is considered a gender-neutral crime, we can lose sight of the fact that rape is not just a horrific crime, but it is also a gender-based crime, thus, above all directed against women. This logic of thought has been argued due to the fact that it is extremely directed towards women and therefore risks putting forward prejudices against men who can equally be victims of rape .¹¹⁸

¹¹⁶ Article 7(b) declares: The States Parties condemn all forms of violence against women and agree to pursue, by all appropriate means and without delay, policies to prevent, punish and eradicate such violence and undertake to: (b) apply due diligence to prevent, investigate and impose penalties for violence against women

¹¹⁷ Velásquez Rodríguez Case, Inter-Am.Ct.H.R. (Ser. C) No. 4 (1988), Inter-American Court of Human Rights (IACrTHR), 29 July 1988, paragraph 172. Available at: <https://www.refworld.org/cases,IACRTHR,40279a9e4.html> [accessed 29 April 2019]

¹¹⁸ Iveta Cherneva, "Recognizing Rape as Torture: The Evolution of Women's Rights Legal Protective Techniques," *Intercultural Hum. Rts. L. Rev* 6 (2011).

Furthermore, from another point of view, it could equally be argued that torture victims are predominantly men. For this reason, the criticism has been widely discussed. However, this might be an interesting academic debate for social scientists and experts interested in gender as a form of discrimination.

Another concern in treating torture with rape is what concerns the punishment of the crime. Some scholars have argued that associating the two crimes would lead the concept of rape under the torture label, underestimating and diminishing the real means by which this is carried out in some cases, that is, through rape. Therefore, punish - in the cases in which it is punished - rape under the umbrella of torture would eclipse the true nature of the crime. However, such existentialistic logic has been contested due to the wide array of legal consequences triggered by the correlation of the two crimes. Indeed, once the rape has been linked to a peremptory norm, the status of the crime inevitably acquires greater importance. Perhaps the same importance, to such an extent to be binding even for those states who have not ratified the convention against torture or the CEDAW convention, since the *ius cogens* rules bind the entire international community regardless of their acceptance of the rule. Thus, appearing as an international crime and becoming a violation of *erga omnes* obligations, the repression of rape can take place both by internal and international courts. Returning to the category of punishable crimes through the universality of the law and therefore applying a jurisdiction that is both territorial and non-territorial.

Furthermore, there is another advantage that is important to emphasize in the combination of torture to rape. That are the possible legal consequences in the field of asylum. If the rape status associated with torture becomes more relevant, then states should also include in the principle of non-refoulment and in everything related to asylum procedures, not only torture but also rape itself. Thus, the possibility for states to repatriate refugees in countries where there is a high probability they would be subjected to rape and torture is denied .

In conclusion, associate rape with torture would erase the conception of rape as a softer crime and perhaps would contribute to consolidating a different perception of the crime, as confirmed by many resolutions emanated by the Security Council.

CHAPTER 3

THE INTERNATIONAL RESPONSE

«As many here are aware, for years there has been a debate about whether or not sexual violence against women is a security issue for this forum to address. I am proud that today we can respond to that lingering question with a resounding “yes” »

- US Secretary of State Condoleezza Rice

3.1 Legal Value of UNSC Resolutions

A peremptory norm is identified when there is a general rule of international law recognized and accepted by the entire international community.¹¹⁹ The norms of international law are principles, rules, and customs. The latter in particular are considered to be codifiers of general law due to their detection from treaties, jurisprudence, state peripheric or central act, but also by the contribution of the united nations.¹²⁰ In other words, customary norms are general unwritten norms, respected by the majority of states (unless they are customary norms of another kind such as regional or particular). However, the international law commission has, since 1947, the duty to promote the progressive development of international law and its codification by detecting customary principles and put them in written form. Among the most relevant conventions detected are the Geneva Conventions, Additional Protocols, the CEDAW and the Universal Declaration of Human Rights. Within these sources, drawn up between 1949 and 1979, the prohibition of rape is explicitly mentioned.

Nevertheless, the protection toward women has remained unchanged, except for some slight improvements.¹²¹ Also, the impunity of the crime. Hence, why did the prohibition of rape, signed even within the instruments considered the apex of international law, has not changed the behavior of states? The previous chapters, tried to put forward various

¹¹⁹ Patricia Viseur Sellers, "Sexual Violence and Peremptory Norms: The Legal Value of Rape," *Case W. Res. J. Int'l L.* 34 (2002).

¹²⁰ Bassiouni.

¹²¹ Dean Adams, "The Prohibition of Widespread Rape as a Jus Cogens," *San Diego Int'l LJ* 6 (2004).

hypotheses such as the difficulties in granting a standard definition, the different perspectives that countries look at crime and the juxtaposition of rape with other international crimes. The aim was to emphasize that rape is equally comparable to other international crimes, and for this reason, only the perception of its prohibition as a *jus cogens* norm would perhaps lead states to change their behavior.

This section, therefore, analyzes those measures which contributed to thicken the basis for the consolidation of a particular *opinio iuris*, necessary for the formation of an imperative rule. To this end, the most important resolutions of the UN Security Council will be taken into consideration.

The UNSC is a body composed of heads of state of member countries, representative - together with the UN General Assembly - of the international community as a whole. However, before to proceed with the analysis, it is necessary to take a step back to understand the real legal value of the decisions taken by the Security Council.

The resolutions of the Security Council are non-binding acts listed in those categories of laws deemed soft laws. Indeed, resolutions tend to be exhortative rather than obligatory and therefore do not impose any legal constraint on states. However, unlike the General Assembly, the resolutions of the Security Council are more important statements that reflect the serious interest of the international community.¹²² In support of this, Article 25 of the Atlantic Charter itself reaffirms the same concept, namely that "members of the United Nations agree to accept and execute the decisions of the Security Council in accordance with the provisions of this Statute."¹²³ The point raised several doubts about the legal validity of Security Council resolutions, partially clarified by the contribution of the International Court of Justice in the Namibia case. In that judgement, published in 1971, the Court remarked that the binding nature of the resolutions was analyzed on a case-by-case basis, taking into consideration the language of the resolution, "the discussions leading to it, the Charter provisions invoked and, in general, all circumstances that might assist in determining the legal consequences of the resolution of the Security Council."¹²⁴ One point, in particular, requires a more careful examination, namely the

¹²² Sellers.

