Defining Rape

Örebro Studies in Law 2

MARIA ERIKSSON

Defining Rape
Emerging Obligations for States under
International Law?

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Abstract

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The prevalence of rape and its widespread impunity, whether committed during armed conflict or peacetime, has been firmly condemned by the UN and its prohibition has been consistently recognised in international law. This development, however, is a rather novel endeavour. The belated response is in part a consequence of rape being characterised by such myths as sexual violence representing an inevitable by-product of war or as being committed by sexual deviants. Its systematic nature has thus been ignored as has the gravity of the offence, often leading to a culture of impunity. This was evident, for example, through the failure to prosecute crimes of rape during the Nuremberg trials, in qualifying it as a harm against a woman's honour in the 1949 Geneva Convention (IV), or in considering it a violation located in the "private sphere", thereby beyond regulation by international law.

However, substantial efforts have been made in international law to recognise obligations for states to prevent rape. A prohibition of the offence has developed both through treaty law and customary international law, requiring the prevention of rape whether committed by state agents or by a private actor. One measure to prevent such violence has been identified as the duty to enact domestic criminal laws on the matter. The flexibility for states in determining the substance of such criminal laws is increasingly circumscribed, leading to the question of whether a particular definition of rape or certain elements of the crime must be adopted in this process.

Elaborations on the elements of the crime of rape have been a late concern of international law, the first efforts made by the *ad hoc* tribunals (the International Criminal Tribunal for Rwanda and the International Criminal Tribunal for the Former Yugoslavia), followed by the regional human rights systems as well as the International Criminal Court. The principal purpose of the thesis is consequently the systematisation and analysis of provisions and emerging norms obliging states to adopt a particular definition of rape in domestic penal codes. The prohibition of rape and, subsequently, the process of defining the crime has been made in three areas of international law – international human rights law, international humanitarian law and international criminal law. Emerging norms in all three regimes are consequently examined in this thesis, bringing to the fore overarching questions on the possible harmonisation of defining rape in these distinct branches of international law. The study will thus provide a contextual approach, aiming to evince whether the definition can be harmonised or if prevailing circumstances, such as armed conflict or peace, should necessarily inform its defini-

Keywords: Prohibition of rape, definition of rape, women's rights, armed conflict, state obligations, fragmentation, humanisation

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Örebro, April, 2010
Maria Eriksson

Table of Contents

List of Abbreviations.....	9
PART I: INTRODUCTION	11
1. The Definition of Rape in an International Perspective.....	11
1.1 Background	11
1.2 Purpose and Research Questions	17
1.3 Delimitations.....	18
1.4 Terminology.....	19
1.5 Sources of International Law	26
1.6 Method	40
1.7 Structure of the Thesis	44
PART II: ELEMENTS OF THE CRIME OF RAPE: A CONTEXTUAL APPROACH	47
2. The Prohibition of Rape in Domestic Criminal Law: A Historic Overview....	47
2.1 Introduction.....	47
2.2 Early Codes: Rape as a Violation of Property Rights	48
2.3 The Middle Ages.....	51
2.4 Corroboration of Complaints	52
2.5 The Women's Movement and Law Reforms	58
3. The Harm of Sexual Violence	64
3.1 Introduction.....	64
3.2 How to Define Harm.....	66
3.3 Can Sexuality be Harmed?.....	69
3.4 Human Dignity and Sexual Autonomy	76
3.5 Cultural and Collective Harm	81
4. Elements of the Crime of Rape.....	88
4.1 The Principle of Legality	88
4.1.1 <i>The Principle in International Law</i>	90
4.1.2 <i>The Extent of Interpretation</i>	95
4.2 Substantive Elements of the Definition of Rape	103
4.2.1 <i>Introduction</i>	103
4.2.2 <i>The Elements of the Crime</i>	105
4.2.3 <i>Non-Consent</i>	108
4.2.3.1 Performative and Subjective Consent.....	110
4.2.3.2 Appropriate Antecedents and Consent.....	116
4.2.4 <i>Coercion</i>	121
4.2.5 <i>Force or Threat of Force</i>	124
4.2.6 <i>Implications of Non-Consent or Force Standards</i>	125

4.2.7 <i>Actus Reus</i>	128
4.2.8 <i>Mens Rea and Criminal Responsibility</i>	134
5. Sexual Violence in Context.....	141
5.1 Introduction: Armed Conflict and Gender Hierarchies as Contextual Elements	141
5.2 Victims of Armed Conflicts	143
5.3. The Presence of Sexual Violence in Conflicts.....	148
5.4 Theories on the Existence of Sexual Violence in Armed Conflicts.....	156
5.5 Rape as a Strategic Tactic of War.....	160
5.5.1 <i>Rape as a Crime against the Community</i>	160
5.5.2 <i>Distinguishing Rape from “Regular” Sexual Relations in Armed Conflicts</i>	167
5.5.3 <i>The Contextual Approach to a Definition of Rape</i>	169
5.5.4 <i>Armed Conflict as a Factor in Defining Rape</i>	178
5.6 Common Forms of Rape in Peacetime	181
5.7 The Prohibition of Rape from Feminist Viewpoints.....	184
5.7.1 <i>The Impact of Gender in Defining Rape</i>	184
5.7.2 <i>Feminist Critique of International Law</i>	192
5.8 Male Rape - The Excluded Victim?	197

PART III: AN INTERNATIONAL HUMAN RIGHTS LAW

PERSPECTIVE	206
6. State Obligations to Prevent and Punish Rape	206
6.1. Introduction	206
6.2 The Role of the State in International Human Rights Law	207
6.3 The Limits of State Obligations: Conduct Attributable to the State	209
6.3.1 <i>Primary and Secondary Rules</i>	209
6.3.2 <i>Definition of an Internationally Wrongful Act</i>	213
6.3.3 <i>Domestic Laws as Breaches of International Law</i>	214
6.3.4 <i>Forms of Attribution</i>	217
6.3.5 <i>Widening the Scope of Responsibility under International Law</i>	220
6.3.6 <i>Consequences of the Public/Private Divide for Women’s Human Rights</i>	225
6.4 The Due Diligence Standard - An Obligation to Prevent and Punish Human Rights Violations	229
6.4.1 <i>The Scope of Due Diligence and the Nature of State Obligations</i>	235
6.4.2 <i>Obligations in International Human Rights Treaties</i>	238
6.4.3 <i>Which Rights Engender Due Diligence Obligations?</i>	245
6.4.4 <i>The Due Diligence Standard as a Tool in Preventing Violence against Women</i>	250
6.4.5 <i>Prevention through Domestic Criminalisation</i>	255
6.4.6 <i>Jurisprudence Delineating the Obligation to Enact Criminal Laws</i> ...	261

6.4.6.1 Case Law on Domestic Violence of the European and Inter-American Human Rights Systems	261
6.4.6.2 Case Law on Sexual Violence	265
6.4.6.3 Conclusions on Obligations in Case Law to Prevent Sexual Violence.....	277
6.4.6.4 Relevant Views and Statements from UN Treaty Bodies	280
6.4.7 <i>Failure of State Obligations to Prevent Single Cases of Rape</i>	283
6.5 Margin of Appreciation - Flexibility in National Implementation?	292
6.6 Conclusions on State Obligations	295
7. The Recognition of Rape as a Violation of International Human Rights Law	297
7.1 Is There a Human Right to Sexual Autonomy?	297
7.2 The Prohibition of Torture and Inhuman or Degrading Treatment	301
7.2.1 <i>The Elements of Torture</i>	301
7.2.2 <i>State Nexus</i>	307
7.2.3 Views and Cases on Rape as a Form of Torture	310
7.2.3.1 The UN System	310
7.2.3.2 Regional Human Rights Courts	316
7.2.4 <i>International Criminal Law - A New Direction in Interpreting the Torture Definition?</i>	322
7.2.4.1 State Nexus	322
7.2.4.2 Severity.....	327
7.2.4.3 Purpose	328
7.3 Rape as a Violation of the Right to Privacy	334
7.4 Rape as a Violation of the Non-Discrimination Principle.....	340
7.4.1 <i>The Principle of Equality and Non-Discrimination</i>	340
7.4.2 <i>Purpose or Effect of Discrimination</i>	342
7.4.3 <i>State Obligations</i>	347
7.4.4 <i>Sexual Violence as a Form of Gender Discrimination</i>	349
7.4.5 <i>The Definition of Rape as an Expression of Gender Discrimination</i>	357
7.4.5.1 Gender Inequality and Access to Justice	357
7.4.5.2 Gender-Bias in the Law	358
7.4.5.3 Gender-Bias in Language	361
7.4.5.4 Statistics as Evidence.....	364
7.5 Universal Impact of the Regional Approach.....	366
7.6 The <i>Ius Cogens</i> Character of the Prohibition of Rape.....	372
7.6.1 <i>Which Rights are Peremptory Norms?</i>	380
7.6.2 <i>A Gender-Sensitive Interpretation of Ius Cogens</i>	382
7.7 Summary of State Obligations on the Prohibition and Definition of Rape	385
PART IV - AN INTERNATIONAL HUMANITARIAN LAW AND INTERNATIONAL CRIMINAL LAW PERSPECTIVE.....	387

8. International Humanitarian Law	387
8.1 Introduction: International Humanitarian Law and Enforcement through International Criminal Law	387
8.2 Characteristics of International Humanitarian Law	388
8.3 Early Codification of the Prohibition of Rape in International Humanitarian Law	390
8.4 The International Military Tribunals at Nuremberg and of the Far East: The Birth of International Criminal Law	391
8.5 The 1949 Geneva Conventions and the 1977 Additional Protocols	394
8.6 The ICRC Study on Customary International Humanitarian Law	402
8.7 Intergovernmental Organisations and the Prohibition of Sexual Violence in Armed Conflicts	404
9. International Criminal Law	409
9.1 Introduction	409
9.2 Prosecution of Rape – The Ad Hoc Tribunals	410
9.2.1 <i>ICTR: The First Definition of Rape in International Law</i>	413
9.2.1.1 The <i>Akayesu</i> Case - A Conceptual Approach to Rape	415
9.2.1.2 Beyond the <i>Akayesu</i> Judgment	419
9.2.1.3 Conclusions	425
9.2.2 <i>ICTY: New Approaches in Defining Rape</i>	426
9.2.2.1 The <i>Furundzija</i> Judgment - A Focus on Force or the Threat of Force	428
9.2.2.2 The <i>Kunarac</i> Judgment - Rape as a Violation of Sexual Autonomy ...	434
9.2.3 <i>Conclusions Based on the Case Law of the ICTR and ICTY</i>	441
9.2.4 <i>The Special Court for Sierra Leone</i>	452
9.3 The International Criminal Court	458
9.3.1 <i>The Birth of the ICC</i>	458
9.3.2 <i>The Rome Statute and the Prohibition of Rape</i>	462
9.3.3 <i>A Complementary Relationship</i>	464
9.3.4 <i>The Rome Statute and the Scope of State Cooperation</i>	466
9.3.4.1 A Duty to Implement the Crimes?	466
9.3.4.2 Modes of Implementation	469
9.3.4.3 Complementarity - Creating Demands on the Content of Domestic Laws?	471
9.3.4.4 Unwillingness	473
9.3.4.5 Inability	475
9.3.4.6 Ordinary Crimes	477
9.3.5 <i>The Elements of the Definition of Rape</i>	483
9.3.6 <i>The Elements of Crimes and its Status for Member States</i>	491
9.3.7 <i>Situations Investigated by the Court</i>	496
9.3.8 <i>Impact of the ICC</i>	498

9.4 Universal Jurisdiction for the Crime of Rape?	502
9.4.1 Which Crimes Incur Universal Jurisdiction?	507
9.4.2 Domestic Application - Various Solutions	514
9.4.4 Conclusion on Universal Jurisdiction and the Prohibition of Rape.....	522
PART V: THE PROHIBITION OF RAPE - CLOSING THE GAP BETWEEN INTERNATIONAL HUMAN RIGHTS LAW AND INTERNATIONAL HUMANITARIAN LAW?	524
10. The Interplay between International Human Rights Law and International Humanitarian Law	524
10.1 The Concepts of Harmonisation and Humanisation in International Law	524
10.2 The Nature of International Human Rights and International Humanitarian Law.....	526
10.3 Fragmentation and Specialisation of Public International Law.....	530
10.3.1 General Remarks.....	530
10.3.2 <i>Lex Specialis v. Lex Generalis</i>	532
10.3.3 <i>Case Law of the ICJ</i>	535
10.3.4 A Complementary Approach.....	539
10.3.5 <i>Fundamental Standards of Humanity - A Step towards Harmonisation</i>	544
10.4 The Concept of “Humanisation” of Humanitarian Law and its Emergence ..	550
10.5 The Application of International Humanitarian Law by Human Rights Courts and Treaty Bodies	557
10.6 Is Harmonisation Desirable?	561
10.7 Harmonising the Definitions of Rape and Torture	565
10.7.1 <i>The Definition of Torture</i>	569
10.7.2 <i>The Definition of Rape</i>	570
PART VI: A CULTURAL PERSPECTIVE	575
11. Cultural Relativism and Obstacles to a Uniform International Definition of Rape.....	575
11.1 Cultural Relativism and Women’s Human Rights	575
11.1.1 <i>Relativity of Women’s Rights</i>	581
11.1.2 <i>Conflicts of Rights</i>	585
11.2 Cultural Relativism and International Criminal Law	587
11.3 Culture and <i>Mens Rea</i> – A Criminal Defence	591
11.4 Relativism Inherent in the International Law System	596
PART VII: CONCLUSIONS - EMERGING OBLIGATIONS IN DEFINING THE CRIME OF RAPE?	599
12. Concluding Summary and Remarks	599
12.1 Introduction.....	599
12.2 Conclusion: The Prohibition and Definition of Rape in International Law ...	600

12.3 The Harmonisation of Regimes and the Importance of Context.....	604
12.4 General Remarks	608
12.5 Critique of International Law Affecting the Prohibition of Rape.....	613
12.6 The Legal Basis for Defining Rape	616
12.7 Suggestions for the Future.....	618
References.....	620

List of Abbreviations

CAR	Central African Republic
CEDAW	Convention on the Elimination of All Forms of Discrimination against Women
CERD	International Convention on the Elimination of All Forms of Racial Discrimination
CRC	Convention on the Rights of the Child
DRC	Democratic Republic of the Congo
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
FGM	Female Genital Mutilation
HIV	Human Immunodeficiency Virus
IACHR	Inter-American Commission for Human Rights
IACtHR	Inter-American Court of Human Rights
ICC	International Criminal Court
ICJ	International Court of Justice
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICRC	International Committee of the Red Cross
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the Former Yugoslavia
ILC	International Law Commission
IMT	International Military Tribunal at Nuremberg
IMTFE	International Military Tribunal of the Far East
IHL	International Humanitarian Law
LGBT	Lesbian, Gay, Bisexual and Transgender Persons
NGO	Non-Governmental Organisation
UDHR	Universal Declaration on Human Rights
UK	The United Kingdom
UN	The United Nations
UNCAT	United Nations Committee against Torture
UNESCO	United Nations Educational, Scientific and Cultural Organization
UNHRC	Human Rights Committee
UN OHCHR	United Nations Office of the High Commissioner for Human Rights
UNICEF	United Nations Children's Fund
UNFPA	United Nations Population Fund

US	The United States
VCLT	Vienna Convention on the Law of Treaties
WHO	World Health Organization

Part I: Introduction

“Legal language does more than express thoughts. It reinforces certain world views and understandings of events.”¹

1. The Definition of Rape in an International Perspective

1.1 Background

The UN Secretary-General has emphasised that the elimination of violence against women remains one of the most serious challenges of our times.² Rape, as a crime that principally affects women and its prevalence in all states, cultures and contexts, whether in an armed conflict or peacetime, represents a prime example of this challenge. Sexual violence committed in armed conflicts has been termed “history’s greatest silence” by the UN and its eradication is considered to be a central issue and a “top priority” in the work of the organisation.³ Part of the task has lain in ending the “greatest silence” – that is, to systematically address and condemn sexual violence. The work involves exposing such myths as rape being an inevitable byproduct of war or an expression of local cultural traditions, rather than e.g. as a war crime or as discrimination on the basis of sex.⁴ Rape in war is frequently understood to be an “intractable cultural trait”⁵ and outside of that context as a “private matter” perpetrated by lone, sexual deviants. Such fictions serve to minimise the gravity of the crime and fail to acknowledge its pervasive nature. Another part of the challenge is to, beyond solely addressing the widespread occurrence of rape, take measures to eradicate the practice. Rape in all contexts has largely been characterised by a culture of impunity and it is maintained that changing a culture of impunity requires the reformation of national laws to recognise such

¹ Finley, Lucinda, *Breaking Women’s Silence in Law: The Dilemma of the Gendered Nature of Legal Reasoning*, 64 Notre Dame L. Rev. 886, (1989), p. 888.

² In-Depth Study on all Forms of Violence against Women, Report of the Secretary-General, UN Doc. A/61/122/Add.1, 6 July 2006, para. 2.

³ “Ending History’s Greatest Silence”, Speech by Inés Alberdi, Executive Director, UNIFEM, 8 July 2009 & UN Action Against Sexual Violence in Conflict Programme, Security Council, 6196th meeting, UN Doc. S/PV.6196, 5 October 2009, p. 3.

⁴ SC Res. 1820 on Women, Peace and Security, UN Doc. S/RES/1820, 19 June 2008 & “Rape must never be minimized as part of cultural traditions, UN envoy [Margot Wallström] says”, UN News, 25 March 2010.

⁵ “Rape must never be minimized as part of cultural traditions, UN envoy [Margot Wallström] says”, UN News, 25 March 2010.

acts as crimes.⁶ Improving the legislative framework on these matters has e.g. been stressed as essential by the UN Secretary-General.⁷ This thesis aims to examine emerging obligations for states in international law to enact criminal laws entailing a prohibition on rape and consider the question of whether or not such duties should extend to include the adoption of a particular definition of the crime.

Within the field of public international law, the prohibition of sexual violence was until recently approached in a tentative manner, whether in international human rights law, international humanitarian law (IHL) or in international criminal law. The 1949 Geneva Conventions depicts rape as harming a woman's honour, rather than as an act against the physical integrity or autonomy of the person.⁸ Transcripts from the Nuremberg war trials held in 1945-1946 demonstrate an extensive practice of rape committed by the armed forces of several nations in various areas of occupation during the Second World War.⁹ Witness testimony on indiscriminate mass rape and sexual mutilation of women of all ages before relatives and neighbours is interspersed in the transcripts. However, the focus of the trials remained on other violations deemed to be of a graver nature and no individual was prosecuted for rape as an international crime. The area of international criminal law, which in effect developed from the establishment of the Nuremberg tribunal, from its inception thus disregarded sexual violence treating it as an unfortunate side-effect of war and not of international concern. That patterns of violence become normalised when followed by impunity is evident. Rape as a tactic of war is becoming increasingly employed as the nature of armed conflict changes, frequently

⁶ "Rape must never be minimized as part of cultural traditions, UN envoy [Margot Wallström] says", UN News, 25 March 2010. See also *The State of Human Rights in Europe: The Need to Eradicate Impunity*, Council of Europe, Committee on Equal Opportunities for Women and Men, Doc. 11964, 23 June 2009.

⁷ Report of the Secretary-General, Women and Peace and Security, UN Doc. S/2009/465, 16 September 2009, para. 42 & SC Res. 1888 on Women, Peace and Security, UN Doc. S/RES/1888, 30 September 2009, para. 6.

⁸ See Article 27, Geneva Convention Relative to the Protection of Civilian Persons in Time of War, 12 August 1949, 75 U.N.T.S 287 (Geneva Convention IV).