¹²³ *Charter of the United Nations*, (24 October).

¹²⁴ International Court of Justice (ICJ), "Advisory Opinion on the Legal Consequences for States of the Continued Presence of South Africa in Namibia.", 1971 #68) See also Advisory Opinion of Western Sahara and Security Council Resolution 276 (1970).

'Chapter provisions invoked.' Indeed, according to many, when the idem Security Council takes decisions under Chapter VII of the UN Charter, the action becomes mandatory. In this case, states are required to comply with the terms, to act in accordance with the Charter to pursue peace and international security.¹²⁵ Furthermore, a resolution of the Security Council may also become binding if it is part of the mandate of a UN mission in which the UN becomes responsible over a state in conflict.¹²⁶

Once the legal value of security council decisions has been clarified, the research will focus on the most critical resolutions issued from 2000 to the present to counter the use of rape during armed conflicts. None of the decisions falls under Chapter VII of the Charter of the United Nations. Consequently, there is no legal and/or economic sanction tied to the resolution. However, these resolutions unequivocally confirm that the Security Council recognizes the link between sexual violence in armed conflict and international peace and security. For this reason, the following decisions draw their importance from being at first subjects of debate and analysis discussed by the General Assembly, up to becoming decisions in the hands of the Security Council. In other words, from words to facts.

3.3 A First Step Toward the Prohibition of Rape

On October 31, 2000, the Security Council made its first attempt to condemn the broad category of challenges facing women in peacebuilding, conflicts, and post-conflict reconstruction and peace processes.¹²⁷ Under the constraining lobbying work, led by the women's international movement in the 1990s, council members adopted resolution 1325.

The passive and static image of women is being questioned for the first time. From gentle sex subjected to the protection of man to a fundamental, independent and politically active actor both nationally and internationally, who plays an "important role... in prevention and resolution of conflicts and peacebuilding" (art. 1-4).¹²⁸ The resolution constitutes a

¹²⁵ *Charter of the United Nations*.

¹²⁶ PROCESSES and 1325.

¹²⁷ Kerry F. Crawford, *Wartime Sexual Violence : From Silence to Condemnation of a Weapon of War*, (Washington DC: Georgetown University Press, 2017).

¹²⁸ "Security Council Resolution 1325 (2000) [on Women and Peace and Security] , in *S/RES/1325 (2000)* (UN Security Council, 2000).

first attempt capable of undermining a male-dominated structure rooted in the highest ranks of the political decision-making process. To support this statement is perhaps sufficient to consider that in 60 years of UN peacekeeping operations, only seven women held a managerial role.¹²⁹ However, what is most notable for research purposes is that the resolution finally sheds light on gender-based violence against women, in armed conflict and peacetime, openly condemning sexual violence

Notwithstanding, eight years have passed to see a real commitment on the part of the international community in counteracting rape during armed conflicts and post-conflict. Many argue that 1325 was an essential step in what concerns gender equality but partially ineffective from a practical point of view, as demonstrated by the results collected. Documented by N. Popovic, it appears that only 16 countries during the following decade adopted the resolution by issuing a National Action Plan.¹³⁰ From 2000 until now, the number has grown substantially not only thanks to the subsequent resolutions but also the commitment of numerous NGOs, reaching about 79 states. Still, a relatively small figure for an international organization composed by 193 States.

Furthermore, the Global Study on United Nation Implementation of SC 1325 states as “on average, only 3 percent of the military in UN missions are women, and the majority of these are employed as support staff. This number has not changed since 2011 and has changed little from the 1 percent of women peacekeepers in 1993 ”.¹³¹ Again, underlining the lack of will of the states to implement the resolution. The only remarkable result concerns the peace treaties. Finally, the word woman begins to appear.

As demonstrated by the graph below provided by the Global Study on the Implementation of UNSC 1325.¹³²

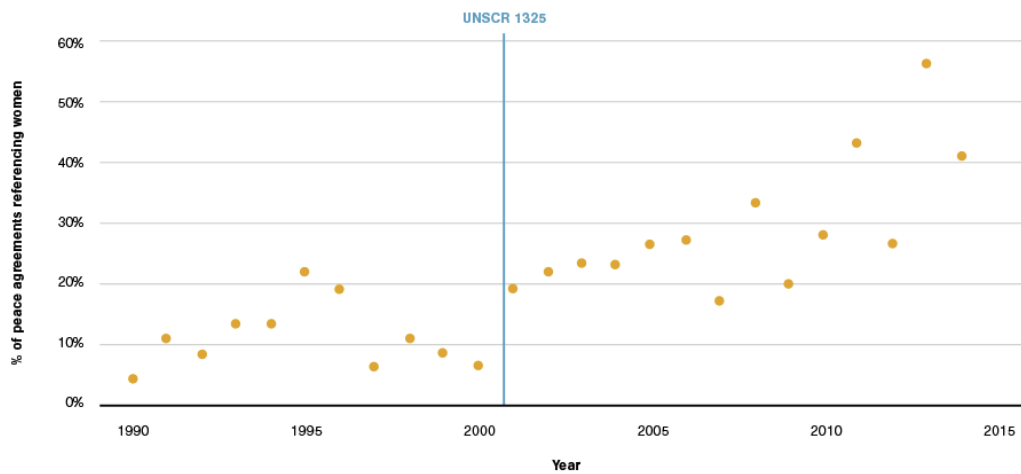
¹²⁹ Camille Pampell Conaway et al., *Women in United Nations Peace Operations: Increasing the Leadership Opportunities* (Women in International Security, Georgetown University, 2008).

¹³⁰ Nicola Popovic et al., *Planning for Action on Women and Peace and Security : National-Level Implementation of Resolution 1325 (2000)* (New York: United Nations Publications, 2010), Book.

¹³¹ United Nation, "A Global Study on the Implementation of United Nations Security Council Resolution 1325," (United Nations, 2015).

¹³² Ibid.

**Percentage of peace agreements including at least a reference to women
(1990 to Oct 2000 and Nov 2000 to 2015)**



However, this seemed not being enough, and several disappointments emerged from the decision. In fact, despite the revolutionary aspect, the resolution was the object of numerous criticisms. Among the most relevant, the way women were - and are - represented has been contested. That is, chained to the permanent status of victims, associated with the inseparable union "women and children" that thickens the stereotype of nurtures, excluded from war and mentioned only in matters of peace. Thus, perpetuating the gender bias related to them, by contributing not only to discriminate men, who are also possible victims of the same violence but also ignoring the fact that women themselves can be perpetrators. In fact, according to some, woman's representative mistake within the resolution is not linked so much to the image of the woman itself, as to the unwillingness to focus the attention on the other side of the problem: the stereotypes connected to masculinity. Such gender bias, as mentioned in the previous sections, cannot be treated separately from sexual violence. Embracing Weitsman ideas, sexual violence as a weapon of war is "designed to terrorize, to emasculate, to dishonor the enemy as a strategy, and that it depends on the social understanding of masculinity, femininity, and inequality".¹³³ The Security Council came to this conclusion, and therefore, sexual violence is openly condemned in the operational sentence number 10. The section urges "all parties to armed conflict to take special measures to protect women and girls from

¹³³ Patricia A. Weitsman, "The Politics of Identity and Sexual Violence: A Review of Bosnia and Rwanda," *Human Rights Quarterly* 30, no. 3 (2008).

gender-based violence, particularly rape and other forms of sexual abuse. "¹³⁴ Despite the efforts to condemn the crime in writing, reality showed how states did little to implement this part of the decision. Perhaps, because protecting women from violence is included in a resolution which focuses its core in inequality and empowerment of women in daily operations of the UN, rather than prohibiting rape.¹³⁵ Therefore, for a good part of the next decade, the international community remained inactive on that field although a positive effect emerged from this. The criticisms put forward became very constructive. They turned into inputs for new reflections.

After eight years of lobbying and pressure, the Security Council approved another resolution. This time gender neutral, which focus its core only on the prohibition of rape, labeled as a weapon of war.

3.3 The Weapon of War Frame

The weapon of war framework constitutes a turning point in the condemnation of rape and its recognition as a mandatory rule. The frame constituted a sort of pass that in 2008, allowed the advocates and the civil society to access the agenda of the Security Council directly. However, to better understand the persuasive effect of the frame, it is necessary to look at the political context in which it was born.

The birth of the frame is rooted a long time ago, with the events of Bosnia and Rwanda where the numerous data collected, testimonies and the assiduous presence of the media documented the atrocities committed by rape used as a war strategy. The ad hoc courts were the first to have a tangible representation of the true nature of the crime, to such an extent that the involvement of the Security Council seemed to be the next step.¹³⁶ Besides, the events in the Congo worked as catalysts in attracting the Security Council attention and its direct involvement. However, the shift of matter was far from simple. On the one hand, doubts arose regarding the competence of the Security Council on a subject concerning human rights, which undoubtedly fell within the sphere of action of the General Assembly.

¹³⁴ "Security Council Resolution 1325 (2000) [on Women and Peace and Security]

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¹³⁵ Crawford.

¹³⁶ Ibid.

On the other hand, many people asked for the utility in advancing a new resolution when the previous one had not yet been implemented. Plus, the risks that this type of maneuver could have entailed. First of all, the Security Council erosion of power. Therefore, it was necessary to put forward robust measures to bypass these insecurities, which at the time constituted insurmountable obstacles. A different way of looking at crime seemed to be the solution. No longer as a wartime rape but as a weapon of war. No longer a side effect but a primary war strategy capable of threatening international peace and security. A perception of the crime strong enough to mobilize the states and to press for change. From this perspective, the action of the Security Council was mandatory since it fell within the core of its competences.

Thus, on October 31, 2008, the Council issued a resolution that best concretizes this change: resolution 1820.

3.3.1 Resolution 1820

The decision of the Security Council constitutes a fundamental piece to be added to our analysis since it represents the realization in written form of a different awareness taking. To better understand the ratio behind the following analysis, it is necessary to think in stages. In fact, we consider the process of recognition of a norm of *ius cogens* in three fundamental steps such as i) *opinio iuris* reflecting the *recognition* of the crime ii) *degree of threat* of the crime devolved by the language used in preambles or other provisions iii) universal acceptance and duties upon states. Thus, we look at resolution 1325 as the peak of the first stage, supported by a multitude of treaties, national penal codes, international pronunciations as we have demonstrated in previous chapters. However, it was only with Resolution 1820 that we reached a full awareness of the seriousness of the crime. Indeed, the importance of crime is perceived only by associating it with Bosnia and Rwanda, depicting it as a weapon of war and showing the devastating effects on victims and on stability between countries. In few words, it emerges the threat of the crime.

In support of our hypothesis regarding a different growing awareness and its recognition, we can look at two factors. The first is connected to the consequences following the resolution. That is, the growing and unprecedented commitment of the Security Council in drafting several resolutions afterward, such as number 1888 (2009), 1889 (2009), 1960

(2010), 2106 (2013) and 2122 (2013). Thus, expanding the legal basis on the subject and helping to consolidate the perception of the gravity of rape. The second reason that makes the resolution important, is instead intrinsic in the way the crime itself is depicted. A threat to international peace and security, as expressed openly in the resolution, which adopts a particularly strong language. The style adopted is devoid of moderate tones, and rich instead of expressions that leak a sense of unease and disorder shared even by the heads of state called to approve the decision. For example, “deep concern that despite [condemnation and calls to address sexual violence] such acts continue to occur, and in some situation have become systematically and widespread reaching *appalling level of brutality*” and also “demands *the immediate and complete cessation* by all parties [...] of all acts of violence”, but most importantly the SC requests the “*policy zero tolerance of sexual exploitation*”.¹³⁷ Words that would seem not only to demonstrate a disturbing feeling regarding the crime, but above all, represent a clear attempt to frame a very specific form of rape: the widespread and systemic one. No more the war- rape.¹³⁸ Thus, the effectiveness of the weapon of war frame in resolution 1820 stands out, whose writing was also supported by Italy that presided over the Security Council in the 2007-2008 two-year period.