⁹ Trial of the German Major War Criminals: Proceedings of the International Military Tribunal Sitting at Nuremberg, 14 Nov. 1945 – 1 Oct. 1946 (42 Vols.), Published at Nuremberg 1947, (IMT Docs.).

occurring in populated areas and with the deliberate targeting of civilians.¹⁰ The brutal and systematic use of sexual violence as a tactic of war in the armed conflicts in Rwanda and former Yugoslavia, with approximately 500,000 and 60,000 rapes committed respectively is a testament to this, as are the mass rapes in more recent conflicts in e.g. Sierra Leone, the DRC and Darfur.¹¹

Rape outside the context of armed conflict occurs in all societies by strangers, acquaintances and intimate partners. Domestic laws prohibiting rape vary greatly, frequently affirming gender stereotypes, e.g. in viewing the offence as a crime against the honour of the woman, and excluding certain categories of victims, such as spouses or prostitutes, or requiring proof of resistance. The corresponding recognition of women's rights as universal human rights was, similarly to international criminal law, a late concern of the international community since the types of violations that women often suffer have been considered to be of a "private" nature, within the confines of the internal affairs of states and not to be regulated by public international law. As acts of private

¹⁰ Cost of Violence against Women 'Beyond Calculation', warns UN Chief, UN News, New York, 8 March, 2009, Report of the Secretary-General to the Security Council on the Protection of Civilians in Armed Conflict, UN Doc. S/2005/740, para. 3, Askin, Kelly, *Prosecuting Wartime Rape and Other Gender-Related Crimes Under International Law: Extraordinary Advances, Enduring Obstacles*, 21 Berkeley Journal of Intl. L 288, (2003), p. 9 & Final Report by Ms. Gay J McDougall, Special Rapporteur, Contemporary Forms of Slavery: Systematic Rape, Sexual Slavery and Slavery-Like Practices During Armed Conflict, UN Doc. E/CN.4/Sub.2/1998/13, 22 June 1998, para. 7, Report of the Sub-Commission on Prevention of Discrimination and Protection of Minorities, Minimum Humanitarian Standards, Analytical Report of the Secretary-General Submitted Pursuant to Commission on Human Rights Resolution 1997/21, UN Doc. E/CN.4/1998/87, 5 January, 1998, para. 33, Report of the Secretary-General to the Security Council on the Protection of Civilians in Armed Conflict, UN Doc. S/2005/740, 28 November, 2005, para. 3, SC Res. 1820 on Women, Peace and Security, UN Doc. S/RES/1820, 19 June, 2008, Coomaraswamy, Radhika, *Sexual Violence during Wartime*, in *Listening to the Silences: Women and War*, ed. Helen Durham and Tracey Gurd, Martinus Nijhoff Publishers, (2005), p. 55, Bensouda, Fatou, *Gender and Sexual Violence Under the Rome Statute*, in *From Human Rights to International Criminal Law, Studies in Honour of an African Jurist, the Late Judge Laity Kama*, Brill, (2007), p. 402.

¹¹ See e.g. on *Rwanda*: UN Doc. E/CN.4/1996/68, 29 January 1996, para. 16, *Former Yugoslavia*: Annex: Final Report of the Commission of Experts Pursuant to Security Council Resolution 780, (1992), UN SCOR, 49th Session, UN Doc. S/1994/674, paras. 250-251 and Ellis, Mark, *Breaking the Silence: Rape as an International Crime*, 38 Case W. Res. J. Int'l L. 225, (2006), p. 226, *Sierra Leone*: Women, War and Peace, UNIFEM, 2002, Vol. 1, p. 9, *Darfur*: Report of the International Commission of Inquiry on Darfur to the Secretary-General, Pursuant to Security Council resolution 1564 (2004) of 18 September 2004, UN Doc. S/2005/60, 1 February 2005, the *DRC*: Report of the Secretary-General pursuant to Security Council resolution 1820, UN Doc. S/2009/362, 15 July 2009, para. 12.

violence, the criminalisation of sexual violence has thus been strictly deferred to domestic legal systems. Though international human rights law is founded on the quality of human dignity, this has not until recently been interpreted in a gender-conscious manner to include sexual autonomy.

This silence in public international law in the fields of international human rights law, IHL and international criminal law on matters relating to women's rights has been a reflection of the lack of acknowledgment of particular concerns of women. As Dinah Shelton argues: "laws reflect the current needs and recognise the present values of society".¹² Law thus functions as an instrument of deterrence and punishment, but it also has a value-generating force and acts as a catalyst for social change, e.g. concerning gender roles. This is also true for public international law, which should reflect such values as gender equality in its aim of providing for the protection of the person.

However, efforts to remedy the lacunas in international law have been made by the international community, acknowledging sexual violence as one of the gravest forms of violations of public international law. As this thesis will demonstrate, international law on the protection against rape is dynamic, continually developing and expanding in scope with regard to state obligations. The UN Secretary-General has emphasised that human rights violations of women, such as rape, are more than harms done to the individual and affect societies at large and "undermine the development, peace and security of entire societies".¹³ It is understood that women's rights do not solely affect this particular group, but has a resonance in the social, political and economic life of society in general.¹⁴ The UN Secretary-General in Resolution 1325 called attention to the disproportionate impact on women in armed conflict, e.g. through sexual violence, and in Resolutions 1820 and 1888 noted the practice of rape as a tactic of war in modern armed conflicts.¹⁵ These resolutions call on states to eradicate such conduct and to end impunity. The *ad hoc* tribunals, established subsequent to the armed conflicts in Rwanda and Yugoslavia, have interpreted rape as a form of international crime. The Rome Statute of the International Criminal Court (ICC) has also been instrumental in recognising

¹² Shelton, Dinah, *Introduction: Law, Non-Law and the Problem of 'Soft Law'*, in *Commitment and Compliance: The Role of Non-Binding Norms in the International Legal System*, ed. Dinah Shelton, Oxford University Press, (2000), p. 7.

¹³ United Nations Secretary General's Message on The International Day for the Elimination of Violence Against Women, 25 November 2008.

¹⁴ Steiner, Henry, Alston, Philip & Goodman, Ryan, *International Human Rights in Context, Law, Politics, Morals*, Oxford University Press, 3rd ed., (2008), p. 175.

¹⁵ SC Res. 1325 on Women, Peace and Security, UN Doc. S/RES/1325, 31 Oct. 2000, Resolution 1820, UN Doc. S/RES/1820, 19 June 2008, 1888.

sexual violence as a matter of the utmost concern for the international community.¹⁶ The explicit mention of the prohibition of rape as a violation of international human rights law in regional treaties generating state obligations is limited but has increasingly been interpreted under the *chapeau* of other human rights.¹⁷ A Convention has also been drafted by the Council of Europe in 2009 containing an explicit obligation for member states to enact criminal laws on rape, including its definition.¹⁸

The *prohibition* of rape is thus uniform in international law. A *definition* of rape has, however, been a late concern of international law, with the first efforts made by the *ad hoc* tribunals, followed by regional human rights courts and UN treaty bodies.¹⁹ States are consequently increasingly circumscribed in their flexibility to enact domestic criminal laws on rape, with obligations as to the adoption of specific elements of the crime. Much of this development has been parallel to the understanding of the harm of rape, which is central to the construction of its definition. Whether harm is considered to be similar to a violation of property rights, the dishonour of the victim, a crime against the community or the autonomy of the person, has been instrumental in the development of the classification and definition of rape, both at the domestic and international law level.

The purpose of this thesis is to attempt to systematise regulations concerning the prohibition on rape and, ultimately, its definition in public international law, comparing the areas of international human rights law, international criminal law and, to a certain extent, IHL. Though these fields of law share a common core of protecting human dignity, they present certain distinctive characteristics relevant to the approach of criminalising rape. International human rights law governs the conduct of states and provides standards by which individuals can raise claims against the state through various international and regional mechanisms. Notwithstanding its applicability in war, this regime has traditionally and primarily concerned itself with the administration of rules in peacetime. IHL is applicable to the “parties of the armed conflict” and regulates state and

¹⁶ Rome Statute of the International Criminal Court, 17 July 1998, UN. Doc. A/CONF.183/9.

¹⁷ Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa, Adopted by the 2nd Ordinary Session of the Assembly of the Union, 11 July 2003, CAB/LEG/66.6.

¹⁸ Draft Convention on Preventing and Combating Violence against Women and Domestic Violence, CAHVIO (2009) 32 Prov., Council of Europe, Strasbourg, 15 October 2009.

¹⁹ The term ‘*ad hoc* tribunals’ signifies the International Criminal Tribunal for Rwanda and the International Criminal Tribunal for the Former Yugoslavia.

individual conduct in such armed struggles. International criminal law is an amalgam of these two areas and establishes individual criminal responsibility for three crimes considered of an international character: genocide, crimes against humanity and war crimes. Though IHL and international criminal law partly, or wholly, regulate individual criminal responsibility, this thesis solely concerns itself with the extent of state responsibility, in these cases delineating the extent of obligations in implementation.

Through the systematisation of provisions, this study will elucidate two main questions: 1) What obligations exist on states under international law in these three increasingly converging areas to *criminalise* rape? 2) Does the obligation demand the adoption of a specific *definition* of rape? In doing so, this thesis will analyse the traditional sources of international law, with an emphasis on relevant treaties and judicial decisions, and proceed to an examination of indications of an emerging customary international law.

Such systematisation will accentuate overarching questions of harmonisation or fragmentation of public international law and the risks or merits of approaching a specific question in a comparative manner, from the perspective of diverse fields of law. Since the examined areas of international law strive to protect the same interests, it is a natural development that they should necessarily function as complementary mechanisms of protection.²⁰ Evident in this work is that the field of public international law since the Second World War has undergone substantial changes in its application, allowing for greater forays into the internal affairs of states'. This evolution in part stems from the process of humanisation, whereby the scope of accountability for human rights transgressions has expanded to include state responsibility for violations committed between private actors and individual accountability for international crimes. This process has to a certain extent led to a convergence of international criminal law, IHL and international human rights law and has involved mutual interpretations of related concepts, with the principle of human dignity forming a common basis.

²⁰ Human rights law has e.g. influenced the formation of customary rules of humanitarian law identified by the ICRC. International humanitarian law has also become necessary for the protection of human rights, through the creation of the discipline of international criminal law and individual accountability. International criminal law itself and the international crimes are a result of the fusion between IHL and human rights. See Henckaerts, Jean-Marie & Doswald-Beck, Louise, *ICRC Study "Customary International Humanitarian Law"*, Cambridge University Press, (2005), in the ICRC Study on Customary Law. For example: "Through a process of osmosis or application by analogy, the recognition as customary of norms rooted in international human rights instruments has affected the interpretation, and eventually the status, of parallel norms in instruments of international humanitarian law." Meron, Theodor, *The Humanization of Humanitarian Law*, 94 A.J.I.L.239, (2002), p. 244.

As will be seen, the *ad hoc* tribunals for Rwanda and the former Yugoslavia, as well as the regional human rights courts, in their case law frequently refer to legal reasoning concerning not only the qualification, but also the definitions of rape developed by other courts and tribunals, regardless of whether they concern international human rights law or international criminal law. Despite such convergence, the question arises in this thesis of whether such development is appropriate considering the difference in *context* between these areas. An understanding of what constitutes coercive circumstances might e.g. be answered differently depending on whether rape occurs in an armed conflict or peacetime. Is fragmentation perhaps valid and necessary in defining rape with regard to the difference in aim of international criminal law, IHL and international human rights law? Or should we be striving towards even further harmonisation between these bodies of law? Put simply, does the context define how one views the crime? The setting, such as the dichotomy between armed conflict and peacetime might well be of relevance from the standpoint of *jurisdiction* – that is, do the circumstances in which the offence of rape is committed perhaps qualify it as an international crime? Does rape committed during an armed conflict warrant a different *definition* of the crime – for example, as to the elements of ‘force’ or ‘non-consent’? Or does the context simply serve as *evidence* with respect to ‘coercion’? Accordingly, I shall in these areas explore similarities and divergences in the international accountability for the crime of rape.

1.2 Purpose and Research Questions

This thesis aims to delineate the extent of state obligations in international law for preventing rape by enacting criminal laws in relation to it, but it will mainly be concerned with examining whether such responsibilities require the adoption of a particular definition of rape. This necessitates an inquiry into the traditional sources of international law in international human rights law, IHL and international criminal law. Since the prohibition of rape and efforts to define the crime have been treated as two separate stages, a general study on its prohibition will often be the first issue explored in each regime, to be followed by the question of the definition. The objective is to display a holistic view of how the international community has dealt with the matter of sexual violence, with public international law as its medium, and to discern any level of consistency occurring between these separate domains of international law. In the process, variations in the general framework of the separate bodies of law will be highlighted for the purpose of illustrating reasons why different considerations may be taken into account when defining rape. A chapter has therefore been devoted to the common/dissimilar nature of rape committed within the context of armed conflict in relation to that carried out in times of peace. In doing so, the

criminalisation of rape will serve the purpose of a study of the extent to which harmonisation exists between international human rights law, IHL and international criminal law and whether there is evidence of a shift towards a uniform and compulsory definition of rape in international law.

1.3 Delimitations

This thesis will focus solely on the *criminalisation* of rape as a means of prevention and protection. It is generally recognised that the eradication of gender-based violence, such as rape, requires a multitude of measures – emphasised, for example, by the CEDAW Committee. The Committee argues for a holistic approach, i.e. not just legislative measures, but also awareness-raising and greater enforcement of existing laws.²¹ The underlying premise that law should act as the principal means of combating sexual violence or violence against women has in fact been challenged by certain scholars who fear that it may represent “a triumph of form over substance”.²² It is argued that the existence of sexual violence is a cultural problem and that it is insufficient in that respect to provide a legal remedy.²³ However, even though criminal law is undoubtedly sensitive to cultural attitudes, such social constructions are clearly influenced by legal rules. Legal norms capture and reinforce cultural norms that may be harmful or are based upon stereotypical notions of gender roles. The law thus entrenches these ideas and may serve as a catalyst for social change. Laws on rape may alter preconditions in society²⁴ and “the law of sex...can operate as a value generating force when those who create or are governed by it perceive in the law an underlying vision of appropriate sexual conduct”.²⁵ Deputy Secretary-General Asha-Rose Migiro, in an address in 2009, stressed the importance of a legal framework that ensures the protection of women’s rights and exhorted states to use their legal systems effectively to eliminate discrimination. The

²¹ See e.g. CEDAW Comments: UN Doc. A/55/38 (part I), para. 70 (India), UN Doc. A/52/38/Rev.1 (part.II), para. 402 (Australia), UN Doc. A/51/38, para. 104 (Iceland), UN Doc. A/53/38/Rev.1, (part. II), para. 165 (Nigeria), UN Doc. A/52/38/Rev.1 (part. II), para. 451 (Bangladesh), CEDAW/C/CRO/CC/2-3, 15 February 2005, (Croatia), para. 34, CEDAW/C/BLZ/CO/4, 10 August 2007, (Belize), para. 12.

²² Chinkin, Christine, *Feminist Interventions into International Law*, 19 Adel. L. Rev 1, (1997), p. 18.

²³ Adams, Dean, *The Prohibition of Widespread Rape as Jus Cogens*, 6 San Diego Int’l L.J. 357, (2005), p. 394.

²⁴ Rhode, Deborah, *Justice and Gender: Sex Discrimination and the Law*, Harvard University Press, (1989), p. 252.

²⁵ Chamallas, Martha, *Consent, Equality and the Legal Control of Sexual Conduct*, 61 S. CAL. L. Rev. 777 (1988), p. 777.

“power of the law” was recognised and held as forming one of the essential principles for achieving an end to violence directed at women.²⁶

This thesis does not presume that criminalisation is the sole method of eradicating the culture of impunity, but agrees that criminal law can serve as an important value-generating force, and accordingly this is the focus of the study. This question serves as an important illustration of the enlarged obligations on the part of states to prevent violence in the “private sphere” in general, i.e. between private individuals.

The central point is that of *state* obligations to prohibit rape through domestic criminal laws. Though IHL and international criminal law, partly or wholly, regulate individual criminal responsibility, the analysis will be limited to state obligations, and in relation to these areas, the duties of states to enact legislation.²⁷

Furthermore, in order to limit the reach of this thesis, the main interest remains on the prohibition and definition of rape, as distinct from all forms of sexual violence - this being the most serious expression of such violence. The prohibition of rape e.g. stipulates more extensive obligations for states than sexual violence in general and is the form of sexual violence that has particularly prompted discussion as to its definition.

1.4 Terminology

Sexual Violence

In the course of this thesis the terms rape and sexual violence are utilised. Sexual violence is a wider notion that also incorporates rape. The Rome Statute of the ICC includes “rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization...” within the concept of sexual violence in 7(1) g. The UN

²⁶ Deputy-Secretary-General’s Remarks to the Joint Dialogue of the Commission on the Status of Women and the Commission on Crime Prevention and Criminal Justice, 53rd Session, CEDAW, New York, 4 March 2009.

²⁷ It should be noted that parallel breaches may arise between individual and state responsibility, albeit the focus is on the latter. Simultaneously as a state is responsible for any wrongful act of its officials and agents, these persons may also be encompassed by individual criminal responsibility, e.g. concerning the international crimes. See Aust, Anthony, *Handbook of International Law*, Cambridge University Press, (2005), p. 429. See, also, Nollkaemper, André, *Concurrence between Individual Responsibility and State Responsibility in International Law*, 52 Int’l & Comp. L.Q. 615 (2003), p. 618. The ICTY in *Furundzija* stated: “Under current international humanitarian law, in addition to individual criminal liability, State responsibility may ensue as a result of State officials engaging in torture or failing to prevent torture or to punish torturers.” *Prosecutor v. Furundzija*, Case No. IT-95-17/1-T, ICTY, Judgment of 10 December 1998, para. 142.

Special Rapporteur on systematic rape, sexual slavery and slavery-like practices pursued during armed conflict has defined sexual violence as “any violence, physical or psychological, carried out through sexual means or by targeting sexuality” including “both physical and psychological attacks directed at a person’s sexual characteristics, such as forcing a person to strip naked in public, mutilating a person’s genitals, or slicing off a woman’s breasts” or “situations in which two victims are forced to perform sexual acts on one another or to harm one another in a sexual manner”.²⁸ This was also discussed by the ICTY in its *Kvočka* judgment. The Trial Chamber declared: “sexual violence is broader than rape and includes such crimes as sexual slavery or molestation”, and also covers sexual acts that do not involve physical contact, such as forced public nudity.²⁹ Sexual violence would also incorporate such crimes as sexual mutilation, forced marriage, and forced abortion.

All forms of sexual violence are violations of human dignity. The importance in distinguishing the different forms of sexual violence primarily lies in the level of harm to which the victim is subjected and the degree of severity, and therefore becomes a matter of sentencing. The ICTY in its *Furundzija* decision affirmed:

“[i]nternational criminal rules punish not only rape but also any serious sexual assault falling short of actual penetration. It would seem that the prohibition embraces all serious abuses of a sexual nature inflicted upon the physical and moral integrity of a person by means of coercion, threat or force or intimidation in a way that is degrading and humiliating for the victim’s dignity. As both these categories of acts are criminalized in international law, the distinction between them is one that is primarily material for the purposes of sentencing”.³⁰

Certain obligations under international law, however, extend solely to rape or are more far-reaching than those for sexual violence. For example, the prohibition of rape is considered to be an *ius cogens* norm, may incur universal jurisdiction and can be considered to be customary international law, at least against the background of international criminal law, which does not extend to

²⁸ Final Report by Ms. Gay J McDougall, Special Rapporteur, Contemporary Forms of Slavery: Systematic Rape, Sexual Slavery and Slavery-Like Practices During Armed Conflict, UN Doc. E/CN.4/Sub.2/1998/13, 22 June, 1998, paras. 21-22.

²⁹ *Prosecutor v. Miroslav Kvočka*, Case. No. IT-98-30/1-T, ICTY, Judgment of 2 November 2001, para. 180. In the *Akayesu* case of the ICTR, sexual violence was defined as “...any acts of a sexual nature which is committed on a person under circumstances which are coercive...”, and may include acts that do not involve a physical invasion or physical contact, such as forced public nudity. *The Prosecutor v. Jean-Paul Akayesu*, Case No. ICTR-96-4-T, ICTR, Judgment of 2 September 1998, para. 598.

³⁰ *Prosecutor v. Furundzija*, Judgment of 10 December 1998, para. 186.

all forms of sexual violence. Similarly, rape has clearly been found to constitute grave human rights violations, such as torture, which does not pertain to sexual violence in general.