However, from the resolutions issued afterwards and from the commitment of the states it arises spontaneously to ask oneself, what was this unexpected interest born of? The political context of 2008 is undoubtedly an important factor to consider but in particular our research will turn the attention to three main actors, perhaps fundamental in understanding how the international community arrived at this point.

The first actor is the United States which are the pioneers of the decision. The US made enormous pressures in elaborating the resolution so much that the year before they tried to put forward a draft which however was not approved. The interest on the decision and the pressing insistence perhaps is attributable to the need to reconstruct the image of the world gendarme stained by the Abu Ghraib scandal.¹³⁹ The administration needed a way to show the world its commitment in fighting the crime and the resolution was the best

¹³⁷ Security Council, "Security Council Resolution 1820 (2008) [on Acts of Sexual Violence against Civilians in Armed Conflicts]
Publisher _____, " in *S/RES/1820 (2008)*, ed. United Nations (2008).

¹³⁸ Crawford.

¹³⁹ For further information about the case, see *supra* note 7.

tool to pursue such goal.¹⁴⁰ In addition, it is important to underline that the persuasive work of advocates had its core in making the seriousness of the crime understood by comparing it to past atrocities, such as Bosnia and Rwanda. Thus, in addition to the sex scandal with Iraqi prisoners, the United States felt the need to avoid drawing the attention once again of its non-intervention in Rwanda, this time placing themselves in the front line. However, the United States was not alone in having political interests at stake. The United Nations itself represent the second actor of our analysis. The UN found itself in an embarrassing position to irreversibly compromise their international credibility: the work of the peacekeeper contingents in the DRC. Despite the presence of the blue helmets the atrocities in Congo continued, showing a total ineffectiveness compounded by the involvement of some contingents in sexual exploitation. In light of this, the United Nations had to intervene with a stronger decision in order not to compromise their image. As carefully noted by Ambassador Gianlorenzo Cornado “Whenever a peacekeeping operation is in place, civilians expect to be protected by UN forces. When this task is not fulfilled the Organization’s, credibility is at stake.”¹⁴¹

Once again, there was no lack of criticism about the non-inclusive nature of the resolution. More specifically, this time the advocates wondered under what kind of protection would fall that vast category of marginalized and rape victims who do not fit into a widespread and systematic framework. A further criticism raised concerned the possible bureaucratic consequences in the United Nations, that is the division of the theme. On the one hand, a branch of the UN deal with empowerment and equality while the other with sexual violence. However, how can we address two problems separately when one is the consequence of the other? Using the words of Dianne Otto, it would seem that the UN has the objective of pursuing the protection of women rather than their emancipation.¹⁴² Acting and condemning what is visible and tangible by ignoring the underlying structural causes of crime: inequality.

¹⁴⁰ Ibid

¹⁴¹ Ministero degli Affari Esteri e della Cooperazione Internazionale Farnesina, "Security Council Open Debate on the Protection of Civilians in Armed Conflict - Statement by H.E. Ambassador Gianlorenzo Cornado, Charge' D'affaires A.I. Of Italy to the United Nations (June 26 ,2009)," (2009).

¹⁴² Dianne Otto, "The Exile of Inclusion : Reflections on Gender Issues in International Law over the Last Decade," *MELBOURNE JOURNAL OF INTERNATIONAL LAW* 10, no. 1 (2009).

Nevertheless, the report submitted by the General Secretary on July 15, 2009, shows the opposite. Namely, the commitment of the UN to pursue the two objectives in parallel. More specifically, the report highlights how measures to prevent sexual violence are closely linked to the fight against inequality, whose development is constantly monitored through reports submitted by the states. However, the General Secretary comes to the sad conclusion that " In many countries around the world, sexual violence continues to be deeply entrenched in inequalities and discrimination against women, and patriarchal structures " adding that "in this regard, few reports have been received of actions being taken by the parties to armed conflict to comply with their *obligations* to refrain from committing sexual violence".¹⁴³

Hence, demeaning the importance of the criticisms regarding the drafting of the resolution and emphasizing instead, once again, the unwillingness of the states to take concrete actions. Actions that constitutes duties, obligations upon states rather than rights.

3.5 Last Step: Resolution 2467 (2019)

On April 23, 2019, the representatives of the fifteen members of the Security Council give their consent to adopt the resolution drafted by Germany, which used a survivor center approach. Therefore, Germany puts the matter on top of its agenda, just as the United States did with resolution 1820. In this case, the US does not cover the role of promoter/supporter of the resolution but turned out to be the inhibitor of the same.

Indeed, the resolution was far from being simple to adopt due to the several themes strictly related to the one of rape, which represents actual battlefields between countries where they claim their perspectives. Among several topics, the main issues on which a debate has been ignited in the Council are the right to sexual and reproductive health, the need to establish a working group during conflicts, the recognition of LGBT people in the category of vulnerable groups and to strength the activity of the ICC and ad hoc tribunals in condemning the crime. The lack of compromise and the disagreement brought the meeting, that started at 10.19am, to end at 8.17pm.¹⁴⁴

¹⁴³ General Secretary, "Report of the Secretary-General Pursuant to Security Council Resolution 1820," in *S/2009/362* (United Nations, 2009).

¹⁴⁴ United Nations, "Security Council Adopts Resolution Calling Upon Belligerents Worldwide to Adopt Concrete Commitments on Ending Sexual Violence in Conflict," United Nations.

The United States, China, and Russia have threatened to use their veto unless the language of some provisions in the resolution would have changed. In particular, the burning issue was related to reproductive health care, in which Germany had expressed in the resolution the will to assist the victims through a “comprehensive sexual and reproductive health care as well as a safe termination of pregnancy and HIV prevention and treatment, as well as reintegration support for survivors.”¹⁴⁵

The US delegation vehemently opposed the text, showing consistency with the conservative line of their president, who expressed his opposition to any UN resolution regarding sexual violence and above all abortion assistance.¹⁴⁶ Besides, Trump has “opposed the use of the word gender, seeing it as a cover for liberal promotion of transgender rights.”¹⁴⁷

Belgium, the UK, and some African countries showed disappointment about the American opposition, but above all France, which found it unacceptable that “several members used the threat of veto to call into question 25 years of advances in this area” adding that “it would be inexplicable to avoid sexual violence in relation to the victims of sexual violence.”¹⁴⁸ Despite the shock of many countries towards the US opposition, the text was modified by entirely omitting the part.

Another topic particularly relevant for the analysis is further opposition regarding the involvement of the International Criminal Court in strengthening its activity to persecute perpetrators. In this regard, the US objected the presence of ICC in this context; repeatedly underlining its distance from the International Criminal Court. However, the disagreement constitutes an important milestone added in support of the thesis, since the provision “notes that the fight against impunity for the most serious crime of international concern committed against women and girls has been strengthened through the work of international and mixed tribunals.”¹⁴⁹ Thus, despite the omission of ICC, the language used underlines again and in a more incisive way the gravity of the crime, supporting the initial thesis question. Moreover, the reinforcing character of the resolution is further

¹⁴⁵ Security Council, “8514th Meeting,” in *S/PV.8514*, ed. United Nations (New York 23 April 2019).

¹⁴⁶ Liz Ford, “Un Waters Down Rape Resolution to Appease Us's Hardline Abortion Stance,” *The Guardian* (2019).

¹⁴⁷ Ibid.

¹⁴⁸ Nations.

¹⁴⁹ UN Security Council, “Resolution 2467,” in *S/RES/2467 (2019)*, ed. United Nations (2019).

confirmed by several concrete requests such as "time-bound commitments," "targeted sanctions against those who perpetrate," "strength legislations" of the Member States and "strength access to justice for victims of sexual violence."¹⁵⁰

Another essential element emerges from the resolution: the correlation with torture. In the preamble, the SC recognizes the need for survivors of rape to receive the necessary care without any discrimination "and to be free from torture and cruel, inhuman or degrading treatment."¹⁵¹ Such a connection between the two crimes, put on the same level, is further support to our analysis on the matter addressed in the previous chapter.

In conclusion, despite the disagreements, the resolution constitutes an important step toward the direction of condemning rape, which undoubtedly consolidates the awareness and the concerns expressed a decade earlier with resolution 1820.

3.6 Relevant states commitments

Every state in the world outlaw rape.¹⁵² Such a statement, is demonstrated by the work of many legal advocates who accurately analyzed the national penal codes worldwide. Above all, it is supported by the analysis of definition's development given in the First Chapter. Indeed, in the abovementioned section, the Chamber of ITCY in the *Furundzia* case, consulted most penal codes from several countries before giving a unanimously accepted definition, as well as condemning rape.¹⁵³ When analyzing the work of the *ad hoc* Tribunal and its commitment in taking into account the penal codes of several states, one characteristic is remarkably relevant: all the sources consulted belong to countries from all over the world such as Chile, Argentina, France, Italy, China, Pakistan, Russia, Australia, USA, India and others. Thus, leading to the conclusion that, although the

¹⁵⁰ Ibid.

¹⁵¹ Security Council, "Resolution 2467," in *S/RES/2467* ed. United Nations (23 April 2019).

¹⁵² Mitchell; Sellers.

¹⁵³ The Court consulted the Chinese Penal Code (Revised) 1997; Art. 177 of the German Penal Code (StGB); Art. 177 of the Japanese Penal Code; Art. 179 of the SFRY Penal Code; Section 132 of the Zambian Penal Code. Art. 201 of the Austrian Penal Code (StGB); French Code Pénal Arts. 222-23; Art. 519 of the Italian Penal Code (as of 1978); Art. 119 of the Argentinian Penal Code. Section 375 of the Pakistani Penal Code 1995; Art. 375 of the Indian Penal Code and many others. For further information consult the Prosecutor v Furundzija *Case No: IT-95-17/I-T* or supra note 18.

cultural divergences, every state in the world outlaw rape, revealing a universal acceptance of a general principle regarding the prohibition of rape.

Besides, rape is a general international law, perhaps due to its indefensible character. It is nevertheless unthinkable to recognize a norm of international law that allows rape in some circumstances. Thus, purely by this logic, rape may acquire the element of non-derogability necessary to establish its peremptory status¹⁵⁴. More specifically, as James Mc Henry underlines, in order to put forward argumentations regarding when rape is acceptable, is necessary to force any human being to advance shocking, brutal and barbaric observations to support this idea of derogability and tolerance.¹⁵⁵

However, the presence of rape in penal codes which is a valid support for a general norm of international law and its irrationality in proving otherwise may not be sufficient if it is not combined with concrete measures adopted from the states. Indeed, this section aims to cite some important domestic commitments useful to support our thesis. More specifically, to consolidate the *opinion iuris* necessary to affirm that the prohibition of rape has become a norm of *jus cogens*. To this end, two recent domestic pronouncements *Kadic v. Kazardic* and *Hwang Geum Joo et al. v Japan* will be briefly analyzed.