Sex and Gender

The term “sex” generally refers to the biological differences between men and women, whereas gender entails the roles and expectations that society has created for each sex, which are influenced by culture, history and religion.³¹ Gender thus describes social distinctions between women and men, with no foundation in biological necessity, and is subject to change over the passage of time.³² This study rests on the presumption that it is mostly women who are the victims of rape, as an expression of gender-based violence. The UN Special Rapporteur on Violence against Women has made clear that violence against women is neither random nor circumstantial, but rather a structural matter connected to the imbalance of power between the genders.³³ It presumes that certain forms of violence are gender-specific, with the most pervasive forms of violence perpetrated by a husband or partner.³⁴ Violence such as rape, forced pregnancy, dowry deaths, sati and FGM are examples of practices aimed at women because of their sex and gender. Underlying reasons for this violence include the male view on female sexuality, which makes women susceptible to sex-related violence. Familial relationships make this group vulnerable in so far as women may be considered to be property. Violence against women may also be directed at a social group of which a woman is a member, viewed e.g. in

³¹ Benninger-Budel, Carin, *Due Diligence and its Application to Protect Women from Violence*, Martinus Nijhoff, (2008), p. 6. The Rome Statute in Article 7 (3) states: “For the purpose of this Statute, it is understood that the term ‘gender’ refers to the two sexes, male and female, within the context of society.” See the Rome Statute of the International Criminal Court, UN Doc. A/CONF.183/9, 17 July 1998.

³² Charlesworth, Hilary & Chinkin, Christine, *The Boundaries of International Law: A Feminist Analysis*, Manchester University Press, (2000), p. 3, Eriksson, Maja Kirilova, *Reproductive Freedom in the Context of International Human Rights and Humanitarian Law*, Martinus Nijhoff, The Hague, (2000), p. 11.

³³ Preliminary Report Submitted by the Special Rapporteur on Violence against Women, its Causes and Consequences, Ms. Rhadika Coomaraswamy, in Accordance with Commission on Human Rights Resolution 1994/95, UN Doc. E/CN.4/1995/42, 22 November, 1994, para. 49.

³⁴ Charlesworth, Hilary & Chinkin, Christine, *The Boundaries of International Law: A Feminist Analysis*, p. 12.

armed conflicts.³⁵ Sexual violence is thus seen as a social construction based upon the gender-related attributes of each sex. This is relevant e.g. when discussing the necessity or possibilities for constructing a gender-neutral definition of rape, not pertaining solely to e.g. the physical attributes the *actus reus* of rape, but also on if the elements reflect a certain gendered reality and the effect of the definition on each sex. The discussion on gender is of particular consequence in the chapter on sex discrimination and gender-biases in the law. Male victims of rape, however, must also be recognised - a category frequently overlooked in domestic penal codes. Male rape, however, may also carry a gender component, which will also be discussed.

The Elements of the Crime of Rape

The elements of the crime will be examined in greater detail in those chapters specifically devoted to the concepts.³⁶ In short, the *actus reus* entails the prohibited act or conduct of an offence. *Consent* is principally seen as either subjective or performative – that is, the individual permitted the sexual act in question or physically displayed such assent. *Force* may involve a range of physical acts ranging from assault to obstructing a person's freedom of movement. *Mens rea* refers to the state of mind of the perpetrator that must be established to have existed at the time of the commission of the offence. Concerning rape, it frequently entails engaging in sexual relations with the knowledge that the sex act in question was non-consensual or a consequence of force. It may also be determined by recklessness or negligence.

International Human Rights Law, International Humanitarian Law and International Criminal Law

The main areas of law to be studied are international human rights law and international criminal law, but also IHL to the extent that it is deemed to be relevant.

International human rights law places obligations on states to afford protection to persons for a wide range of rights and freedoms, recognising the

³⁵ Charlesworth, Hilary & Chinkin, Christine, *The Boundaries of International Law: A Feminist Analysis*, para. 48. According to Coomaraswamy, women are vulnerable to violence because of their female sexuality, such as rape and female genital mutilation; because they are related to a man, belong to a particular social group, where violence becomes a means of humiliating the group, or by the state (e.g. rape in detention).

³⁶ See Chapter 4.

“inherent dignity...and inalienable rights of all members of the human family”.³⁷ The notion of rights finds its basis in various theories such as natural law or social contract principles, and was traditionally considered to be the internal matters of states.³⁸ This branch now mainly constitutes a positive system founded on the traditional sources of international law. The regime places duties on states to guarantee basic rights to people within their jurisdiction. The scope of state obligations has gradually extended and, in accordance with the due diligence regime, the state can also be held responsible for infractions emanating from private individuals. The person can claim rights through the human rights framework, depending on the mechanisms accepted by the state, while this is limited through the international humanitarian law or international criminal law regime.

International humanitarian law (IHL) is generally defined as the branch of international law that limits the use of violence in armed conflicts through a) sparing those who do not or have ceased to directly participate in hostilities and b) limiting the violence to the amount necessary to achieve the aim of the conflict.³⁹ Article 2 of the Geneva Conventions provides for the regulations to apply “to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties even if the state of war is not recognised by them...”.⁴⁰ A basic differentiation is made between combatants and those not involved in hostilities. A distinction is also drawn between international and non-international conflicts, engaging different rules.

³⁷ The preamble of the Universal Declaration of Human Rights of 1948, Universal Declaration of Human Rights, G.A. Res. 217A, 22-23, UN GAOR, 3d Sess, 1st plen. mtg., UN. Doc A/810 (10 December 1948). See also Evans, Malcolm, *International Law*, Oxford University Press, 2nd ed., (2006), p. 769.

³⁸ Steiner, Henry, Alston, Philip, Goodman, Ryan, *International Human Rights in Context, Law, Politics, Morals*, 3rd ed., Oxford University Press, (2008), p. 59.

³⁹ Sassóli, Marco & Bouvier, Antoine, *How Does Law Protect in War? Cases, Documents and Teaching Materials on Contemporary Practice in International Humanitarian Law*, ICRC, (1999), p. 67.

⁴⁰ Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, 12 August 1949, 75 U.N.T.S 31 (Geneva Convention I), Geneva Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members, Armed Forces at Sea, 12 August 1949, 75 U.N.T.S 85 (Geneva Convention II), Geneva Convention Relative to the Treatment of Prisoners of War, 12 August 1949, 75 U.N.T.S 135 (Geneva Convention III), Geneva Convention Relative to the Protection of Civilian Persons in Time of War, 12 August 1949, 75 U.N.T.S 287 (Geneva Convention IV).

Such distinction, however, is gradually eroding.⁴¹ The 1949 Geneva Conventions especially protect the victims of war - the sick and wounded, prisoners of war and civilians. IHL binds “parties to the conflict,” chiefly the state but also non-state actors, in e.g. Common Article 3 of the Geneva Conventions relating to non-international conflicts. Though not explicitly expressed, states are obligated in that they may be held responsible for the acts of its armed forces or state agents. State parties to the Conventions are obliged to “respect and ensure” the provisions.⁴² Few enforcement possibilities exist for IHL, which includes the Protecting Powers. The expectation has rather been on implementation and enforcement at the domestic level. However, the *ad hoc* tribunals and the ICC, albeit enforcing international criminal law, apply and interpret certain provisions of IHL.

International criminal law prescribes an exclusive set of crimes. An international crime is an act that nations collectively recognise as a transgression so serious that it is regarded as a matter of international concern that cannot be left to the mechanisms of an individual state, which under normal circumstances would have had jurisdiction. Reasons include efficiency, practicality and fear of impunity owing to the nature of the crimes, which normally involve acts or omissions by the state apparatus.⁴³ Each international crime stems either from a treaty or has developed through customary international law. The Rome Statute of the ICC more specifically prohibits genocide, war crimes and crimes against humanity and is generally understood to reflect customary international law. International criminal law is distinct in that it incurs obligations for the

⁴¹ Shaw, Malcolm, *International Law*, 5th ed, p. 1069. See also e.g. Moir, Lindsay, *Grave Breaches and Internal Armed Conflicts*, Journal of International Criminal Justice 2009 7(4):763-787, Wagner, Natalie, *The Development of the Grave Breaches Regime and of Individual Criminal Responsibility by the International Criminal Tribunal for the Former Yugoslavia*, IRRC, Vol. 85, No. 850, (June 2003), Henckaerts, Jean-Marie and Doswald-Beck, Louise, *Customary International Humanitarian Law*, International Committee of the Red Cross, Cambridge University Press, (2005), Henckaerts, Jean-Marie, *Study on Customary International Humanitarian Law: A Contribution to the Understanding and Respect for the Rule of Law in Armed Conflict*, International Review of the Red Cross, Vol. 87, No. 857, (March 2005).

⁴² Article 1 of the Geneva Conventions; Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, (Geneva Convention I), Geneva Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members, Armed Forces at Sea, (Geneva Convention II), Geneva Convention Relative to the Treatment of Prisoners of War, (Geneva Convention III) and Geneva Convention Relative to the Protection of Civilian Persons in Time of War, (Geneva Convention IV).

⁴³ De Than, Claire & Shorts, Edwin, *International Criminal Law and Human Rights*, Sweet & Maxwell, (2003), p. 13.

individual regardless of status. This is a result of the inception of international criminal law in connection with the Nuremberg trials where the nations of world, following the atrocities of the war, were determined to expand the scope of public international law to include the responsibility of individuals.⁴⁴ In the interests of justice and considering the magnitude of the crimes concerned, it was not sufficient to hold “abstract entities” such as the state to be responsible.

Until recently, the international criminal legal framework, both from a procedural standpoint and in its normative framework, was rather primitive but it has developed through the work of the *ad hoc* tribunals and it is expected that the efforts of the ICC will fortify this area of law. Albeit international criminal law has established itself as an independent normative system within public international law, the building blocks largely consist of international human rights law and international humanitarian law. References in the statutes of the *ad hoc* tribunals and the ICC, as well as in their case law, are frequently made to the 1949 Geneva Conventions – in addition to human rights treaties such as the UN Genocide Convention⁴⁵ and the UN Convention against Torture.⁴⁶ The three international crimes of the *ad hoc* tribunals and the ICC, war crimes, crimes against humanity and genocide, likewise draw inspiration from both international humanitarian law and international human rights law.⁴⁷ War crimes naturally require a nexus to an armed conflict and are primarily based upon the content of the 1949 Geneva Conventions. A nexus to an armed conflict does not exist for crimes against humanity and genocide, the latter stemming from the UN Genocide Convention, i.e. a human rights treaty. Slavery and torture, which are

⁴⁴ Though international criminal law aims to have a deterrent effect, it is often held that criminal justice provides a retrospective, confrontational perspective on behaviour in war, meanwhile IHL must be implemented through preventative action and immediate reactions to violations. See Sassòli, Marco, *The Implementation of International Humanitarian Law: Current and Inherent Challenges*, Yearbook of International Humanitarian Law, Vol. 10, Dec. 2007, p. 57.

⁴⁵ Statute of the International Tribunal for the Former Yugoslavia, adopted 25 May 1993 by UN Security Council Resolution S/RES/827, UN Doc. S/25704, Statute of the International Criminal Tribunal for Rwanda, Adopted by Security Council Resolution 955, 8 November 1994, Convention on the Prevention and Punishment of the Crime of Genocide, 9 December 1948, 78 U.N.T.S. 277.

⁴⁶ Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1985, G.A. res. 39/46, UN Doc. A/39/51.

⁴⁷ Werle, Gerhard & Jessberger, Florian, *Principles of International Criminal Law*, Asser Press, (2005), p. 40. The authors argue that international criminal law, among other things, is an instrument to protect human rights, which is especially clear concerning crimes against humanity. However, only a limited number of human rights are protected through ICL.

subcategories of the international crimes were also initially violations established within international human rights treaties.

The three bodies of law are integrated and a similar core of subject-matter exists, which is evident concerning also the prohibition of rape.

1.5 Sources of International Law

Article 38 of the Statute of the International Court of Justice has generally been accepted as establishing the sources of international law.⁴⁸ Though the Article serves specifically to guide the ICJ, its influence extends to other international courts and contexts beyond its adjudication.⁴⁹ The following sources are listed:

- a) international conventions, whether general or particular, establishing rules expressly recognised by the contesting states;
- b) international custom, as evidence of a general practice accepted as law;
- c) the general principles of law recognised by civilised nations;
- d) judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.

The Statute does not aim to create a hierarchy of sources, albeit judicial decisions and doctrine are generally considered to be subsidiary.⁵⁰ The following chapter will generally explain the traditional sources of international law and how they have been applied throughout this thesis. In order to evince state obligations in criminalising rape, a wide range of international and regional treaties of IHL, international criminal law and international human rights law are analysed. However, the bulk of the materials applied are judicial decisions of regional human rights courts and *ad hoc* tribunals as well as recommendations from UN treaty bodies and other soft law documents, owing to the fact that the prohibition of rape and its definition has developed principally in those secondary sources. General principles are also touched upon in the discussion on the case law of the *ad hoc* tribunals and the ECtHR, which have relied upon this source in order to determine the elements of the crime of rape.

⁴⁸ The Statute of the International Court of Justice, United Nations, 18 April 1946, Koskenniemi, Martti, *Sources of International Law*, Ashgate, (2000), p. xi.

⁴⁹ Steiner, Henry, Alston, Philip & Goodman, Ryan, *International Human Rights in Context, Law, Politics, Morals*, Oxford University Press, 3rd ed., (2008), p. 60, Shelton, Dinah, *Introduction: Law, Non-Law and the Problem of 'Soft Law'*, p. 6.

⁵⁰ Bassiouni, Cherif, *A Functional Approach to "General Principles of International Law"*, 11 Mich. J. Int'l L. 768, (1989-1990), p. 782.

Conventions

Treaties as a source of law are relatively uncontroversial. States are bound because they have consented to the legal obligations of the convention concerned. Treaties have come to be viewed as a preferred form of lawmaking over custom because of their relative specificity. However, many areas are not covered by treaties and many states are not party to relevant conventions, leading customary international law to maintain a vital role.⁵¹ Though treaty regulations explicitly prohibiting rape are limited, an extensive referral to relevant international and regional human rights treaties is made in this study, since the prohibition of rape has been interpreted under the *chapeau* of other rights/provisions. This includes e.g. the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR),⁵² the American Convention on Human Rights,⁵³ the International Covenant on Civil and Political Rights (ICCPR),⁵⁴ Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)⁵⁵ and the Rome Statute. According to Martin Scheinin, the work of UN human rights treaty bodies such as their views, concluding observations and general comments in general also form part of the obligations of state parties to treaties, since such documents are interpretations of the treaty obligations, in accordance with the Vienna Convention on the Law of

⁵¹ Dunoff, Ratner, Wippman, *International Law, Norms, Actors, Process, A Problem-Oriented Approach*, Aspen Law & Business, (2002), p. 70.

⁵² European Convention for the Protection of Human Rights and Fundamental Freedoms, 4 November 1950, 213 U.N.T.S. 221.

⁵³ American Convention on Human Rights, 22 November 1969, O.A.S.T.S. 36, OEA7Ser.L/V/II.23 doc.rev.2.

⁵⁴ International Covenant on Civil and Political Rights (ICCPR), 1966, 999 U.N.T.S. 171.

⁵⁵ Convention on the Elimination of All Forms of Discrimination against Women, 18 December 1979, 1249 U.N.T.S. 13.

Treaties.⁵⁶ This is, however, not uncontroversial because the committees themselves have not indicated such a wide scope.⁵⁷

Customary International Law

The content and formation of customary international law is highly controversial and much discussed in legal doctrine. Custom emerges from a general, continual and uniform practice of states (*usus*), accompanied by a belief that such practice is required by the rule of law (*opinio iuris*).⁵⁸ The regularity of the repeated acts of states generates a sense of legal obligation. It therefore rests on the implicit consent of states as they engage in, or acquiesce in, a particular practice. The ICJ in its *North Sea Continental Shelf Case* asserted that state practice must be virtually uniform, extensive and representative.⁵⁹ Different states must not have engaged in substantially divergent conduct.⁶⁰ However, state conduct that contradicts a rule may confirm it, if accompanied by attempts to justify the act.⁶¹

⁵⁶ Vienna Convention on the Law of Treaties, 23 May 1969, 1155 U.N.T.S 331. Scheinin, Martin, *Human Rights Treaties and the Vienna Convention on the Law of Treaties: Conflict or Harmony?*, in *The Status of International Treaties on Human Rights*, Venice Commission, Council of Europe, September 2006, p. 52. See Article 31 (3) (b) of the VCLT, which holds that a general rule of interpretation of a treaty constitutes “any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation”. Such documents accordingly entail such “subsequent practice”.

⁵⁷ See e.g. CCPR/C/SR.1406, para. 3. Yearbook of the International Law Commission, UN Doc. A/CN.4/SER.A/1996/Add.I (Part I), (1996), para. 240, Steiner, Henry, *Individual Claims in a World of Massive Violations: What Role for the Human Rights Committee?*, p. 17 ff, Buergenthal, Thomas, *The U.N. Human Rights Committee*, Max Planck Yearbook of United Nations Law, Vol. 5, (2001), p. 397. It is, however, correct that an incentive exists for other member states than solely those for which the view or concluding observation concerns to adjust its behaviour, in order not to also be found in breach of the treaty in question.

⁵⁸ *North Sea Continental Shelf Cases*, (Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands), Judgment of 20 February 1969, para. 77.

⁵⁹ *Ibid*, para. 74.

⁶⁰ However, contrary practice does not prevent the formation of a rule of customary law if it is condemned by other states or denied by the government itself. See International Court of Justice, *Case Concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States)*, Judgment of 27 June 1986, para. 186.

⁶¹ *ICRC Study on Customary International Humanitarian Law*, Introduction, p. xxxvii. See also Werle, Gerhard & Jessberger, Florian, *Principles of International Criminal Law*, p. 47.

The practice does not have to be universal, but it is sufficient that it is “general”.⁶²

State practice may take various forms, including diplomatic contacts, public statements by government officials, legislative and executive acts, military manuals, treaties, decisions of international and national courts, and declarations and resolutions of international organisations.⁶³ International organisations now participate alongside states in creating customary norms. Their acts may be a part of developing practice and also constitute evidence of *opinio iuris*.⁶⁴ However, the significance and implications of a particular document varies greatly. As concerns the resolutions of e.g. the UN Security Council, it will depend on whether the text purports to confirm existing law or simply recommends appropriate action. The number of states voting for and against a resolution is also relevant.⁶⁵

Treaties can generate rules of customary international law and bind states beyond those that have ratified the document. The extent of ratification of a

⁶² International Law Association, Final Report of the Committee on the Formation of Customary (General) International Law, Statement of Principles Applicable to the Formation of General Customary International Law, Report of the Sixty-Ninth Conference, London, 2000, p. 10. The Restatement of the Foreign Relations Law of the United States specifies: “The practice necessary to create customary law may be of comparatively short duration, but...it must be ‘general and consistent’. A practice can be general even if it is not universally followed but it should reflect wide acceptance among the states particularly involved in the relevant activity.” See Restatement of the Law, Third, Foreign Relations Law of the United States, (1987), The American Law Institute, Chapter 1-International Law: Character and Sources, § 102, Comments & Illustrations (b), Practice as customary law. According to Jean-Marie Henckaerts, the criterion is qualitative rather than quantitative, i.e. not a question of how many states participate, but which states, also noted by the ICJ in that it must “include that of States whose interests are specially affected”. See Henckaerts, Jean-Marie, *Study on Customary International Humanitarian Law: A Contribution to the Understanding and Respect for the Rule of Law in Armed Conflict*, International Review of the Red Cross, Vol. 87, No. 857, (March 2005) and *North Sea Continental Shelf Cases*, ICJ, para. 74.

⁶³ Dunoff, Ratner, Wippman, *International Law, Norms, Actors, Process, A Problem-Oriented Approach*, p. 74. See also Werle, Gerhard & Jessberger, Florian, *Principles of International Criminal Law*, p. 52.