In the first case, a claim was brought under the Alien Tort Claims Act (ATCA)¹⁵⁶ and the pronouncement of the judge implicitly confirms the peremptory character of the prohibition of rape as a norm of *jus cogens*. The case concerns Croat and Muslim women who filed a tort action claim against Radovan Karadzic, the President of the self-proclaimed Bosnian-Serb republic, accused of having commanded people under his control to commit numerous atrocities including “brutal acts of rape, forced prostitution, forced impregnation, torture and summary executions.”¹⁵⁷ During the trial, Kardzic defended himself by leveraging on the unrecognized status of Bosnia, concluding that he was not a state actor, thus not punishable. The US District Court agreed with the defense and dismissed the case for lack of subject in matter. Subsequently the Second Circuit Court determined that International Law create obligations also for non-state actors when

¹⁵⁴ Mitchell.

¹⁵⁵ James R McHenry III, "The Prosecution of Rape under International Law: Justice That Is Long Overdue," *Vand. J. Transnat'l L.* 35 (2002).

¹⁵⁶ The ATCA is a statute subscribed in the United States Code. The section acts “the district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.” The statute has been interpreted as

¹⁵⁷ *Kadic v. Kazardic*, in *70F.3d*, ed. 2d Cir. (1995).at 236-37

the offences are of “universal concern”. Concluding that “acts of murder, rape, torture and arbitrary detention (slavery) have long been recognized as violations of the most fundamental norms of the law of war and direct violation of International Law”¹⁵⁸. By affirming so, the Court not only reinforce the seriousness of rape listed amongst other peremptory norms, but it also confirms the non-derogability of the norm, thus establishing a universal jurisdiction over the crime.

In *Hwang Geum Joo*, the judge Henry H. Kennedy Jr, explicitly mentions the violation of a *jus cogens* norm. The case regards the Japanese scandal occurred in World War II, known as “comfort women” in which more than 200.000 women were forced into prostitution and abused by the Japanese army. The class action was filed in the US District Court for the District of Columbia by fifteen Asian women against the state of Japan. The Court acknowledged that these “comfort women were repeatedly raped -often by as many as thirty or forty men a day- tortured, beaten, mutilated and sometimes murdered”¹⁵⁹. In light of this, the plaintiffs argued that that “Japan's *jus cogens* violations constitute an implied waiver of sovereign immunity under § 1605(a)”. Despite the fact that the Court’s decision appears to refuse the concept of implicit waiver - recalling precedent cases - it recognizes the illegality of rape and sexual violence as a *jus cogens* violation by concluding that “Japan’s *jus cogens* violations do not constitute an implied waiver under § 1605(a)”.¹⁶⁰

The cases mentioned above clearly show the international disapproval of rape and its peremptory nature reflected in domestic jurisdictions, as well as the commitments of some states to end the impunity of the crime. This last goal is also pursued by another fundamental international actor: The United Kingdom. In fact, since 2010, when William Hague was appointed British foreign secretary, the country showed to the world an unprecedented commitment to combat sexual violence.

In 2013 the UK established a Team of Experts of seventy members funded by the government to study the recurrence of sexual violence; committed approximately £1.4 to the UN offices dedicated to the topic; pledged, also with the help of USA and Japan, £23

¹⁵⁸ Ibid. at 243

¹⁵⁹ *Hwang Geum Joo v. Japan*, in 172F (D.D.C2001). At 52-55

¹⁶⁰ Ibid, at 61

million to the G8 to end impunity.¹⁶¹ Lastly, the UK government, which held the G-8 presidency in 2013, reaffirmed how rape and sexual violence constitute a grave breach of the Geneva convention, consolidating once again the *opinion iuris* related to the prohibition of rape as a norm of *jus cogens*.

¹⁶¹ Crawford.

CONCLUSION

Uniquely, rape is a constituent element of every accepted peremptory norm. It is used to commit torture, genocide, and slavery to reach an unthinkable level of suffering. Yet, it has not been condemned as such, and still the developments on the matter are slowly proceeding. The main reason behind this backwardness is linked to the true nature of the crime itself which, compared to other jus cogens recognized norms, branches into a variety of areas within the mindset, culture, and beliefs of every state. More specifically, looking from the role of women in some societies to legal obstacles -in even agreeing on a standard definition- and ambiguities within the domestic civil and penal codes; from the fear of misuse of power by international institutions to the lack of awareness regarding the topic. All aspects that have hindered, in the past years, the explicit acceptance of the prohibition of rape and have also obstructed the draft of a convention regarding the matter. In other words, the crime raised several issues, such as the element of consent, gender equality, sexual autonomy that have never been readdressed by past societies.

However, regardless of the technical obstacles mentioned, practically a jus cogens norm is being created thanks to an acquired awareness, and its alarming occurrence. Elevating the importance of the crime and placing it nowadays on top of the international agenda. Such concern, combined with the proliferation of legal sources on the matter, consolidates the *opinion iuris* necessary to detect a jus cogens norm.

The first approach which constitutes a turning point in demonstrating the imperative nature of the crime of rape is its place on an equal footing with torture, a recognized peremptory norm. The comparison reveals not only the similar effects that it has on the victims, primarily demonstrated by recalling the work of D. Mukwege, W. Burgess or H. Pierce but it also puts the light on the gravity of the crime. The seriousness of the crime has been cited by several amongst the most important treaties of International Law over the past centuries, such as the Hague Convention, Geneva Convention, and Additional Protocols. Also, international and national pronouncements such as *Akayesu v Prosecutor*, *Raquel Martí de Mejía v. Perú*, *Aydin v Turkey*, *Prosecutor v Delic et al.* and many other cases have recognized the similitudes with torture. A significant contribution in considering the crime of rape equally outrageous for human dignity in the same way as torture, come additionally from the work of several Non-Governmental Organization,

amongst the most relevant Amnesty International and Human Right Watch reports. These organizations brought up the issue related to the unwillingness of the states in adopting concrete actions, denouncing the inconsistency of their behavior as well as revealing the weaknesses of the International Law. Therefore, all these sources left the international community with the question whether the prohibition of rape shall be treated, and readdressed, as same as torture. Hence, with a peremptory norm.

The second substantial contribution in clarifying the peremptory nature of the prohibition of rape, come from the commitment of the United Nations. The UN is combating not only the impunity of perpetrators but also the states' negligence in adopting concrete actions to adjust the structural issues related to the crime. In this respect, the UNSC issued various decisions to counter sexual violence and gender inequalities, such as resolution 1325 (2000), 1820 (2008), 1888 (2009), 1889 (2009), 1960 (2010), 2106 (2013) 2122 (2013), and 2467(2019). However, the timing in which the resolutions were emanated reveals an interesting and fundamental fact to add to our research: the change brought after resolution 1820. After 2008, there has been a growing proliferation of resolutions due to a newly acquired awareness: the perspective from which the crime was seen drastically changed. Therefore, rape is not deemed as a byproduct of war any more or as inevitable and unfortunate aggression which involves isolated cases. The crime is not even a war rape anymore. It is a dangerous and brutally effective weapon of war, capable of destroying societies, jeopardize the stability of countries, and threat international security. For this reason, the violence, previously considered as a matter under the General Assembly sphere, has now shifted under the Security Council competencies.

This change in awareness is the first concrete step to establish an inderogable norm ensuring women freedom from rape firmly. Enforcing the norm and appropriately addressing the crime perhaps constitute a unique catalyst to achieve gender equality and ultimately eradicating this ruthless, disconcerting violence.

Final Summary

Negli ultimi decenni, il crimine di stupro ha attirato particolare interesse da parte dei media, delle corti internazionali e di organizzazioni internazionali, sensibilizzando fortemente sia l'opinione pubblica che le istituzioni governative della maggior parte degli stati riconosciuti ad oggi. Il principale strumento attraverso il quale è stato possibile diffondere una solida consapevolezza in materia è il linguaggio adottato.

Un tempo, tutto ciò che riguardava lo stupro veniva trattato con riluttanza, paura, alle volte anche disgusto nel menzionare i dettagli più crudi della violenza, nell'ascoltare testimoni o anche nella semplice percezione della brutalità della natura umana e i livelli inimmaginabili verso i quali è in grado di estendersi. Pertanto, i dettagli più realistici, le descrizioni trasparenti e i contenuti eccessivamente sensibili, venivano occultati dietro vocaboli giuridici che hanno permesso il formarsi di lacune legali e il perpetuarsi, anche all'interno del diritto internazionale stesso, tabù e stereotipi di genere. Tristemente presenti e radicati anche in quelle società che vengono considerate ad oggi come sviluppate.

Il quadro dipinto, ha così permesso ad un crimine di guerra riconosciuto e condannato dalle Convenzioni di Ginevra, Codice Liber statunitense, Convenzione dell'Aja, Protocolli Addizionali e molti altri fra gli strumenti più importanti del Diritto Internazionale di passare inosservato, tollerato, nonché impunito per diversi secoli. Fino a che l'esplosione delle tensioni in Bosnia e Ruanda, ampiamente descritte e affrontate dai media, e lo scandalo di Abu Ghraib nel 2003, hanno portato all'estinzione di quella consolidata idea di accettazione creatasi attorno al crimine. Da inevitabile conseguenza dei conflitti armati, causata dall'impulso sessuale irrefrenabile dei soldati contro alcuni individui, ossia *stupro di guerra* (war rape), a crimine contro l'umanità avanzato sistematicamente come *arma da guerra* (weapon of war) in grado di minacciare la pace e la sicurezza internazionale.

Il presente lavoro ha come oggetto d'analisi proprio lo sviluppo della concezione di stupro e in particolare delle misure legali adottate a livello internazionale per contrastare il crimine, al fine di dimostrare come la proibizione dello stupro sia divenuta nel corso degli anni una tematica a tal punto prioritaria per l'agenda internazionale, da essere evoluta in una norma di diritto cogente, nonché posta all'apice del diritto internazionale.

Per comprendere lo stretto legame che intercorre tra mondo giuridico e realtà del crimine, è fondamentale inquadrare *in primis* cosa si intende per norma di *jus cogens* o norma imperativa, le incertezze che circondano il termine e il valore legale a livello internazionale che detiene. Parallelamente, verrà dedicata una sezione riguardo al concetto di stupro in cui verranno poste in evidenza le problematiche e l'avversione degli stati nell'elaborare una definizione di stupro universalmente accettata. Tematica divenuta ostacolo preponderante in grado di impedire la proliferazione di strumenti legali capaci di eradicare il crimine.

Nel 1998, tuttavia, con la Statuto di Roma, istitutivo della corte penale internazionale, supportato dal documento aggiuntivo *Elements of Crimes*, si è riusciti ad ovviare al problema fornendo una definizione del crimine, la quale sembrerebbe essere generalmente riconosciuta. Così, solo a ridosso del XXI secolo, dopo secoli di violenze sessuali testimoniate da un considerevole repertorio storico, si è giunti al riconoscimento scritto del crimine.

Le successive parti costitutive del lavoro rappresentano il cuore dell'analisi e verranno accuratamente elaborate adottando la metodologia di ricerca basata su due livelli analitici: il micro level of analysis e il macro level. Nel II Capitolo l'individuo, in particolare la vittima di stupro, viene posta al centro dell'analisi al fine di perseguire un duplice obiettivo.

Da un lato, identificare le cause che inibiscono i singoli stati ad adottare misure concrete per combattere il crimine. Vale a dire, fare luce su una delle più importanti cause strutturali: l'ineguaglianza di genere. Infatti, gli stereotipi ancorati alla donna, il ruolo che detiene in determinate società, la grave sofferenza fisica e psicologica a seguito dello stupro, la mancanza di assistenza sanitaria per prevenire malattie sessualmente trasmissibili, il rischio di essere esclusi dalla propria comunità a causa della 'contaminazione subita', il 'torto' commesso all'onore della propria famiglia, rappresentano una moltitudine di preconcetti in grado di indurre la vittima a prediligere la scelta del silenzio. Così, rafforzando non solo il tabù sullo stupro ma contribuendo a consolidare stereotipi di genere e perpetuare l'impunità del crimine.