⁶⁴ Gallant, Kenneth, *The Principle of Legality in International and Comparative Criminal Law*, Cambridge University Press, (2009), p. 306.

⁶⁵ Dunoff, Ratner, Wippman, *International Law, Norms, Actors, Process, A Problem-Oriented Approach*, p. 75.

treaty may be relevant to ascertain a customary norm.⁶⁶ The ICJ has stated: “multilateral conventions may have an important role to play in recording and defining rules deriving from custom, or indeed in developing them”.⁶⁷ Additionally, the Statutes of the ICTY and ICTR are also acts of an international organisation as they were established pursuant to UN Security Council resolutions.⁶⁸ The case law of the *ad hoc* tribunals can thus arguably be seen as practice in evincing customary international law. However, though the decisions may *contribute* to customary law, it is generally asserted that they do not in themselves create binding rules of international law.⁶⁹

Concerning the subjective element of *opinio iuris*, because states rarely act with express reference to international law, it is difficult to ascertain whether or not the practice has arisen out of a sense of obligation and it must often be inferred from the nature and circumstances of the practice.⁷⁰ Often the same act

⁶⁶ See International Court of Justice, *North Sea Continental Shelf Cases*, 20 February 1969, para. 73 and International Court of Justice, *Case Concerning Military and Paramilitary Activities in and against Nicaragua*, 27 June 1986, para. 188. Another important factor in the decision of the Court was that the relevant UN General Assembly resolutions had been widely approved, in particular Resolution 2625 (XXV) on friendly relations between States, which was adopted without a vote. See also *ICRC Study on Customary International Humanitarian Law*, p. xlii-xliv, Steiner, Henry, Alston, Philip & Goodman, Ryan, *International Human Rights in Context, Law, Politics, Morals*, 3rd ed., p. 74.

⁶⁷ International Court of Justice, *Case Concerning the Continental Shelf*, Judgment of 3 June 1985, para. 27. The treaty may be drafted to reflect customary law, the negotiating process may crystallise a customary rule or a treaty provision may subsequently become accepted as custom. See paras. 60-82. Inherent problems, however, lie in discerning international customary law stemming from treaty law, since state practice may be related to the treaty obligations and not the customary status. See Betlehem, Daniel, *The Methodological Framework of the Study*, in *Perspectives on the ICRC Study on Customary International Humanitarian Law*, eds. Elizabeth Wilmshurst, Susan Carolyn Breau, Cambridge University Press, (2007), p. 8.

⁶⁸ However, the judgments of the tribunals are independent of the will of the individual states. See UN S.C. Res. 827 on Establishing an International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia, UN Doc. S/RES/827, 25 May 1993 and S.C. Res. 955 on Establishment of an International Tribunal and adoption of the Statute of the Tribunal (ICTR), UN Doc. S/RES/955, 8 November, 1994.

⁶⁹ Gallant, Kenneth, *The Principle of Legality in International and Comparative Criminal Law*, p. 348. Bantekas, Ilias, *Reflections on Some Sources and Methods of International Criminal Law and Humanitarian Law*, 6 Int'l Crim. L. Rev. 121, (2006), p. 130.

⁷⁰ *ICRC Study on Customary International Humanitarian Law*, Introduction, p. xxxix-xlii. See, also, Dunoff, Ratner, Wippman, *International Law, Norms, Actors, Process, A Problem-Oriented Approach*, p. 75.

reflects both a practice and legal conviction.⁷¹ Statements such as UN resolutions can thus be seen as evidence of both criteria. *Opinio iuris* plays an important function in international criminal law, as this regime has suffered from a lack of willingness on the part of states to implement penal norms. A general commitment to the norms is accompanied with a widespread reluctance of state prosecution.⁷² This was also emphasised in the *Tadic* case of the ICTY.⁷³

The modern interpretation of custom is essentially conducted through a deductive process, focusing primarily on *opinio iuris* in the form of texts and statements, e.g. UN General Assembly declarations or treaties, rather than on practice. Thus modern custom is able to develop more rapidly since it can be deduced from various statements and documents in the international fora.⁷⁴ Frederic Kirgis asserts that state practice and *opinio iuris* operate along a sliding scale requiring greater consistency in state practice where there is little *opinio iuris*, while tolerating contradictory behaviour where there is greater consensus regarding its illegality. Accordingly: “the more destabilizing or morally distasteful the activity...the more readily international decision-makers will substitute one element for the other”.⁷⁵ Certain authors argue the important role of human dignity as a standard in measuring customary norms. Oscar Schachter,

⁷¹ Henckaerts, Jean-Marie, *Study on Customary International Humanitarian Law: A Contribution to the Understanding and Respect for the Rule of Law in Armed Conflict*, p. 182. For example, military manuals count as state practice and often reflect the legal conviction of the state at the same time.

⁷² Werle, Gerhard & Jessberger, Florian, *Principles of International Criminal Law*, p. 47.

⁷³ *Prosecutor v. Dusko Tadic aka "Dule" (Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction)*, IT-94-1, ICTY, Judgment of 2 October 1995, para. 99. The Tribunal thus relied on official pronouncements of states, military manuals and judicial decisions. In the *Krstic* case, the ICTY looked at treaties, case law of the ICTR, ILC drafts, reports of UN institutions such as the UN Human Rights Commission, the Rome Statute and domestic legislation. *Prosecutor v. Radislav Krstic*, Case No. IT-98-33-T, ICTY, Judgment of 2 August 2001, para. 541 ff.

⁷⁴ Reydam, Luc, *Universal Jurisdiction, International and Municipal Legal Perspectives*, Oxford University Press, (2003), pp. 7-8.

⁷⁵ Kirgis, Frederic, *Custom on a Sliding Scale*, AJIL, (1987), p. 149. See e.g. the Permanent Court of International Justice, *Lotus Case (France v. Turkey)*, Judgment of 7 September 1927, PCIJ Ser. A, No. 10, p. 28 (States had not abstained from prosecuting wrongful acts aboard ships because they felt prohibited from doing so); International Court of Justice, *North Sea Continental Shelf Cases*, pp. 43-44. Also Jean-Marie Henckaerts notes that *opinio iuris* becomes especially important in cases where the practice is ambiguous, which is often the case of omissions. See Henckaerts, Jean-Marie, *Study on Customary International Humanitarian Law: A Contribution to the Understanding and Respect for the Rule of Law in Armed Conflict*, p. 182. The Kirgis sliding scale was e.g. mentioned in the *ICRC Study on Customary International Humanitarian Law*, Introduction p. xlii.

for instance, maintains that statements of condemnation are sufficient evidence of a customary norm if the conduct in question transgresses the basic concept of human dignity.⁷⁶ However, all human rights find their basis in human dignity, rendering this distinction somewhat redundant.

The vast expansion in international law and the promulgation of documents has made the determinacy of customary international law difficult. As Robert Jennings contends: “there are now so many vehicles for the expression of *opinio juris* - digests of State practice and opinion, resolutions of innumerable inter-governmental and non-governmental organisations or *ad hoc* conferences, and of the General Assembly itself - that it is increasingly difficult to say with any conviction what is *lege lata* and what is *lege ferenda*”.⁷⁷ The ICJ has stressed the importance of norm-generating, as opposed to aspirational language, in documents as evidence of custom.⁷⁸ As Charlesworth and Chinkin assert, language such as that in the Declaration on the Elimination of Violence against Women can only be seen as aspirational, in that it employs such vague expressions as “states *should* condemn violence against women”.⁷⁹

This thesis aims partly at analysing whether the prohibition *per se* of rape and a particular definition of the crime have developed into customary international law, as evidenced through treaty law, judicial decisions of international and regional tribunals, courts and treaty bodies, as well as UN resolutions and soft law documents.

General Principles

General principles of international law as a source concern legal principles derived from the world’s major legal systems.⁸⁰ A review may be conducted of representative legal systems to evince specific rules that are sufficiently widespread and considered to be “recognised by civilized nations”.⁸¹ The ICTY has noted:

⁷⁶ Schachter, Oscar, *International Law in Theory and Practice: General Course in Public International Law*, p. 336.

⁷⁷ Jennings, Robert, *What is International Law and How Do We Tell it When We See it?*, in Koskeniemi, Martti, *Sources of International Law*, Ashgate, (2000), p. 35.

⁷⁸ *North Sea Continental Shelf Cases*, para. 72.

⁷⁹ Charlesworth, Hilary & Chinkin, Christine, *The Boundaries of International Law: A Feminist Analysis*, p. 74. Emphasis added.

⁸⁰ See Schachter, Oscar, *International law in Theory and Practice*, Martinus Nijhoff, (1991), p. 50.

⁸¹ Art. 38 (1) (c) of the Statute of the International Court of Justice, United Nations 18 April 1946. The presumption exists that all member states to the UN are considered “civilized”. See Bassiouni, Cherif, *A Functional Approach to General Principles of International Law*, p. 768.

“Whenever international criminal rules do not define a notion of criminal law, reliance upon national legislation is justified, subject to the following conditions: (i)...international courts must draw upon the general concepts and legal institutions common to all the major legal systems of the world...; (ii)account must be taken of the specificity of international criminal proceedings when utilising national law notions. In this way a mechanical importation or transposition from national law into international criminal proceedings is avoided.”⁸²

General principles have been described as the “cardinal principles” of legal systems and “a core of legal ideas”.⁸³ It is described as an enigmatic source, due, at times, to a lack of transparency in its application.⁸⁴ As opposed to customary international law, evidence of general principles is not located primarily in international practice but rather in national legal systems.⁸⁵ The rule does not necessarily have to meet a test of universal acceptance and it has never been

⁸² *Prosecutor v. Furundzija*, Judgment of 10 December 1998, para. 178. See also the discussion by Judge McDonald and Judge Vohrah in *Erdemovic*: “Although general principles of law are to be derived from existing legal systems, in particular, national systems of law, it is generally accepted that the distillation of a ‘general principle of law recognised by civilised nations’ does not require the comprehensive survey of all legal systems of the world as this would involve a practical impossibility and has never been the practice of the International Court of Justice or other international tribunals...In light of these considerations, our approach will necessarily not involve a direct comparison of the specific rules of each of the world’s legal systems, but will instead involve a survey of those jurisdictions whose jurisprudence is, as a practical matter, accessible to us in an effort to discern a general trend, policy or principle underlying the concrete rules of that jurisdiction which comports with the object and purpose of the establishment of the International Tribunal.” See *Prosecutor v. Erdemovic*, IT-96-22-A, ICTY, Appeals Chamber Judgment, Joint Separate Opinion of Judge McDonald and Judge Vohrah, 7 October 1997, para. 57.

⁸³ Bassiouni, Cherif, *A Functional Approach to General Principles of International Law*, p. 770.

⁸⁴ Jennings, Robert, *What is International Law and How Do We Tell it When We See it?*, p. 39.

⁸⁵ Schabas, William, *The UN International Criminal Tribunals: The Former Yugoslavia, Rwanda and Sierra Leone*, Cambridge University Press, (2006), p. 102. See, also, Fastenrath, Ulrich, *Relative Normativity in International Law*, p. 168, Schachter, Oscar, *International law in Theory and Practice*, p. 50. According to Bassiouni, general principles function as 1) a source of interpretation of conventions and customary international law, 2) as a means for developing new norms of conventional and customary law, 3) as a supplemental source to the above mentioned and 4), a modifier of such sources. See Bassiouni, Cherif, *A Functional Approach to General Principles of International Law*, p. 776. However, national judgments can also provide evidence of *opinio iuris* or count as state practice when determining the scope of customary international law. See Ferdinandusse, Ward N., *Direct Application of International Criminal Law in National Courts*, Asser, (2006), p. 6.

indicated whether or not the principle should reach a certain quantitative or numerical test.⁸⁶ In the jurisprudence of the *ad hoc* tribunals, a balance between common law and civil law states has, however, been indicated as an important factor.⁸⁷

General principles have been of considerable significance to international criminal law,⁸⁸ which in its current form has depended materially on national criminal law in the form of institutions, processes and substantive regulations and penalties.⁸⁹ The result has been a mixture of the various legal traditions from which inspiration derives, i.e. both common law and civil law systems. General principles to a certain extent have also been applied within the European human rights context, by way of the margin of appreciation method of interpretation.

One must, however, be cautious not to apply principles that arise from the domestic legal structure interchangeably with those of the international system, and to recognise the major differences that exist. Jennings observes a trend viewing this category of source as “a blank check to go delving among selected municipal laws: a sort of comparative lawyer’s charter”.⁹⁰ The distinct characteristics of the arrangements include their values, philosophies, aims, subjects, norm-creation, enforcement mechanisms and their processes.⁹¹ An important limitation is thus that municipal laws should not be imported as a matter of course and that the principle in question must be appropriate for application in international law.⁹² For instance, Judge McNair in a separate opinion of the ICJ noted:

“The way in which international law borrows from this source is not by means of importing private law institutions ‘lock, stock and barrel’, ready-made and fully equipped with a set of rules... The true view of the duty of international tribunals in this matter is to regard any features or terminology which are reminiscent of the rules and institutions of

⁸⁶ Bassiouni, Cherif, *A Functional Approach to General Principles of International Law*, p. 788.

⁸⁷ *Prosecutor v. Furundzija*, Judgment of 10 December 1998, para. 178.

⁸⁸ Werle, Gerhard & Jessberger, Florian, *Principles of International Criminal Law*, p. 47.

⁸⁹ Cryer, Friman, Robinson & Wilmschurst, *An Introduction to International Criminal Law and Procedure*, p. 12, and p. 64.

⁹⁰ Jennings, Robert, *What is International Law and How Do We Tell it When We See it?*, p. 41.

⁹¹ Bassiouni, Cherif, *The Philosophy and Policy of International Criminal Justice*, in Man’s Inhumanity to Man, Essays on International Law in Honour of Antonio Cassese, ed. by Lal Chand Vohrah, Fausto Pocar, Yvonne Featherstone etc., Kluwer Law International, (2003), p. 65.

⁹² Schachter, Oscar, *International Law in Theory and Practice: General Course in Public International Law*, p. 79.

private law as an indication of policy and principles rather than as directly importing these rules and institutions.”⁹³

The ICJ has also further stated:

“In this field international law is called upon to recognize institutions of municipal law that have an important and extensive role in the international field. This does not necessarily imply drawing any analogy between its own institutions and those of municipal law, nor does it amount to making rules of international law dependent upon categories of municipal law.”⁹⁴

International law can also be used as a source to derive general principles, to the extent that it represents the principles of municipal laws. This is evidenced through e.g. UN General Assembly and Security Council resolutions. To a certain degree, this source thus overlaps with customary law, e.g. when an *opinio iuris* exists but not the requisite practice. Bassiouni’s view is that if a principle exists in most national laws, it is inherently part of the structure of international law.⁹⁵

General principles as a source of international law are growing in prominence. Bassiouni has recorded that increasing global interdependence has exposed the inadequacies of international treaty and customary law – for instance, in the

⁹³ *International Status of South West Africa*, ICJ 146, Judgment of 11 July 1950, Judge McNair, separate opinion, p. 148.

⁹⁴ *Barcelona Traction Case*, 5 February 1970, p. 33, para. 38. See also *Prosecutor v. Kupreskic*, Case No. IT-95-16-T, ICTY, Judgment of 14 January 2000, para. 677: “General principles of international criminal law, whenever they may be distilled by dint of construction, generalisation or logical inference, may also be relied upon. In addition, it is now clear that to fill gaps in international customary and treaty law, international and national criminal courts may draw upon general principles of criminal law as they derive from the convergence of the principal penal systems of the world. Where necessary, the Trial Chamber shall use such principles to fill any lacunas in the Statute of the International Tribunal and in customary law. However, it will always be necessary to bear in mind the dangers of wholesale incorporation of principles of national law into the unique system of criminal law as applied by the International Tribunal.”

⁹⁵ Bassiouni, Cherif, *A Functional Approach to General Principles of International Law*, pp. 768, 773. He notes that courts have not always been clear on the distinction between customary law and general principles. See *ibid*, p. 791. Bruno Simma and Philip Alston note the reciprocal relationship of general principles and domestic law, stating: “Principles brought to the fore in this ‘direct’ way...would (and should) then percolate down into the domestic fora, instead of being elevated from the domestic level to that of international law by way of analogy”. Simma, Bruno & Alston, Philip, *The Sources of Human Rights Law: Custom, Jus Cogens and General Principles*, 12 Aust. YBIL 82, (1988-1989), p. 102.

human rights field, and that general principles may become “the most important and influential source of international law”.⁹⁶ The extensive use of national law by way of reference has thus been caused by necessity because of the lacunas found in international law.⁹⁷

General fears of an arbitrary and subjective application of principles have been raised.⁹⁸ However, it is generally understood that international tribunals will not create new rules, but rather bring latent rules ones to light by empirical means.⁹⁹ Charlesworth and Chinkin note unease that the use of general principles could result in existing prejudices in domestic laws simply being transposed into the international law system, e.g. structural gender discrimination.¹⁰⁰ Additionally, it has been observed that the principles might well lead to confusion since the different concepts and definitions used by the various actors might reflect their own legal systems.¹⁰¹

The use of general principles of international law as a source has been particularly useful in the analysis of the definition of rape by international tribunals – such as the ICTY and ICTR and the ECtHR, as a result of the fact that no definition of the crime existed prior to their adjudications of the subject. In such contexts the primary recourse has been principles of domestic laws on the prohibition of rape.

Judicial Decisions

Judicial decisions and doctrine do not pronounce rules but serve as means of interpretation, thus providing a “law-determining” function.¹⁰² Though judicial decisions are solely a subsidiary means for determining rules of law, the novelty

⁹⁶ Bassiouni, Cherif, *A Functional Approach to General Principles of International Law*, p. 769.

⁹⁷ Boot, Machteld, *Genocide, Crimes against Humanity, War Crimes: Nullum Crimen Sine Lege and the Subject Matter Jurisdiction of the International Criminal Court*, Intersentia, (2002), p. 77.

⁹⁸ Bassiouni, Cherif, *A Functional Approach to General Principles of International Law*, p. 783.

⁹⁹ Ibid, p. 784.

¹⁰⁰ Charlesworth, Hilary & Chinkin, Christine, *The Boundaries of International Law: A Feminist Analysis*, p. 79.

¹⁰¹ Boot, Machteld, *Genocide, Crimes against Humanity, War Crimes: Nullum Crimen Sine Lege and the Subject Matter Jurisdiction of the International Criminal Court*, p. 57. Boot notes: “Confusion increases where differences between the various national, or international, jurisdictions are more profound”.

¹⁰² Bassiouni, Cherif, *A Functional Approach to General Principles of International Law*, p. 782.

of acknowledging sexual violence as a concern of international law has led to developments occurring primarily in sources outside of treaties. Such decisions have helped to interpret treaty regulations and have accorded substance to norms in international law that are frequently abstract in nature. As Gallant argues, though the ICJ Statute considers judicial opinions to be a subsidiary source, in international criminal law judgments are a primary, if not *the* primary, source of law.¹⁰³ This is not surprising considering the general lack of treaties in this body of law. It is generally understood that decisions by e.g. the *ad hoc* tribunals do not constitute state practice, since the tribunals are not state organs, but a finding by an international tribunal of a customary rule constitutes persuasive evidence of such a fact. The decisions may also contribute to the emergence of a customary rule by influencing state practice.¹⁰⁴

It is important to note that unlike in domestic legal systems, there is no binding precedent in international law since there is no hierarchy of courts, and various courts and tribunals do not find themselves bound by their own previous case law.¹⁰⁵ As will be further discussed, the *ad hoc* tribunals have made plain that while the *stare decisis* principle is not as prominent in international law as in domestic legal systems, for reasons of consistency and predictability, the tribunals should strive to not significantly depart from previous case law, unless such departure is in the interests of justice.¹⁰⁶ The tribunals frequently refer to a broad range of judicial authorities as well, such as the case law of the ECtHR,

¹⁰³ Gallant, Kenneth, *The Principle of Legality in International and Comparative Criminal Law*, p. 349. See, also, Cryer, Friman, Robinson & Wilmschurst, *An Introduction to International Criminal Law and Procedure*, p. 64. Bantekas, Ilias, *Reflections on Some Sources and Methods of International Criminal Law and Humanitarian Law*, p. 129, van Schaack, Beth, *Crimen Sine Lege: Judicial Lawmaking at the Intersection of Law and Morals*, ExpressO, (2008), p. 48, Cryer, Robert, *Of Custom, Treaties, Scholars and the Gavel: The Influence of the International Criminal Tribunals on the ICRC Customary Law Study*, p. 244.

¹⁰⁴ *The ICRC Study on Customary International Humanitarian Law*, p. xxxiv, Henckaerts, Jean-Marie, *Study on Customary International Humanitarian Law: A Contribution to the Understanding and Respect for the Rule of Law in Armed Conflict*, p. 179, *Prosecutor v. Kupreskic*, Judgment of 14 January 2000, para. 540. This has been criticised by Robert Cryer, arguing that the persuasive nature of case law ought to depend on the quality of the decisions by tribunals. See Cryer, Robert, *Of Custom, Treaties, Scholars and the Gavel: The Influence of the International Criminal Tribunals on the ICRC Customary Law Study*, p. 251.

¹⁰⁵ Fitzmaurice, Sir Gerald, *Some Problems Regarding the Formal Sources of International Law*, in Koskeniemi, Martti, *Sources of International Law*, Ashgate, (2000), p. 170. See, also, *Prosecutor v. Kupreskic*, Judgment of 14 January 2000, para. 540. See more in Chapter 4.1 on the discussion on the principle of legality.

¹⁰⁶ See Chapter 4.1 and e.g. *Prosecutor v. Zlatko Aleksovski*, Appeals Chamber Judgment of 24 March 2000, IT-95-14/1-A, ICTY, para. 107.

UN Committees and IMT/IMTFE, not as binding precedents but as “persuasive and compelling authorities, deserving of serious consideration”.¹⁰⁷ Judge Shahabuddeen of the ICTR has e.g. stated: “so far as international law is concerned, the operation of the desiderata of consistency, stability, and predictability does not stop at the frontiers of the Tribunal...The Appeals Chamber cannot behave as if the general state of the law in the international community whose interests it serves is none of its concern”.¹⁰⁸ The practice of the *ad hoc* tribunals has, however, been described as one of “judicial selectivity and law-shaping”, where judges have felt compelled to provide legal gravity to their arguments on international customary law by referring to random judicial decisions of other courts or tribunals.¹⁰⁹

This thesis makes extensive reference to the case law of the *ad hoc* tribunals and regional human rights courts as a subsidiary source of law and as an interpretation of treaty regulations, but also as evidence of emerging customary international law. Because of the novelty of acknowledging rape as a violation of international law, the interpretation of the substance of the prohibition of rape has mainly been conducted in such adjudicatory bodies.

Doctrine

Doctrine is relied upon to diversify argumentation, highlight discussions and expose problems in the matters discussed. The authors represent a host of

¹⁰⁷ Schabas, William, *The UN International Criminal Tribunals: The Former Yugoslavia, Rwanda and Sierra Leone*, p. 110. Antonio Cassese has directed criticism at the *ad hoc* tribunals’ embracing of the jurisprudence of the ECtHR. Cassese, Antonio, *The Influence of the European Court of Human Rights on International Criminal Tribunals - Some Methodological Remarks*, in Human Rights and Criminal Justice for the Downtrodden, Essays in Honour of Asbjorn Eide, ed. Morten Bergsmo, Martinus Nijhoff, Leiden, (2003). International tribunals may only take into consideration the case law from other courts, such as the ECtHR, in order to demonstrate the existence of a customary rule or general principle of law. See *Prosecutor v. Kupreskic*, Judgment of 14 January 2000, para. 540. However, the tribunals have at times directly resolved the issue at hand by quoting the human rights courts or made such a reference in support of a conclusion they have already reached through other means of legal reasoning without indicating the basis or significance of making reference to national courts or human rights tribunals. Antonio Cassese warns that such an unregulated approach places “external” law to the international criminal court, i.e. national law or ECtHR case law, on the same level as international criminal law and fails to acknowledge its pre-eminence. Cassese, Antonio, *The Influence of the European Court of Human Rights on International Criminal Tribunals - Some Methodological Remarks*, pp. 21 & 24.

¹⁰⁸ *The Prosecutor v. Laurent Semanza*, ICTR-97-20-A, ICTR, Decision, Separate Opinion of Judge Shahabuddeen, 31 May 2000, para. 25.

¹⁰⁹ Bantekas, Ilias, *Reflections on Some Sources and Methods of International Criminal Law and Humanitarian Law*, p. 130.

discourses and are experts primarily in general public international law, international criminal law, IHL, international human rights law, national criminal law, and feminist legal studies.

Soft Law

A trend in international law is the growing promulgation of quasi-legal documents in the form of soft law.¹¹⁰ Soft law documents include UN General Assembly resolutions, declarations, agendas, programmes and platforms of action and general comments by UN organs, and are articulated in a non-binding form.¹¹¹ Traditional sources may be seen as being too rigid and slow in responding to current needs.¹¹² Soft law documents play an important part in international law, either as precursors to hard law or as supplements to hard law documents in resolving ambiguities or in filling in gaps.¹¹³ The relationship between hard law and soft law documents in international law can be described as a “dynamic interplay”,¹¹⁴ which is particularly common in the field of international human rights law in interpreting the extent of obligations.¹¹⁵ Such sources serve to provide a modern, contemporary reading of “hard law” documents that may not explicitly elaborate on the topic at hand.¹¹⁶ They thus fill the lacunas in international law and serve an interpretive role.¹¹⁷ Such documents have on occasion also provided statements of *opinio iuris* to an emerging customary norm and have assisted in specifying its content.¹¹⁸

¹¹⁰ Dunoff, Ratner, Wippman, *International Law, Norms, Actors, Process, A Problem-Oriented Approach*, p. 70.

¹¹¹ See e.g. Chinkin, Christine, *Normative Development in the International Legal System*, in *Commitment and Compliance: The Role of Non-Binding Norms in the International Legal System*, ed. Dinah Shelton, Oxford University Press, (2000), p. 30. Klabbers, Jan, *The Redundancy of Soft Law*, in Koskenniemi, Martti, *Sources of International Law*, Ashgate, (2000), p. 168.

¹¹² Dunoff, Ratner, Wippman, *International Law, Norms, Actors, Process, A Problem-Oriented Approach*, p. 87.

¹¹³ Ibid.

¹¹⁴ Shelton, Dinah, *Introduction: Law, Non-Law and the Problem of ‘Soft Law’*, p. 10.

¹¹⁵ Shelton, Dinah, *Commentary and Conclusions*, in *Commitment and Compliance: The Role of Non-Binding Norms in the International Legal System*, ed. Dinah Shelton, Oxford University Press, (2000), p. 449.

¹¹⁶ I denote treaties and customary international law as “hard law”.

¹¹⁷ Klabbers, Jan, *The Redundancy of Soft Law*, p. 168.

¹¹⁸ Shelton, Dinah, *Introduction: Law, Non-Law and the Problem of ‘Soft Law’*, p. 1. Dunoff, Ratner, Wippman, *International Law, Norms, Actors, Process, A Problem-Oriented Approach*, p. 89.

Formally, soft law documents are not binding and their function in international law is viewed with scepticism by some, considering their sheer magnitude, the doubtful authority of certain creators and the often general and vague language construction.¹¹⁹ Soft law is seen as a contradiction in terms, since it does not have any legal consequences. However, others point to a fertile relationship between hard and soft law. The international system is becoming more complex with a proliferation of documents and means of measuring standards. As Christine Chinkin argues, the inadequacies of treaties and custom as modes of international law-making are progressively exposed. This is due to the broadened subject-matter of international regulation, the growing importance of non-state actors and global challenges such as human rights violations that require “diversified forms and levels of law-making”.¹²⁰ These types of documents have been particularly important for the advancement of international law pertaining to violence against women, as the regime has been slow in acknowledging such concerns in treaty law and through custom. Reports by UN treaty bodies and special rapporteurs as well as conference platforms of actions have thus served to advance the discourse on women’s rights.

In the course of this study an array of soft law documents will be discussed. They include reports by the UN Special Rapporteurs, particularly on Violence against Women, UN declarations and resolutions, decisions and general comments by UN treaty organs and world conference statements such as the Beijing Platform for Action – all of which advance the discussion on the prohibition of sexual violence and the interpretation of its substance.

1.6 Method

The method chosen is first and foremost a traditional legal dogmatic approach. However, this is contextualised through additional perspectives in appropriate parts of the thesis, such as the feminist critique of international law.

The focus of this work is on international obligations of states to criminalise rape in domestic criminal law by way of international human rights law, international humanitarian law and international criminal law. As such, it principally applies a positivist method in examining the current law as promulgated by the traditional sources of international law. Positivists describe the law as it is, independent of moral and ethical considerations. International law consists of the rules upon which states have agreed through treaties and custom.¹²¹ The classic positivist view regards law as a unified system of rules

¹¹⁹ Dunoff, Ratner, Wippman, *International Law, Norms, Actors, Process, A Problem-Oriented Approach*, p. 89.

¹²⁰ Chinkin, Christine, *Normative Development in the International Legal System*, p. 22.

¹²¹ *Ibid*, p. 293.

emanating from state will. It relies heavily on the consent of states for its legal validity. Moral validity is thus not significant.¹²² It is in this manner an “objective” reality that does not indulge in *de lege ferenda* argumentation and considers “hard law” alone as real law, as opposed to soft law sources.¹²³ Contrary to the feminist legal method, which is unabashedly subjective, the positivist method attempts to reflect an objective review of the law. This approach differentiates between the law and such “personal prejudices and political motivations”.¹²⁴ It does not mean that the normative content of the rules is viewed as static. The content of rules is understood to be dynamic and can take on a different meaning over the passage of time.¹²⁵

However, the primary form of method employed in this thesis is a modern version of positivism. This version of positivism acknowledges that the interpretive tools of the sources of law have changed, adapting to new developments in international affairs. For example, evidence of “state practice” of customary law has arguably widened to include e.g. domestic legislation and judicial decisions, with increased importance of judgments from international tribunals.¹²⁶ This view also holds soft law to be an important device for interpreting the meaning of rules and for spurring on legal change.¹²⁷ The comparative positivist method in reviewing three different regimes in international law contextualises the approach to prohibiting and defining rape, since its nature in armed conflict as opposed to peacetime is noted.

The question is further contextualised through the application of feminist legal perspectives, reviewing the legal framework that exists in the frame of reference of its gendered construction and impact. The feminist legal method has solely been employed as an additional perspective in certain chapters and not as a consistent methodological approach. Whereas the positivist approach is directed at providing an objective analysis of legal sources, the feminist perspective, as intentionally subjective, provides a valuable critical viewpoint. This method does

¹²² Himma, Kenneth Einar, *Law, Morality, and Legal Positivism: Proceedings of the 21st World Congress*, Franz Steiner Verlag, (2004), p. 14, Raz, Joseph, *The Authority of Law: Essays on Law and Morality*, Oxford University Press, (1979), p. 38. According to the latter, positivists hold that law is a social fact and the identification of law does not involve moral arguments. Law’s conformity to morals and ideals is thus not necessary.

¹²³ Simma, Bruno, & Paulus, Andreas L., *The Responsibility of Individuals for Human Rights Abuses in Internal Conflicts: A Positivist View*, AJIL, Vol. 93, No. 2, (April 1999), p. 304.

¹²⁴ *Ibid*, p. 306.

¹²⁵ Fastenrath, Ulrich, *Relative Normativity in International Law*, p. 155.

¹²⁶ Simma, Bruno, & Paulus, Andreas L., *The Responsibility of Individuals for Human Rights Abuses in Internal Conflicts: A Positivist View*, p. 307.

¹²⁷ *Ibid*, p. 308.

not aim to lead to clear legal conclusions, but rather serves to challenge the perceived objectivity of international law.¹²⁸ Because of the, at times, clearly political agenda, this method may be perceived to be unscholarly.¹²⁹ Positivist authors such as Bruno Simma and Andreas Paulus take the view that the professionalism of lawyers dictates “the impartial mediation of attitudes, ideologies or conflicts”.¹³⁰ Feminist authors instead question the possibility of objectivity in the international law system, given its construction and historic exclusion of matters of particular concern to women.¹³¹

The feminist approach does not answer the main question of this thesis – that is, the extent of state obligations regarding the criminalisation of rape, but rather provides a critical evaluation of existing laws and gaps in the legal framework. This approach is also important from a historical standpoint since feminism has had a substantial influence and effect on the current approach in international law to the crime of rape.

The feminist legal method on international law examines its various layers from a gender perspective. The analysis of feminist scholars in relation to violence against women concentrates on “the structure of relationships in a male-dominated (patriarchal) culture, on power and on gender”.¹³² Beyond this precept, there is no uniform approach among feminists, rather “feminism is not a single ‘theory’, ‘school’ or ‘methodology’”.¹³³ Several approaches exist, including that of the liberal/equality feminist which seeks to eradicate the injustice towards women through means of advancing their equality and autonomy. The radical feminists, on the other hand, are of the opinion that many institutions in society support and stimulate gender oppression and that all states are hierarchically structured. This includes the gendered process of creating

¹²⁸ Charlesworth, Hilary, *Feminist Methods in International Law*, p. 379.

¹²⁹ Ibid, p. 380.

¹³⁰ Simma, Bruno, & Paulus, Andreas L., *The Responsibility of Individuals for Human Rights Abuses in Internal Conflicts: A Positivist View*, p. 316.

¹³¹ Charlesworth, Hilary, *Feminist Methods in International Law*, p. 392.

¹³² Quénivet, Noëlle, *Sexual Offenses in Armed Conflict & International Law*, Transnational Publishers, (2005), p. xi.

¹³³ Fellmeth, Aaron Xavier, *Feminism and International law: Theory, Methodology, and Substantive Reform*, 22 Human Rights Quarterly 663, (2002), p. 664. To a certain extent, the feminist analysis of international law has arguably ceased to develop and as Dobash notices: “the area of violence against women has become increasingly narrow and self-referential” and has resulted “in a reluctance to further develop new ideas”. See Dobash, R.E & Dobash, R.P, *Cross-Border Encounters: Challenges and Opportunities*, in *Rethinking Violence against Women*, eds. Dobash & Dobash, Sage Publications, London, (1998), p. 1. Accordingly, the focus remains on the doctrines of certain influential authors such as Charlesworth and Chinkin, and such critique as the public/private distinction.

international law, as well as the vocabulary of such norms.¹³⁴ Feminists hold that rights are “defined by the criterion of what men fear will happen to them.”¹³⁵ In consequence, the subject matter considered appropriate for international regulation reflects male priorities. In international law, the latter feminist approach takes the viewpoint asserts that the process of legal reform and the development of soft law documents take a distinctive male perspective in that women previously had long been excluded from the field of decision-making.¹³⁶ However, the development of women’s human rights has largely taken place through the operation of soft law documents owing to the exclusion from the sphere of hard law creation. An increased gender-sensitive interpretation of existing hard law documents can also be detected. A male perspective can nevertheless still be noticed.

The discriminatory impact of apparently neutral regulations is acknowledged, as well as silences in international law on violations suffered by women.¹³⁷ Basic concepts such as ‘state responsibility’ or ‘conflict’ are analysed to reveal a gendered nature.¹³⁸ The dual critique therefore analyses both how law is made and the content of existing regulations. Consequently:

”in law, asking the woman question means examining how the law fails to take into account the experiences and values that seem more typical of women than of men, for whatever reason, or how existing legal standards and concepts might disadvantage women. The question assumes that some features of the law may be not only nonneutral in a general sense, but also “male” in a specific sense. The purpose of the woman question is to expose those features and how they operate, and to suggest how they might be corrected”.¹³⁹

¹³⁴ Gender is seen as a social creation of how an individual is viewed, what characteristics are ascribed to the person and what role that person plays in society. Gender is partly linked to sex, which is the biologically determining factor of a person being male or female. See e.g. Charlesworth, Hilary, *Feminist Methods in International Law*, AJIL, Vol. 93, No. 2, (April 1999), p. 379.

¹³⁵ Charlesworth, Hilary, *What are “Women’s International Human Rights?”*, p. 71.

¹³⁶ Charlesworth, Chinkin, Wright, *Feminist Approaches to International Law*, 85 A.J.I.L. 613, (1991).

¹³⁷ Ratner, Steven & Anne-Marie Slaughter, *Appraising the Methods of International Law: A Prospectus for Readers*, p. 294, Charlesworth, Hilary, *Feminist Methods in International Law*, p. 381.

¹³⁸ Charlesworth, Hilary & Chinkin, Christine, *The Boundaries of International Law: A Feminist Analysis*, p. 49.

¹³⁹ Bartlett, Katharine, *Feminist Legal Methods*, 103 Harv. L. Rev. 829, (1990), p. 837. Thus: “In exposing the hidden effect of laws that do not explicitly discriminate on the basis of sex, the woman question helps to demonstrate how social structures embody norms that implicitly render women different and thereby subordinate.” Ibid, p. 843.

Within the realm of feminism, most pertinent to this thesis is the analysis of international law. Feminist theories of this branch of law measure the extent to which rights take into account the experiences of women and also the degree to which they are in reality available to women. Feminist legal scholars thus aim to discover the hidden gender of the construction of international law.

As will be discussed, CEDAW obliges states to eradicate laws that have a basis in gender stereotypes. As held by Rikki Holtmaat, in order to establish whether this is the case, it is important to conduct studies of what particular gender assumptions exist and whether the regulations reflect such.¹⁴⁰ It also helps to understand the intentions that lie beneath violence directed against women and sexual violence in particular, since one can only then construct legal sanctions that acknowledge relevant harms. Thus, the victim's experience and the perpetrator's intentions must be taken into account to evince the harm that the law seeks to prevent.¹⁴¹ However, this work moves beyond a strictly feminist legal method and applies a gender legal method where appropriate.¹⁴² This acknowledges that men are also gendered individuals and that both genders are affected by the offence of rape, albeit in different ways. While women form the majority of victims of rape, male rape also occurs. In many jurisdictions men are not acknowledged as victims in the definition of rape, e.g. by describing the *actus reus* in a manner that ascribes the role of perpetrator to men alone. This focus on both genders is, of course, not welcomed by all feminists, some who complain that it causes a "dilution" of the feminist knowledge. However, even with a "gender" perspective, feminism remains central to the method.¹⁴³

1.7 Structure of the Thesis

Part I constitutes an introduction of the subject as well as the methods and sources employed.

Part II: In order to enhance the discussion on international obligations to define rape, the thesis will initially introduce the subject of the history of the prohibition of rape at the domestic level, as well as present theories on the harm

¹⁴⁰ Holtmaat, Rikki, *Preventing Violence against Women: The Due Diligence Standard with Respect to the Obligation to Banish Gender Stereotypes on the Grounds of Article 5 (a) of the CEDAW Convention*, in *Due Diligence and its Application to Protect Women from Violence*, Martinus Nijhoff, (2008), p. 77.

¹⁴¹ Ni Aolain, Fionnuala, *Rethinking the Concept of Harm and Legal Categorizations of Sexual Violence During War*, 1 *Theoretical Inquiries L.* 307, (2000), p. 309.

¹⁴² Pilcher, Jane & Whelehan, Imelda, *50 Key Concepts in Gender Studies*, Sage Publications, (2004), p. xii, Svensson, Eva-Maria, *Genus och Rätt - En Problematisering av Föreställningen om Rätten*, Lustus, (1997), p. 19.

¹⁴³ *Ibid*, p. xii ff.

and elements of the crime. This will point to an evolution in the understanding of the harm of rape at both the domestic and international level, which has a direct bearing on its definition. The brief introduction to the elements of the offence in turn provides a clarification of terminology, which in turn has moral and legal implications for a particular definition. Because the discussion on the elements of the crime of rape at the international level is a rather novel endeavour, this section contains a mixture between legal theories on domestic criminal law, which is generally more advanced, and international criminal law. The importance of the principle of legality is emphasised and discussed in relation to international law. Sexual violence is also placed in the context of its role in armed conflict as opposed to peacetime, which informs the definition of rape. The feminist perspective on international law is also raised since it provides a valuable theoretical discussion not only on the definition of rape but also on possible lacunas in the international response.