Dall'altra, il secondo obiettivo è quello di dimostrare il paradosso che sussiste fra lo stupro e la tortura, crimine la cui proibizione è riconosciuta come norma cogente. Difatti, è stato dimostrato, dal lavoro di personalità brillanti come A. Burgess o il premio Nobel

per la pace 2018, D. Mukwege, come lo stupro arrechi danni fisici e psicologici equiparabili a quelli della tortura e come in molti casi il primo viene spesso utilizzato per perseguire lo scopo del secondo. A sostegno di tale assunto, basti guardare allo scandalo di Abu Ghraib ampiamente documentato. Dunque, due atrocità frequentemente poste sullo stesso piano in casi come *Akayesu v Prosecutor*, *Raquel Martí de Mejía v. Perù*, *Aydin v Turkey*, *Prosecutor v Delic et al*, documenti, reports da organizzazioni governative e non governative come Amnesty International o Human Rights Watch, e innumerevoli documenti legali a livello statale. Eppure, in nessun caso trattate e perseguite allo stesso modo, ossia come norme di *jus cogens*.

Il paragone con la tortura contribuisce dunque a consolidare l'opinione *iuris* necessaria per la formazione di una norma inderogabile e universalmente accettata. Inoltre, è bene ricordare come lo stupro non è solo il mezzo con il quale viene portata avanti la tortura in alcuni casi, ma anche lo strumento con il quale viene commesso il genocidio - sotto forma di pulizia etnica come Bosnia e Ruanda - o la schiavitù sotto forma di schiavitù sessuale. Tutti crimini condannati con norme cogenti.

Un altro importante contributo nel dimostrare la natura imperativa della proibizione dello stupro, è fornito dalla risposta della comunità internazionale. Pertanto, nel III Capitolo l'attenzione viene rivolta a quelle istituzioni governative in grado di rappresentare la comunità internazionale nel suo insieme, come le Nazioni Unite. A tal proposito è necessario in *primis* analizzare il valore legale delle risoluzioni emanate dal Consiglio di Sicurezza, chiarite in parte dal contributo della Corte Internazionale di Giustizia nel caso Namibia, nonché l'ingerenza delle decisioni nella giurisdizione nazionale. Una volta stabilita la rilevanza delle risoluzioni del Consiglio di Sicurezza, verranno prese in considerazione le decisioni più rilevanti prese dal 2000 ad oggi, al fine di porre in evidenza i cambiamenti concettuali riguardo al crimine di stupro: da crimine di guerra che riguardava casi isolati, a minaccia per la sicurezza internazionale. Cambio di prospettiva, dimostrato dal passaggio stesso della materia dall'Assemblea Generale al Consiglio di Sicurezza.

A seguito di un pressante lavoro di lobbying da parte della società civile, il Consiglio di Sicurezza emanò il 28 Ottobre del 2000 la risoluzione 1325. Con essa, l'immagine passiva e statica della donna viene messa in discussione per la prima volta. Dal gentil sesso

subordinato alla protezione dell'uomo ad attore fondamentale, indipendente e politicamente attivo a livello nazionale e internazionale, a tal punto da ricoprire un "ruolo importante ... nella prevenzione e risoluzione dei conflitti e della costruzione della pace." (art. 1 -4). La risoluzione rappresenta un primo tentativo nel modificare una struttura maschilista radicata fino ai ranghi più alti delle gerarchie internazionali. A sostegno di tale assunto, basti pensare che in 60 anni di operazioni di peackeping, solo sette donne hanno ricoperto un ruolo manageriale.

Tuttavia, ciò che preme maggiormente dimostrare con la decisione 1325 è che per la prima volta si parla di *violenza di genere* sia nei conflitti armati che in tempi di pace chiamando gli stati ad intervenire attivamente con Piani Nazionali adeguati. Inoltre, nonostante la condanna allo stupro viene citata nel punto 10, sembrerebbe essere passata in secondo piano, come dimostrato dai successivi impegni da parte degli stati, poiché sottoscritta in una risoluzione che vedeva come principale obiettivo quello di eradicare l'ineguaglianza e perseguire l'emancipazione della donna.

Infatti, nella successiva decade, solo 16 stati elaborarono un piano nazionale, tra cui l'Italia, per dare attuazione alla risoluzione del Consiglio di Sicurezza. I restanti 177 stati membri delle Nazioni unite, dimostrarono una chiara avversione e riluttanza nei confronti della materia.

Ad ogni modo, gli sforzi della risoluzione 1325 vennero rafforzati con una nuova risoluzione, la 1820, emanata nel 2008. La decisione costituisce un tassello fondamentale da aggiungere alla nostra analisi poiché rappresenta la realizzazione in forma scritta di una diversa presa di consapevolezza. Il linguaggio della risoluzione è più incisivo, il crimine viene associato al Bosnia e Ruanda, vengono dimostrati gli effetti sulle vittime e appare per la prima volta la connotazione del crimine con arma di guerra. Da qui, emerge un drastico cambio di prospettiva che guarda al crimine come minaccia alla pace e sicurezza internazionale. Difatti, a confermare l'importanza della 1820 e la rivoluzione concettuale che ha apportato, è lo sforzo senza precedenti nel contrastare la violenza dimostrato dall'assiduo impegno del Consiglio di sicurezza che emanò numerose risoluzioni, di cui la più recente nell'Aprile 2019.

Questo cambiamento di veduta non consolida solo l'opinio iuris necessaria al fine di stabilire una norma di ius cogens in materia ma è anche il primo passo concreto per garantire fermamente la libertà delle donne dallo stupro. Applicare una norma imperativa

e affrontare in modo appropriato il crimine potrebbe costituire un catalizzatore unico per raggiungere l'uguaglianza di genere e in definitiva sradicare questa violenza spietata e sconcertante.

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