Parts III and IV constitute the main divisions of the thesis – that is, the regulatory framework of international human rights law, international humanitarian law and international criminal law. These parts contain an evaluation of the sources of international law in order to ascertain whether a duty to criminalise rape exists for states and whether that obligation relates to a particular definition. The chapters thus analyse the obligation of states in relation to all three areas of law.

Part V discusses similarities and differences between the examined areas of law on a theoretical level, with particular attention paid to the structure of IHL and international human rights law, international criminal law to a certain extent being an amalgam of the two. The point of this chapter is to assess the rationale behind discrepancies in the approach between these branches of law to the definition of rape, but also torture, and to examine the question of whether a harmonisation between the regimes pertaining to these questions is possible or desirable.

Part VI briefly discusses the cultural relativist critique of international law, especially international human rights law, for the purpose of exposing in particular the reference to culture in the rejection of women's human rights. This will demonstrate obstacles in the process of crafting treaty regulations related to the sexual autonomy of the person, but also to enforcing such rights in practical ways in certain cultures. This, alongside the feminist critique, further contextualises the issue of the criminalisation of rape. These perspectives strive to transform human rights law to accommodate either a gender perspective or cultural diversity. As such, they agree on the same basic idea that human rights should apply to all individuals, regardless of gender and culture, and this should

not be achieved through neutrality of the law but rather by recognising the particulars of the group.¹⁴⁴

Part VII contains conclusions and an analysis of the presented material in addition to a general discussion on the subject matter. Suggestions for the future in the development in defining rape at the international level are furthermore included.

¹⁴⁴ Brems, Eva, *Enemies or Allies? Feminism and Cultural Relativism as Dissident Voices in Human Rights Discourse*, 19 Human Rights Quarterly 136, (1997), p. 154.

Part II: Elements of the Crime of Rape: A Contextual Approach

2. The Prohibition of Rape in Domestic Criminal Law: A Historic Overview

2.1 Introduction

The prohibition of rape in international law has been greatly influenced by domestic regulations of the offence. In fact, international recognition of the illegality of sexual violence largely stems from the worldwide criminalisation of the act.¹⁴⁵ This is particularly apparent in the case law of the regional human rights courts and *ad hoc* tribunals, which have largely based their definitions of rape on general principles of law arising from domestic criminal codes. The development of the criminalisation of rape is therefore also of interest to note on the national level.

Whereas the act of rape has been criminalised by various legal systems for over two millennia, the definition has continuously transformed at the national level according to society's understanding of sexual morality. Changes have foremost developed alongside societal views on the protective interest in criminal law during a particular era. Religious and cultural values in a society regarding sexuality are closely related to the general status of women and are continually re-evaluated. Which acts are deemed immoral and criminal is subject to change, but particularly restrictive approaches in recognising violations of women's rights have been persistently unyielding. The prohibition of rape has correlated strictly with the current status of women in society and therefore did not spark a comprehensive discussion of reform until the general women's movement in the 1970s in many Western states.¹⁴⁶ Initially viewed as a crime against the family and honour, an increasing number of states are recognising sexual violence as a violation of sexual autonomy and self-determination. The following introduction of the history of the criminalisation of rape serves to illustrate the definition of rape as an indication of gender-equality in society and demonstrates which social structures and ideas may inform its criminalisation. The chapter only briefly points to certain general trends in criminalising rape on

¹⁴⁵ Viseur Sellers, Patricia, *Sexual Violence and Peremptory Norms: The Legal Value of Rape*, p. 302.

¹⁴⁶ Spohn, Cassia & Horney Julie, *Rape Law Reform, A Grassroots Revolution and its Impact*, Plenum Press, (1992), p. 20.

the domestic level, with the historical aspects of international regulations included in the chapters on international law.¹⁴⁷

2.2 Early Codes: Rape as a Violation of Property Rights

The early criminalisation of rape in many states was directly tied to the social condemnation of non-marital consensual sex. Such laws primarily functioned as a way to determine whether a woman had a reasonable excuse for committing the wrongful acts of adultery or fornication. Women were considered legal minors in most Western states, the inequality between the sexes based in part on proposed biological reasons of strength and intellect.¹⁴⁸ In this context, rape devalued wives and daughters and threatened the patrilineal system of inheritance.¹⁴⁹ The role of criminal laws on rape was another form of social control to regulate the transfer of property.¹⁵⁰ If a woman was raped, compensation was thus paid to the appropriate male in charge, i.e. the woman's father or husband, with the sum depending on the woman's economic position and other determinative factors, with rape classified as a crime of theft.¹⁵¹ This was evident in the first written law prohibiting rape: the ancient Babylonian Code of Hammurabi around 1750 BC.¹⁵² In societies such as Babylonia and

¹⁴⁷ Due to difficulties in finding other sources, this historic overview is predominantly focused on the transformation of the view on the crime of rape in Western states.

¹⁴⁸ Clark, Lorene & Lewis, Debra, *Women, Property and Rape*, in *The Sociology of Crime and Deviance: Selected Issues*, ed. Susan Caffrey and Gary Mundy, Greenwich University Press, (1995), p. 151.

¹⁴⁹ Rhode, Deborah, *Justice and Gender: Sex Discrimination and the Law*, p. 244.

¹⁵⁰ *Ibid*, p. 154.

¹⁵¹ *Ibid*, p. 154. Dripps, Donald, *Beyond Rape: An Essay on the Difference Between the Presence of Force and the Absence of Consent*, 92 Colum. L. Rev. 1780, (1992), p. 1780, Sungi, Simeon, *Obligation Erga Omnes of Rape as a Ius Cogens Norm: Examining the Jurisprudence of the International Criminal Tribunal for the Former Yugoslavia, International Criminal Tribunal for Rwanda and the International Criminal Court*, p. 116, McNamee, Catherine, *Rape*, in *A Comparative Perspective on Major Social Problems*, ed. Rita James Simon, Lexington Books, (2001), p. 2.

¹⁵² Brundage, James, *Law, Sex, and Christian Society in Medieval Europe*, Chicago University Press, (1990), p. 10. In ancient Judaism, rape was also considered a civil wrong rather than a moral offence. The wrong was considered to be the theft from the rightful owner, i.e. her father, and thus decreased her value. The Old Testament book of Deuteronomy, the basis of ancient Hebrew law, provided that if an unmarried woman is married, the offender must pay a certain sum to the woman's father and marry the victim. The law also presumed a married woman who was raped to have committed adultery. Burgess-Jackson, Keith, *A Most Detestable Crime: New Philosophical Essays on Rape*, OUP (1999), p. 16. McNamee, Catherine, *Rape*, p. 3.

Assyria, the severity of the offence depended on the social and marital status of the victim.¹⁵³ Illicit sexual activities were divided into 1) adultery, 2) intercourse with an unmarried woman or widow or 3) such intercourse with coercion or force.¹⁵⁴ Consequently, rape of a virgin was an economic matter with characteristics of a property crime, whereas rape of a married woman often was viewed as an excuse to avoid execution for adultery.¹⁵⁵ Consent was solely an issue in so far as it delineated the various crimes, i.e. whether the act constituted adultery or rape. The difference lay in the severity of the punishment, depending on whether the woman was married, unmarried or widowed. In this sense, a woman's consent played a secondary role to that of her marital and social status. Rape within marriage was not a concept since a husband was presumed full access to his wife. It also appears that sex outside of marriage was presumed to be consensual. However, there was an exemption during times of war and robbery, since the deprivation of freedom negated the possibility of consent.¹⁵⁶

Similarly, under Roman law, rape was viewed as a property crime against the husband or father of the victim and the public's interest in punishing rape was a matter of regulating competing male interests in controlling sexual access to women.¹⁵⁷ The crime of *raptus* constituted capturing a woman through use of force. The woman was thus removed from the person under whose authority she lived.¹⁵⁸ As Roman law developed, *raptus* could either contain abduction *or*

¹⁵³ Rhode, Deborah, *Justice and Gender: Sex Discrimination and the Law*, p. 245.

¹⁵⁴ Laiou, Angeliki, *Sex, Consent and Coercion in Byzantium*, in *Consent and Coercion to Sex and Marriage in Ancient and Medieval Societies*, ed. Angeliki Laiou, Dumbarton Oaks, (1993), p. 111.

¹⁵⁵ Dripps, Donald, *Beyond Rape: An Essay on the Difference Between the Presence of Force and the Absence of Consent*, p. 1780, McNamee, Catherine, *Rape*, p. 3.

¹⁵⁶ Moses, Diana, *Livy's Lucretia and the Validity of Coerced Consent in Roman Law*, in *Consent and Coercion to Sex and Marriage in Ancient and Medieval Societies*, ed. Angeliki Laiou, Dumbarton Oaks (1993), p. 58. Abduction outside the city or tribe was seen as acceptable, since it was part of the spoils of war. McNamee, Catherine, *Rape*, p. 3.

¹⁵⁷ Roman law was based on the concept that each family had a *paterfamilias*, which was the head of the household and the eldest living male ancestor. The *paterfamilias* contained the legal and moral power of his descendants and owned all property. Borkowski, Andrew, *Textbook on Roman Law*, London (1994), p. 102. See also Dripps, Donald, *Beyond Rape: An Essay on the Difference Between the Presence of Force and the Absence of Consent*, 92 Colum. L. Rev. 1780, (1992), p. 1780. The word property is used in a metaphorical sense. Though women were not considered slaves that could be bought and sold, the economic value attached to women, e.g. through dowries and arranged marriages, put women in a position as property. See also Brundage, James, *Law, Sex, and Christian Society in Medieval Europe*, p. 14.

¹⁵⁸ Burgess-Jackson, Keith, *A Most Detestable Crime: New Philosophical Essays on Rape*, p. 16, Saunders, Corinne, *The Medieval Law of Rape*, 11 K.C.L.J. 19 (2000), p. 20. The Justinian classification of *raptus* thus included rape but was not a necessary element.

sexual relations by force, thus developing into a sexual crime. In general, apart from in warfare, the crime of rape was largely ignored and rape was treated as other forms of illicit sexual intercourse.¹⁵⁹ Certain categories of women could not be raped, e.g. prostitutes.¹⁶⁰ The Justinian Code extended protection to unmarried women, widows or nuns, who would be devalued by the act since “chastity once polluted cannot be restored.”¹⁶¹ Accordingly, women were not viewed as autonomous agents in relation to their sexuality since this was not their own commodity.

Whereas sexual activity under the Roman Empire was to be confined within either marriage or concubinage, in Byzantium the legal limits of sexual activity were further restricted and the ideal advanced by the church was that of the monogamous marriage. The canon of Balsamon stated that there is “only one form of legitimate sexual relationship between man and woman; everything outside that is illegitimate”.¹⁶² In Byzantine canon law, consent played a more prominent role than in Roman law.¹⁶³ The early codification in the *Ecloga* defined the crime as “illicit carnal knowledge without consent”.¹⁶⁴ It was envisaged that only certain categories of women could be raped: unmarried girls or nuns, i.e. not married or widowed women.¹⁶⁵ The Christian Church was an important influence in the development of the principle of individual responsibility and the concept of a person’s consent. At the same time, it enforced ideas of purity and embraced the evaluation of a woman’s general behaviour or prior history in judging the credibility of the particular act in question.¹⁶⁶ As regards the understanding of consent, the Byzantines appear to have placed a greater importance on objective rather than subjective factors. Circumstances such as weapons and accomplices, as well as the location of the

¹⁵⁹ Saunders, Corinne, *The Medieval Law of Rape*, p. 22.

¹⁶⁰ *Ibid*, p. 16.

¹⁶¹ *Ibid*, p. 21.

¹⁶² Laiou, Angeliki, *Sex, Consent and Coercion in Byzantium*, p. 132, Levin, Eve, *Sex and Society in the World of the Orthodox Slavs, 900-1700*, Cornell University Press, (1989), p. 217.

¹⁶³ Laiou, Angeliki, *Sex, Consent and Coercion in Byzantium*, p. 111.

¹⁶⁴ *Ibid*, p. 125.

¹⁶⁵ Burgess-Jackson, Keith, *A Most Detestable Crime: New Philosophical Essays on Rape*, p. 17, Levin, Eve, *Sex and Society in the World of the Orthodox Slavs, 900-1700*, Cornell University Press, (1989), p. 218 ff, Laiou, Angeliki, *Sex, Consent and Coercion in Byzantium*, p. 125.

¹⁶⁶ *Ibid*, p. 196.

act, were understood to negate free consent. Women had to offer the utmost resistance until near death since it was presumed that women could avoid rape.¹⁶⁷

2.3 The Middle Ages

The prohibition of rape evinced considerable interest in the early and late Middle Ages and most early criminal codes address rape to some extent.¹⁶⁸ As feudalism expanded in Europe and developed into organised cast-bound agricultural societies, laws prohibiting rape gradually underwent changes and acknowledged compensation directly to the rape victim.¹⁶⁹ However, since feudalism was a class-built social construction based on servitude, the laws distinguished between victims from different feudal classes and compensation was relative to the class to which the woman belonged. The injury to a servant would in this system be valued less than that of a woman as a ward of the king.¹⁷⁰

In the 12th century, the ecclesiastic legislators were the first to recognise the victim as an independent legal person, without reference to her social rank or guardian.¹⁷¹ The principle of personal responsibility was embraced by the church. Secular, alongside ecclesiastic, legislators began to transform the legal conceptions of sexual violence, and rape was defined as a crime against the person rather than against property. This was notable in the revision of the ancient laws of Rome by Gratian, who in his collection of canon law *Decretum* separated the crimes of property and against persons. Rape was defined as “unlawful coitus, related to sexual corruption”.¹⁷² Gradually four elements of rape evolved: abduction, coitus, violence and a lack of free consent on the part of the woman.¹⁷³ A burgeoning view of the woman’s autonomy therefore evolved along with the concept of individuals’ possession of rights without reference to

¹⁶⁷ Laiou, Angeliki, *Sex, Consent and Coercion in Byzantium*, p. 173. The psychological injury to the victimised woman was considered, but primarily as a form of harm to her marriage prospects.

¹⁶⁸ Saunders, Corinne, *The Medieval Law of Rape*, p. 20.

¹⁶⁹ Schwendinger, Julia and Herman, *Rape and Inequality*, Sage Publishers, (1983), p. 97.

¹⁷⁰ Ibid, p. 97.

¹⁷¹ Ibid, p. 102.

¹⁷² Burgess-Jackson, Keith, *A Most Detestable Crime: New Philosophical Essays on Rape*, p. 16.

¹⁷³ Schwendinger, Julia and Herman, *Rape and Inequality*, p. 102. The *Decretum Gratiani* is a collection of canon law compiled by Gratian. It forms the first part of six legal texts of the *Corpus Juris Canonici*, constituting the legal base of the Roman Catholic Church until 1917.

their social status. However, canon law still excluded marital rape.¹⁷⁴ According to Brundage, medieval canon law has played a central role in shaping laws pertaining to sexuality in Western countries, leading to an increased control by governments of sexual conduct, especially non-marital and extra-marital relations.¹⁷⁵

2.4 Corroboration of Complaints

The French revolution was important in recasting rape as a crime against the individual, rather than against a “guardian”, focusing on the injury rather than the theft, evident e.g. in the Penal Code of France in 1791. This was a result of the increased emphasis on self-determination.¹⁷⁶ However, this was in many respects solely a theoretical development, not equalled in practice.¹⁷⁷ The law that developed both in common law and civil law countries continued to limit the definition of rape to certain categories of individuals, most notably including a marital exemption and exclusion of the male victim. Justice Lord Hale of Britain in the seventeenth century proclaimed that “by their matrimonial consent and contract, the wife hath given up herself in this kind unto her husband, which she cannot retract”.¹⁷⁸ Black’s law dictionary also defined rape as “the act of sexual intercourse committed by a man with a woman not his wife”.¹⁷⁹ The notion that certain forms of rape were less harmful prevailed and continues to be reflected in

¹⁷⁴ Burgess-Jackson, Keith, *A Most Detestable Crime: New Philosophical Essays on Rape*, p. 17. One of the more liberal views on the rape victim, the Statutes of Westminster of England at the end of the 13th century provided that rape applied to all women, whether a virgin or married or a prostitute. A suit could be brought by the victim or the crown. See Cling, B.J., *Sexualized Violence against Women and Children*, The Guilford Press, (2004), p. 15. Rape was seen as a misdemeanour and entailed that no man should “ravish a maiden within age, neither by her own consent, nor without consent, nor a wife or maiden of full age, nor other women against her will”. This was modified in 1309 to recategorise rape as a felonious crime, solely focusing on the lack of consent: “If a man should ravish a woman, married, maiden, or other woman, where she did not consent, neither before nor after...”. Allison, Julie & Wrihstman, Lawrence, *Rape - The Misunderstood Crime*, Sage Publications, (1993), p. 196. Rape and abduction were seen as similar acts.

¹⁷⁵ Brundage, James, *Law, Sex, and Christian Society in Medieval Europe*, p. xx.

¹⁷⁶ Vigarello, Georges, *A History of Rape: Sexual Violence in France from the 16th to the 20th Century*, Polity, (2001), p. 88. It belonged to the code under the heading of “crimes and attacks against persons”.

¹⁷⁷ Vigarello, Georges, *A History of Rape: Sexual Violence in France from the 16th to the 20th Century*, p. 88.

¹⁷⁸ Hale, Matthew, *Historia Placitorum Coronae: The History of the Pleas of the Crown*, Vol. 1, Rider, (1800), p. 629.

¹⁷⁹ Black’s Law Dictionary Containing Definitions of the Terms and Phrases of American and English Jurisprudence, 3rd ed, 1933.

domestic views on the harm of rape.¹⁸⁰ For example, the legal reform in the 1950s in Sweden on the expansion of the definition of rape, allowed for lower punishment in cases of acquaintance rape or within marriage, thereby connecting the question of legal harm with the issue of culturally determined culpability.¹⁸¹ Harm was also in many cases understood as a violation of the honour of a woman or her family rather than an infringement of the physical and mental integrity of the victim. For example, in the eighteenth century rape was defined by Blackstone in the United Kingdom as “the carnal knowledge of a woman forcibly and against her will”.¹⁸² The injury caused was still that of the family, e.g. the law gave the victim the opportunity to nullify the perpetrator’s sentence through marriage and thereby portraying the family in a more favourable light.¹⁸³ Similar provisions were seen also in civil law systems. Though a coherent approach to the crime of rape cannot be traced in such states, most laws in Europe have come to focus on the use of force.¹⁸⁴

Criminal laws on rape that developed in many countries continued to be dominated by the perceived threat of female fabrication.¹⁸⁵ Because it was believed that women had an added incentive to fabricate complaints of sexual violence in order to explain premarital intercourse, infidelity, pregnancy or disease, for which the cost in most cultures is higher for women, rape should

¹⁸⁰ See more below on the discussion on harm in Chapter 3.

¹⁸¹ SOU 1953:14, Förslag till brottsbalk, avgivet av straffrättskommittén, p. 234.

¹⁸² Blackstone, Sir William, *Commentaries on the Laws of England: In Four Books*, 18th London ed, Vol. II, Book III and IV, Collins and Hannay (1823), p. 161.

¹⁸³ Dripps, Donald, *Beyond Rape*, p. 1780. The marital exemption still exists in a large number of countries.

¹⁸⁴ For example, the Swedish law in the 18th century coupled the requirement of force with the element of “against her will.” Missgärningsbalken, 22:1, 1736-1779. The punishment was death.

¹⁸⁵ As late as 1967, an article in the Columbia Law Review held that uncorroborated testimony of alleged victims should not be accepted, because “stories are frequently lies or fantasies”. See *Corroborating Charges of Rape*, 67 Columbia Law Review 1137, (1967), p. 1138. Temkin, in reviewing the treatment of the rape victim in the British justice system relays several instances where judges have demonstrated a belief in the view of the untruthful female complainant. In 1982, the Judge of the Crown Court in Cambridge instructed the jury: “Women who say no do not always mean no. It is not just a question of saying no, it is a question of how she says it, how she shows and makes it clear. If she doesn’t want it, she only has to keep her legs shut and she would not get it without force and there would be marks of force being used”. Judge David Wild, Cambridge Crown Court, 1982, cited in Jennifer Temkin, *Rape and The Legal Process*, p. 10.

accordingly be treated differently than other crimes.¹⁸⁶ As Justice Hale stated three centuries ago: "[rape is]...an accusation easily to be made and hard to be proved, and harder to be defended by the party accused, tho never so innocent".¹⁸⁷ One of the most influential lawyers in the field of evidentiary rules in the US of his time, John Wigmore, argued that "[n]o judge should ever let a sex-offense charge go to the jury unless the female complainant's social history and mental make-up have been examined and testified to by a qualified physician".¹⁸⁸ The legal standards were frequently influenced by medical experts asserting e.g. that women had the physical means to avoid rape if they wished, by using hands, limbs and pelvic muscles.¹⁸⁹ Anthropologists in the 1960's supported the idea that the average woman could not be raped. Margaret Mead declared that "by and large, within the same homogenous social setting an ordinarily strong man cannot rape an ordinarily strong healthy woman".¹⁹⁰ The beliefs also included the theory that a woman who became pregnant as a result of the claimed rape must have consented, regardless if she clearly expressed non-consent, since a woman could only conceive as a result of experiencing lust and excitement.¹⁹¹

¹⁸⁶ Wigmore argued regarding the testimony of female victims: "On the surface the narration is straightforward and convincing. The real victim, however, too often in such cases is the innocent man; for the respect and sympathy naturally felt by any tribunal for a wronged female helps give easy credit to such a plausible tale". *Wigmore, J. H, A Treatise on the Anglo-American System of Evidence in Trials at Common Law*, 3rd ed., Boston, Little, Brown, (James Chadhourn, revised ed. 1978), para. 924a. While provocative, it is important to not immediately dismiss the early scholarships on female fabrication. Considering the status of women at the time and the consequences of illegitimate sex, it is plausible the fear was not as ill-founded as it might seem. Women who engaged in non-marital sex risked prosecution for fornication and alleging rape was one of the few available defences. Lisa Cuklanz also proposes that "women had strong, socially based motivations to lie about rape...when a woman's character was so closely related to her reputation for chastity". Cuklanz, Lisa, *Rape on Trial*, University of Pennsylvania Press, (1996), p. 19.

¹⁸⁷ Hale, Matthew, *Historia Placitorum Coronae: The History of the Pleas of the Crown*, p. 634.

¹⁸⁸ Wigmore, John Henry, *Evidence in Trials at Common Law*, vol. 3A, sec. 924a.

¹⁸⁹ McGregor, Joan, *Is it Rape?: On Acquaintance Rape and Taking Women's Consent Seriously*, Ashgate (2005), p. 31. A judge e.g. argued that "rape cannot be perpetrated by one man alone on an adult woman of good health and vigor".

¹⁹⁰ Mead, Margaret, *Male and Female: A Study of the Sexes in a Changing World*, William Morrow & Co. Inc., (1949), p. 203.

¹⁹¹ Temkin, Jennifer, *Rape and the Legal Process*, Oxford University Press, (2002), p. 123.

Legal scholars and policymakers frequently referred to various psychoanalytical studies on the female psyche and sexuality, which concluded that women often desire or invent forced sex but as a result feel shame and guilt and declare it rape. An author in Yale Law Journal in the 1950s claimed that there is an “unusual inducement to malicious or psychopathic accusation inherent in the sexual nature of the crime [of rape]”.¹⁹² Furthermore, the note argued that women rarely know what they want nor are sincere and often require force to have a pleasurable experience.¹⁹³ Havelock Ellis, who revolutionised the view on sexuality in the beginning of the 20th century in the United Kingdom, concluded that a man has a natural need to feel dominant and the woman a desire to feel subordinate in sexual relations. It is in the woman’s nature to display a sense of shyness and offer resistance even though she in reality consents to the act.¹⁹⁴ Ellis concluded that men are characteristically active, aggressive, sexually insistent, and easily aroused.¹⁹⁵ His research has had a disconcerting impact on the legal system. John Wigmore supported the proposition that most women at some point entertain fantasies of rape and that it is “easy for some neurotic individuals to translate their fantasies into actual beliefs and memory falsifications”.¹⁹⁶ In this sense, since it was difficult to determine whether a woman sincerely meant no during sex, the requirement of physical resistance was encouraged, and not merely resistance through verbal protests or such “infantile behaviour as crying”.¹⁹⁷ As a result, many jurisdictions have at some stage necessitated a display of physical resistance on the part of the victim, requiring the victim to “resist to the utmost” or display “such earnest resistance as might reasonably be expected under the circumstances”.¹⁹⁸

¹⁹² *Forcible and Statutory Rape: An Exploration of the Operation and Objectives of the Consent Standard*, Yale Law Journal 62, No. 1 (1952), p. 61.

¹⁹³ *Ibid.*

¹⁹⁴ Larsson, Sara, “*Fina Flickor*” *Kan Inte Våldtas*, i Den Onda Cirkeln, ed. Görel Granström, Uppsala Publishing House, (2004) p. 144.

¹⁹⁵ Ellis, Havelock, *Studies in the Psychology of Sex*, Volume 3, (1927).

¹⁹⁶ Wigmore, J. H, *A Treatise on the Anglo-American System of Evidence in Trials at Common Law*, 3rd ed., Boston, Little, Brown, (1940).

¹⁹⁷ Rhode, Deborah, *Justice and Gender: Sex Discrimination and the Law*, p. 247.

¹⁹⁸ McGregor, Joan, *Is it Rape?: On Acquaintance Rape and Taking Women’s Consent Seriously*, p. 35, Anderson, Michelle, *Reviving Resistance in Rape Law*, U. Ill. L. Rev. 953, (1998). Cases from the 1800s exhibit an inherent distrust in the female victim and interpreted the resistance requirement harshly, e.g. the Wisconsin Supreme Court, which in *Brown v. State* held that the struggle and screaming by the victim in the case was not sufficient but: “there must be the most vehement exercise of every physical means or faculty within the woman’s power to resist the penetration of her person, and this must be shown to persist until the offense is consummated.” 127 Wisc. 106 N.W. 536, 538 (1906).

Additional corroboration requirements in many states consisted of evidence of the victim's past sexual history, either concerning the relationship with the perpetrator or his/her sexual history in general, in order to prove that the victim was of a bad character, e.g. a prostitute or promiscuous and therefore likely to have consented to the intercourse also in the case concerned. Historically, evidence of hitchhiking, smoking and excessive drinking as well as the wearing of seductive clothing and the use of bad language has also been of relevance as to the character of the victim, factors that still exist in various jurisdictions.¹⁹⁹ In certain countries the victim may even be required to submit to a medical examination to ascertain whether the victim was a virgin prior to the attack.²⁰⁰

The Supreme Court in Michigan in the same year also ruled that the victim must demonstrate that she "did everything she could under the circumstances to prevent defendant from accomplishing his purpose. If she did not do that it is not rape...The jury must find that she was overcome and overpowered, and that resistance must have continued from the inception of the case to the close, because if she yielded at any time it would not be rape". See *People v. Murphy*, 145 Mich. 524, 528, 108 N.W. 2d 1009, 1011, (1906). In a case in 1880 in the United States, evidence demonstrated that a woman's hands and feet had been held tight by the assailant and the victim was threatened by a revolver when she screamed. The Supreme Court of Wisconsin held that the perpetrator's threat to use his gun was merely "conditional upon her attempting again to cry out...The testimony does not show that the threat of personal violence overpowered her will, or...that she was incapable of voluntary action". *Whittaker v. State* (1880), 50 Wisconsin 519, 520, 522, cited in McGregor, Joan, *Is it Rape?: On Acquaintance Rape and Taking Women's Consent Seriously*, p. 30

¹⁹⁹ Temkin, Jennifer, *Rape and the Legal Process*, p. 9. The difficulties the victims face in the legal process and during the court proceedings are naturally a product of procedural rules, such as the sexual history of the victim and gender stereotypes, but also the definition of the crime itself affects the experience, determining the direction of the process. A non-consent based definition may lead to a different form of proceeding than a definition focusing on force.

Further, a judge in 1990 informed the jury that a verbal refusal of intercourse may not be intended in a serious manner and "[a]s the gentlemen on the jury will understand, when a woman says no she doesn't always mean it...Men can't turn their emotions on and off like a tap like some women can". Judge Raymond Dean, Old Bailey, 1990, cited in Temkin, Jennifer, *Rape and the Legal Process*, p. 10. See further *R v. Gammon*, (1959) 43 Cr. App. Rep. 153, p. 159. During the trial in 1959 in the UK, the judge stated: "we who have had long experience of these cases know that evidence of a girl giving evidence of indecency by a man is notoriously unreliable, and you look in those cases for some other evidence making it likely that her story is true. It does not appear nearly as much in the case of boys".

²⁰⁰ Report of the Special Rapporteur on Violence against Women, its Causes and Consequences, Ms. Rhadika Coomaraswamy, UN Doc. E/CN.4/1997/47, 12 February, 1997, para. 34.

Other jurisdictions require the victim to file her complaint promptly after the alleged violation.²⁰¹

The rationale of admitting evidence as to the previous sexual history of the victim was to evince whether she had consented, the belief being that chastity was a trait of character that was constant and that a woman with previous sexual experience was more likely to have consented in the case at hand. This approach was demonstrated in a case from 1838 in a New York court, where the judge argued that one must distinguish between a woman “who has already submitted herself to the lewd embraces of another, and the coy and modest female severely chaste and instinctively shuddering at the thought of impurity”.²⁰² A corroboration warning, i.e. instructions that additional evidence is required, has frequently been provided by the trial judge to juries in various countries. In Canada prior to its legislative reform in 1983, such instructions were e.g. provided only in cases of sexual offences involving a female victim.²⁰³

²⁰¹ See e.g. laws in Massachusetts, USA, discussed in *Commonwealth v. King*, 445 Mass. 217 (2005), Anderson, Michelle, *The Legacy of the Prompt Complaint Requirement, Corroboration Requirement, and Cautionary Instructions on Campus Sexual Assault*, 84 B.U.L. Rev. 945, (2004).

²⁰² *People v. Abbott*, 19 Wend. 192, 195-196, N./ (1838). Kelly Askin argues that in the 19th century, consent was not even a matter of a woman’s will or whether she resisted or not. Rather: “...consent was a matter of how she conducted herself, whether she, by her conduct, made it clear that she was the sexual property of her husband or father or the common property of all men. So if a woman was deemed to be unchaste, it did not matter that she clearly resisted the rape, she had consented at a general level”. The law therefore reflected the view that breaking of the woman’s will had not occurred in instances where the woman was perceived as displaying herself as free of male possession. See Askin, Kelly, *War Crimes Against Women, Prosecution in International War Crimes Tribunals*, Brill, (1997), p. 220.

²⁰³ S.142, The Criminal Code, Canada: “...the judge shall, if the only evidence that implicates the accused is the evidence, given under oath, of the female person in respect of whom the offence is alleged to have been committed and that evidence is not corroborated in a material particular by evidence that implicates the accused, instruct the jury that it is not safe to find the accused guilty in the absence of such corroboration...”. See Sullivan, Leslie, Kuchta, *The Anatomy of Rape*, Saskathchewan Law Review 40 Sask. L. Rev. (1976-1977), p. 27. Temkin, in reviewing the treatment of the rape victim in the British justice system relays several instances where judges have demonstrated a belief in the view of the untruthful female complainant. In 1982, the Judge of the Crown Court in Cambridge instructed the jury: “Women who say no do not always mean no. It is not just a question of saying no, it is a question of how she says it, how she shows and makes it clear. If she doesn’t want it, she only has to keep her legs shut and she would not get it without force and there would be marks of force being used”. Judge David Wild, Cambridge Crown Court, 1982, cited in Jennifer Temkin, *Rape and The Legal Process*, p. 10. Further, a judge in 1990 informed the jury that a verbal refusal of intercourse may not be intended in a serious manner and “[a]s the gentlemen on the jury will understand, when a woman says no she doesn’t always mean it...Men can’t turn their emotions on and off

Certain jurisdictions have further required corroboration of eye-witnesses, particularly in countries abiding by a certain interpretation of Sharia law.²⁰⁴ Islamic law requires a rape charge to be corroborated by the witness testimony of four male witnesses.²⁰⁵ The evidentiary rule requires the observation of the actual penetration during sexual intercourse. In Islamic law, rape is included in the category of Hadd crimes, offences with specific punishment ordained by God. This includes Zina, sexual indiscretion, which has been interpreted to include rape. It is thus not a separate category, but considered in the same class as other sexual acts outside marriage, including fornication, adultery, incest and homosexuality.²⁰⁶ If a woman fails to establish rape, she is in danger of being convicted of fornication or adultery in order to protect women's chastity.²⁰⁷

2.5 The Women's Movement and Law Reforms

The women's movement that developed in many Western states in the 1960s and 1970s promoted the general personal development and growth for women.²⁰⁸

like a tap like some women can". Judge Raymond Dean, Old Bailey, 1990, cited in Temkin, Jennifer, *Rape and the Legal Process*, p. 10. See further *R v. Gammon*, (1959) 43 Cr. App. Rep. 153, p. 159. During the trial in 1959 in the UK, the judge stated: "we who have had long experience of these cases know that evidence of a girl giving evidence of indecency by a man is notoriously unreliable, and you look in those cases for some other evidence making it likely that her story is true. It does not appear nearly as much in the case of boys".

²⁰⁴ For example, Pakistan, Sudan, Afghanistan.

²⁰⁵ Previous law in Pakistan. Hudood Ordinance, Art. 8 stated that proof shall be in the form of either:

(a) the accused makes before a Court of competent jurisdiction a confession of the commission of the offence or,

(b) at least four Muslim adult male witnesses, about whom the Court is satisfied...that they are truthful persons and abstain from major sins, give evidence as eye-witnesses of the act of penetration necessary to the offence: provided that, if the accused is a non-Muslim, the eye-witness may be non-Muslim.

²⁰⁶ Joseph, Suad & Najmadabi, Afsaneh, *Encyclopedia of Women & Islamic Culture: Family, Law and Politics*, Vol. 2, Brill, (2005), p. 698.

²⁰⁷ Quraishi, Asifa, *Her Honor: An Islamic Critique of the Rape Laws of Pakistan from a Woman-Sensitive Perspective*, Michigan Journal of Intl. Law, Vol. 18:287, p. 295 In this sense, the woman carried the burden of proof that the sexual activity was a result of violence rather than adultery since she by reporting the rape already has confessed to sex out of wedlock. Pregnancy is also used as evidence of *zina*, adultery and there a number of rape trials reported where the female complainant has been convicted for *zina* because of being unable to prove that the pregnancy was a consequence of rape. The general contention is that women do falsely accuse men of rape in order to escape punishment for fornication/adultery. It is therefore *presumed* that an unmarried woman who has engaged in sexual relations/is pregnant will claim she has been raped in order to avoid punishment.

²⁰⁸ Kelly, Liz & Radford, Jill, *Sexual Violence Against Women and Girls, An Approach to an International Overview*, in *Rethinking Violence against Women*, Dobash and Dobash eds., Sage Publications, London, (1998), p. 53.

The main concerns in the 1970s were primarily related to the political participation of women and economic equality in the work place, as well as the participation of women in the development process in certain regions of the world.²⁰⁹ As the UN Special Rapporteurs on Violence against Women has concluded, the issue of violence against women has been treated in isolation from the wider concern for women's rights and equality.²¹⁰ In her opinion, this stems from a narrow interpretation of human rights law. However, as the movement grew, so did the realisation that female sexuality had been defined from the viewpoint of male domination and that this form of oppression was also a part of a general gender inequality in society. The effects of male stereotyping were particularly evident in criminal laws on rape.

According to feminist ideas, criminal laws prohibiting rape may display a cultural expectation of proper female behaviour. A regulation which only condemns sexual violence accompanied by force enhances male opportunities to coercive sex, increases women's dependence on a male protector and reinforces men's dominant position.²¹¹ Accordingly, the pervasiveness of rape is fundamental in the social construction which defines women as inferior. The feminist viewpoint of the nature of rape radically changed the perception in many states by focusing on what the victimisation of rape entailed for women. As Cathy Roberts points out, the feminist understanding of rape in the beginning bore little resemblance to the viewpoint of psychologists and society in general: "Feminism rejected the model of the lone deviant, acting out perverted fantasies or frustrations, and substituted instead a figure who had an uncomfortable similarity to the average man".²¹² Rather than explaining the existence of rape as an expression of individual aberration, the feminist movement declared it a structural problem. Since women as a social group in many cultures are

²⁰⁹ Preliminary Report Submitted by the Special Rapporteur on Violence against Women, its Causes and Consequences, Ms. Rhadika Coomaraswamy, in Accordance with Commission on Human Rights Resolution 1994/95, UN Doc. E/CN.4/1995/42, 22 November 1994, para. 20.

²¹⁰ Integration of the Human Rights of Women and the Gender Perspective: Violence against Women, The Due Diligence Standard as a Tool for the Elimination of Violence against Women, Report of the Special Rapporteur on Violence against Women, its Causes and Consequences, Yakin Ertürk, UN Doc. E/CN.4/2006/61, (20 January 2006), para. 100.

²¹¹ MacKinnon, Catherine, *Toward a Feminist Theory of the State*, Schulhofer, Stephen, *Unwanted Sex: The Culture of Intimidation and the Failure of Law*, Harvard University Press, (1998), p. 25.

²¹² Schulhofer, Stephen, *Unwanted Sex: The Culture of Intimidation and the Failure of Law*, p. 24.

symbolically connected to sexuality in the form of reproductivity or honour, the control of sexuality had in this view lead to the control of women.²¹³

The 1970s represented a movement in many states aiming towards liberalising the public's attitudes on sexuality, ridding itself of society's previous taboos. One aim was to liberate the individual's natural approach to sexuality from cultural oppression, which would lead to greater gender equality.²¹⁴ With the increased liberalisation of sexuality, women would break free from previous stereotypes of appropriate behaviour for men and women and lead to an acknowledgement that also women have a need to express their sexuality without social control. However, as noted by Kerstin Berglund, political concerns as to sexuality and criminal law provisions do not always aim to protect the same interests since the legal system strives to protect the individual, and the political aim at the time was rather a positive autonomy in providing the individual with the right to have sexual relations.²¹⁵ The movement e.g. brought a social acceptance of women consenting to sexual relations outside the scope of marriage in many states. However, the contradictory attitudes, particularly towards women and the proper boundaries of behaviour are still noticeable in definitions of rape around the world, reflecting a distrust in the female victim and at times unrealistic attitudes of the level of forceful interactions to which women consent. Arguably, women have become more vulnerable to rape as a result of the liberalisation, since women are allowed to, and do consent to sexual relations. Meanwhile, both the perpetrator and the legal system in many countries presume the victim to be a highly sexually liberated individual, presuming consent in situations that previously would have been considered forceful.²¹⁶ The threshold for acceptable behaviour has in this sense risen.

Fundamental reforms of legislation regarding both the definition of rape as well as procedural rules took place in many domestic jurisdictions in the 1970s and 1980s, often as a result of an altered understanding of the nature of the crime, inspired by the feminist movement. It primarily concerned the introduction of new forms of offences with an emphasis on rape as a crime of violence in the form of a sexual expression, rather than an offence with sexual

²¹³ Berglund, Kerstin, *Straffrätt och Kön*, Iustus, (2007), p. 90.

²¹⁴ Ibid, p. 249. Many feminists adopted a rights discourse as appropriate, viewed as an especially important tool on the international arena, which has also been criticised as obscuring the need for political and social change. The rights discourse was, however, seen as offering a recognised vocabulary for framing such political and social wrongs. Charlesworth, Hilary, *What are "Women's International Human Rights?"*, pp. 58 & 61.

²¹⁵ Berglund, Kerstin, *Straffrätt och Kön*, p. 249.

²¹⁶ McGregor, Joan, *Is it Rape?*, p. 95.

satisfaction as a motive.²¹⁷ Many states introduced reforms concerning the elements of ‘non-consent’ and ‘force’, as well as widened the scope of potential victims, e.g. by including marital rape. The reforms also in many cases strived to widen the scope of the *actus reus* beyond the traditionally narrow focus on vaginal penetration to include other forms of sexual acts.²¹⁸ The objectives of such reforms were simultaneously to improve the legal process for rape victims, including the willingness to report the crime, as well as to influence societal attitudes. These aims were emphasised by legislators in many jurisdictions.

The Michigan Criminal Sexual Conduct Statute introduced in 1974, which aimed to bring about “change that would be both instrumental and symbolic in impact: properly implemented it could bring about improvements in the criminal justice system, the conviction rate and the treatment of victims.” Additionally, it would “confront and change cultural norms”.²¹⁹ In New South Wales of Australia, the reform was constructed to “serve an educative function in further changing community attitudes to sexual assault”.²²⁰ This function was further emphasised: “Irrespective of its ability either to discourage certain forms of behaviour, or to bring offenders to justice, the law should delineate and prohibit behaviour which is socially abhorrent. And more than this, the law should adopt the role of community educator. It should condemn behaviour which is exploitative, violent, and/or involves the violation of one person’s liberty by another”.²²¹ The reform in Canada intended to lessen the humiliation experienced by the victim in a rape trial and to constitute a symbolic educational message to society.²²² In Sweden the legal reform of the criminal law in 2005 aimed to “improve protection against sexual violations and further enhance sexual integrity and the right of self-determination”.²²³ Deterrence and contributing to changing people’s perceptions of the harms of sexual violence were mentioned as overarching goals.²²⁴

²¹⁷ Temkin, Jennifer, *Rape and the Legal Process*, p. 149, Torrey, Morrison, *Feminist Legal Scholarship on Rape: A Maturing Look at One Form of Violence Against Women*, in *Feminist Jurisprudence, Women and the Law: Critical Essays, Research Agenda, and Bibliography*, eds. Taylor, Rush, Munro, Rotham Publisher, (1998).

²¹⁸ See discussion in Chapter 4.2.7.

²¹⁹ Temkin, Jennifer, *Rape and the Legal Process*, p. 150.

²²⁰ NSW Parliamentary Debates (Hansard), Australia, Legislative Assembly, 18 March 1981, at 4758.

²²¹ Naffine, Ngaire, *An Inquiry into the Substantive Law of Rape*, Women’s Adviser’s Office, Dept. of the Premier and Vabinet, South Australia, (1984), p. 11.

²²² Temkin, Jennifer, *Rape and the Legal Process*, p. 151.

²²³ Prop. 2004/05:45: En ny sexualbrottslagstiftning, p. 21.

²²⁴ *Ibid.*

The aim of the reforms have also in part been to liberalise sexuality from cultural constraints and societal taboos and demonstrate that sexual experiences *per se* could not be harmful to the interest of the individual. Rape provisions were e.g. recast as “sexual assault.” In Canada, such a reform was introduced, noting that “the very use of the word ‘rape’ attaches a profound moral stigma to the victims and expresses an essentially irrational folklore about them”.²²⁵ The term “sexual assault” was perceived as not imbued with the same level of stigma. Arguably, the word rape is also attached to certain stereotypical notions, for instance that rape are attacks by a stranger and that the use of severe physical force is a necessary element, leading to a greater reluctance of the court or jury to convict a defendant.²²⁶ Many jurisdictions have now reconsidered the recasting of rape in terms of sexual assault. Though the stigma was previously viewed as negative, it is now seen as necessary in order for the general public to react towards the crime with the appropriate level of “revulsion”. The experience and harm of the victim would arguably be downgraded by designating it “sexual assault.”²²⁷

Though the effects of such law reforms seldom demonstrate a significant decrease in attrition rates,²²⁸ the merit of a re-evaluation of the definition can also be sought on a moral level as influencing society’s view on gender roles and the appropriate limits in sexual relations. As Susan Estrich points out: “the interrelationship between force, consent and *mens rea* as understood by courts means that simply moving these pieces around in a statute is unlikely to affect the legal system’s working definition of the crime, although it may alter the

²²⁵ Law Reform Commission of Canada, Report on Sexual Offences, LRCC No 10 (1978), p. 12.

²²⁶ Temkin, Jennifer, *Rape and the Legal Process*, p. 177.

²²⁷ *Ibid.*, p. 178.

²²⁸ The results vary depending on the extent of the reform, and though statistics are ambivalent whether a reformed rape definition actually leads to higher conviction numbers, it is clear that there is no dramatic difference in most cases. See e.g. Rhode, Deborah, *Justice and Gender: Sex Discrimination and the Law*, p. 252, Schulhofer, Stephen, *Unwanted Sex: The Culture of Intimidation and the Failure of Law*, p. 38, Estrich, Susan, *Rape*, Yale Law Journal, Vol. 95, No. 6, (1986), pp. 1134, 1159-1160, Spohn, Cassia & Horney Julie, *Rape Law Reform, A Grassroots Revolution and its Impact*, Temkin, Jennifer, *Rape and the Legal Process*, WHO World Report on Violence and Health, 2002, p. 170, BRÅ 2005:7, p. 51. The deterring effect of international criminal law provisions is even more difficult to quantify considering its recent development and concretisation of substantive and procedural rules concerning rape. Critique has e.g. been raised concerning the lack of prevention of the continuation of violence in former Yugoslavia, subsequent to the establishment of the ICTY. It is, however, believed that once a culture of accountability has become entrenched, furthered by the establishment of the ICC, such an impact will be noted. Cryer, Friman, Robinson & Wilmschurst, *An Introduction to International Criminal Law and Procedure*, pp. 21-22.

message communicated to the public by the law”.²²⁹ Legal provisions are an integral part of the public’s attitude towards sexual relations and gender. Naturally, society’s attitude to what is considered rape, who is a rapist and the appropriate behaviour of men and women influences whether an incident will be reported and prosecuted. For example, by making “force” a requirement of rape, society is permitting all forms of pressures and coercion that do not entail violence. The metamorphosis from a formal adoption of a law to a societal evolution is slow-moving and cannot always be easily quantified in numbers. The symbolic value of the reforms may have started a process of long-term attitude change that is difficult to measure in a legal impact study.²³⁰ Schulhofer points out that especially criminal law never functions independently of the culture in which it is set and although the sexual culture has changed since the 1970s, it has not developed at the same pace as the regulations and aspirations of the feminist legal scholars.²³¹

Thus, while the criminalisation of rape solely constitutes part of the effort to prevent sexual violence and to eradicate impunity, the rights’ discourse provides an official recognition of the importance of these goals and a mechanism for further development. Certain aspects of the early criminalisation of rape is still prevalent in many societies, e.g. the restriction of possible rape prosecutions to certain classes of women, strict requirements of corroboration and the classification of rape as a violation of the honour of the woman. Rape myths are still recorded in contemporary domestic jurisdictions, such as beliefs that only certain types of women are raped, that women provoke rape through their behaviour or clothes and that the motive is sexual arousal.²³² As the thesis will demonstrate, the intrusion into the domestic sphere of regulating private sexual conduct, however, has increased, further encouraging the development towards the protection of the sexual autonomy of the individual also on the international level and placing obligations on states to transform their domestic criminal laws prohibiting rape.

²²⁹ Estrich, Susan, *Rape*, Yale Law Journal, Vol. 95, No. 6, (1986), p. 1160.

²³⁰ Spohn, Cassia & Horney Julie, *Rape Law Reform, A Grassroots Revolution and its Impact*, p. 175.

²³¹ Schulhofer, Stephen, *Unwanted Sex: The Culture of Intimidation and the Failure of Law*, p. 39.

²³² Sexual Assaults Linked to “Date-Rape Drugs”, Council of Europe doc. 11038, Report of the Committee on Equal Opportunities for Women and Men, 2 October 2006, fn. 1.

3. The Harm of Sexual Violence

Before introducing the elements of the crime of rape commonly applied in provisions on the domestic and international arena, this chapter will provide an introduction of the concept of harm in criminal law. The understanding of harm informs the construction of definitions of rape and has also been instrumental in the analysis of the scope of the definition of the offence in international law. The perceived harm of the offence acknowledged by the legislator will influence the choice of such elements as non-consent or force, as well as the *actus reus*, e.g. with certain sexual acts considered more harmful than others.

3.1 Introduction

Criminal law is a tool for achieving specific goals. The moral and political rationalisations for criminalising behaviour are generally two-fold: 1) to deter from harm-doing and 2) to punish wrongdoing.²³³ The goal of deterring harm-doing in criminal law is to influence people to abstain from certain behaviour that society finds morally repugnant and hazardous. It strives to have an impact on people's moral code and change societal perceptions. In this sense, legal doctrine constitutes the basis for cultural change. Criminal law is thus not meant to be a neutral system, but rather intended to supplant the choices of individuals.²³⁴ While certain additional objectives often are raised in connection to international criminal law, such as reconciliation of communities and capacity-building, considering that much of international criminal law will be implemented and applied domestically, it largely aims to serve similar objectives.²³⁵ For example, in the preamble of the Rome Statute of the ICC it is asserted that the state parties are "...determined to put an end to impunity for the perpetrators of these crimes and thus to contribute to the prevention of such crimes".²³⁶ Comparable language has been used in case law of regional human rights courts obliging states to adopt criminal law as a means of protecting

²³³ Stewart, Hamish, *Harms, Wrongs and Set-backs in Feinberg's Moral Limits of the Criminal Law*, 5 Buff. Crim. L. Rev. 47, (2001-2002), p. 47. Cryer, Friman, Robinson & Wilmschurst, *An Introduction to International Criminal Law and Procedure*, p. 20. According to Kenneth Gallant: deterrence, retribution, incapacitation and rehabilitation. See Gallant, Kenneth, *The Principle of Legality in International and Comparative Criminal Law*, p. 26.

²³⁴ Simester, A.P & Smith, A.T.H, *Criminalization and the Role of Theory*, in Harm and Culpability, Clarendon Press, (1996), p. 4.

²³⁵ Cryer, Friman, Robinson & Wilmschurst, *An Introduction to International Criminal Law and Procedure*, p. 17.

²³⁶ Preambular para. 5.

persons from violence.²³⁷ A similar objective to provide protection against *harm* therefore exists on the international level.

Joel Feinberg, in discussing the moral limits of criminal law, concludes that it is solely legitimate for a society to criminalise behaviour if it causes harm.²³⁸ When determining the limits of criminal regulation, it is therefore essential to articulate the harm of the act in question. The first step is to establish the *wrongs* we seek to prevent and thereafter construct the appropriate perimeters in order to achieve prevention. The foremost question when regulating the act of rape is which aspect of the offence is morally repugnant and should be punished. The understanding of the harm of rape influences which types of acts and behaviour are criminalised. When determining the harm of an act, a generalisation of the experiences and reactions of the individual in a certain context must be made. Is it the physical violence, the injury to the individual's sexuality or even the implication at a general level of women's subordination? For example, in certain jurisdictions rape is viewed as an act of violence and not sexuality. Harm may be seen as the physical invasion of the victim and therefore largely a matter of a physical injury, whereas another approach finds harm primarily in the non-consensual act of sex, i.e. the violation of the victim's autonomy to control his/her sexuality and personal liberty. These theories will influence the construction of the definition, traditionally leading either to a focus on the use of force, non-consent or both in relation to sexual activity, depending on the perceived harm.

The question of harm is analogous to the issue of the protective interest of the criminal law provision.²³⁹ The interest to be guaranteed by the provision determines the individual harm. If the interest is to protect the sexual self-determination of the person, the harm will consequently entail non-consensual sexual relations.²⁴⁰ The issue of the harm of rape also aims to answer questions

²³⁷ See e.g. *M.C. v. Bulgaria* and discussion in Chapter 6.4.6.

²³⁸ Feinberg, Joel, *Harm to Others, The Moral Limits of Criminal Law*, Oxford University Press, (1984), p. 31 ff. This was opposed to behaviour that was solely "sinful". Feinberg further states: "Rape is a harm and a severe one. Harm prevention is definitely a legitimate use of the criminal law". Feinberg, Joel, *Offense to Others, The Moral Limits of Criminal Law*, Oxford University Press, (1985), p. 154. Hirsch, Andrew von, *Extending the Harm Principle: "Remote" Harms and Fair Imputation*, in *Harm and Culpability*, Clarendon Press, (1996), p. 260. See also Gross, Hyman, *A Theory of Criminal Justice*, Oxford University Press, (1979), p. 114. Hyman proposes that "it is harms that make conduct criminal, because the conduct produces or threatens the harm, or even in some cases constitutes the harm".

²³⁹ Feinberg, Joel, *Harm to Others*, p. 33 ff.

²⁴⁰ Gardner, John & Shute, Stephen, *The Wrongness of Rape*, in *Oxford Essays in Jurisprudence*, Oxford University Press, (2000), p. 205.

as to a possible distinction between rape and other forms of physical assault, and if such a division should be made.

The analysis of the harm of rape is largely similar concerning domestic criminal laws and international law. However, additional concerns are often raised in the context of international criminal law, e.g. the harm to the community in e.g. cases of genocide. Harm in such cases is thus group based. The issue will also resurface in the discussion on cultural relativism in the thesis. The harm of an act is arguably linked to a victim's culture and since the experienced harm may vary, so may also the definition of rape depending on the context.

3.2 How to Define Harm

How is the concept of harm interpreted in criminal law? Feinberg understands it as a "wrongful setback to interests".²⁴¹ A limit to this concept is that a set-back to interests is not harmful if it has been voluntarily consented to.²⁴² It has also been described as "an untoward occurrence consisting in a violation of some interest of a person".²⁴³ Harm is therefore not automatically a wrongful act unless it invades another person's interests. In the liberal understanding of harm, the injury is identified independently from the context in which it takes place.²⁴⁴ This has, however, been criticised e.g. by feminist scholars who argue that context informs the harm, and that a failure to bear in mind e.g. the gender imbalance in society leads to an eschewed understanding of the concept.²⁴⁵

The notion of harm is directly related to personal freedom and the autonomy to make free choices.²⁴⁶ Personal autonomy is frequently raised as the main interest to be protected through criminal law, whether it is the protection of bodily integrity or personal property, but also in relation to acts that undermine

²⁴¹ Feinberg, Joel, *Harm to Others*, pp. 35-36.

²⁴² Stewart, Hamish, *Harms, Wrongs and Set-backs in Feinberg's Moral Limits of the Criminal Law*, Buffalo Criminal Law Review, vol. 5:47, p. 62.

²⁴³ Gross, Hyman, *A Theory of Criminal Justice*, p. 115.

²⁴⁴ Munro, Vanessa, *Dev'l-in Disguise? Harm, Privacy and the Sexual Offences Act 2003*, in *Sexuality and the Law, Feminist Engagements*, ed. Vanessa Munro and Carl F. Stychin, Routledge-Cavendish, (2007), p. 13.

²⁴⁵ *Ibid*, p. 12.

²⁴⁶ Mill, J.S, John Gray, *On Liberty and other Essays*, Oxford University Press, (1991), p. xv, Hart, H.L.A, *Law, Liberty and Morality*, Oxford University Press, (1963). See also Berglund, Kerstin, *Gender and Harm*, Scandinavian Studies in Law, Vol. 54 (2009), p. 14.

“our sense of self-respect and self-worth”.²⁴⁷ Consent therefore tends to play an important role in criminal law in determining harm, hence the frequent inclusion of “non-consent” as an element of the crime of rape.

The purpose of the state to protect its citizens against harm is that harm inhibits the ability to live autonomously, since the fear of harm alone constrains our actions and choices. Harm, however, is not synonymous with ‘hurt’.²⁴⁸ While the question of how women experience sexual violence is strictly empirical, the question of what constitutes the harm of rape is theoretical.²⁴⁹ Harm and experience are thus not inextricably related. However, certain acts that may be seen as violations of rights are perceived as violations precisely because they *typically* give rise to experiential harm, even when they do not in a particular case.²⁵⁰ Wertheimer asserts that “if humans did not typically experience distress in response to invasions of our privacy or sexuality, then there would be no point to insisting that we have a right that others not engage in such behaviours”.²⁵¹

²⁴⁷ McGregor, Joan, *Is it Rape?*, p. 15. Protection against harm in criminal law is often related to civil liberties found in human rights catalogues. See Berglund, Kerstin, *Gender and Harm*, p. 14.

²⁴⁸ Baber, H. E., *How Bad is Rape?*, *Hypatia*, vol. 2 no. 2, (Summer 1987), p. 125. These interests can broadly be divided into 1) violations of interest in retaining or maintaining what one is entitled to have, e.g. life, liberty, property and physical well-being, 2) offences to sensibility, 3) impairment of collective welfare and 4) violations of governmental interests. See Gross, Hyman, *A Theory of Criminal Justice*, p. 120.

²⁴⁹ Wertheimer, Alan, *Consent to Sexual Relations*, Cambridge University Press, (2003), p. 89.

²⁵⁰ *Ibid*, p. 100.

²⁵¹ *Ibid*, p. 101. The proposition that rape is a distinctive crime based upon the *value* placed on sexuality begs the question if the law should consider the harm to the *individual* victim. For example, Jeffrie Murphy discusses whether the rape of a prostitute could ever be equal in severity to other rapes. Murphy, Jeffrie, *Some Ruminations on Women, Violence and the Criminal Law*, pp. 52-53. If the gravity of the offence is the harm caused to her sexuality, should such considerations as the victim’s sexual past then become a matter of importance? Such ideas exist in certain jurisdictions that for example mitigate the punishment if a victim is a prostitute. See previous Article 438 of the Penal Code of Turkey, which allowed for a two-thirds reduction of the punishment of a man who raped a prostitute. This was reformed in 1990.

Peter Westen suggests that the harms inflicted by rape can vary depending on the level of violence inflicted and the relationship of the complainant to the attacker. Westen, Peter, *The Logic of Consent; The Diversity and Deceptiveness of Consent As a Defense to Criminal Conduct*, Ashgate, (2004), p. 151. The argument in such cases is that all individuals value their sexuality in different ways. It is clear that rape may not be experienced similarly by all victims, but this does not preclude the possibility of drawing general conclusions on what harms rape may generally entail.

The debate on the definition of rape has been infused with the dichotomy on the one hand of seeking to protect the sexual freedom of the individual while on the other of allowing the state to create moral demands for appropriate behaviour of its citizens. Morality has always played an important, if not central role, in criminal law. Legislation is a fluid instrument that reflects public morals and attitudes towards, for example, gender roles. Since sex and morality are intertwined in most cultures, the harm of rape has often been determined by morals influencing the prevailing legal standards, religious or otherwise.²⁵² Consensual sex outside of marriage may for example be seen as immoral, and sexual violence described in terms of violations of a woman's honour. As Berglund argues: "It is impossible to make a statement about sexuality, without an interpretation of what sexuality is. After all, sexuality is a social construct, not merely a biological fact."²⁵³ One cannot therefore distinguish between morals and the common view on what is "normal" sexuality. What is considered to be harmful sexual behaviour will evolve accordingly.

Though rules of criminal law in general derive from moral codes, laws prohibiting rape now increasingly avoid the measurement of morals and strive towards a more stringent positivism.²⁵⁴ Determining the legal boundaries of sexuality without the context of culture and morality is, however, fraught with difficulty. Morals determine when an act becomes sexual and therefore affects the legislator's view of the *actus reus* of rape. Morals also determine the appropriate level of pressure that is allowed between participants. This in turn affects the understanding of the harm of rape. A woman who voluntarily subjects herself to an increased risk of harm, for example by intoxication, might be considered as less harmed. It is therefore difficult to fathom a construction of a valid definition of rape that has not been influenced by notions of gender and sexuality. It is, however, important to distinguish between morals that do not pertain to the valid concerns of the harm of rape. The protective interest of legislation should not be the desire, for example, to impede promiscuity, but to protect the self-determination of the person. Arguably, the protection of the individual's interests is now receiving an increasingly prominent role in criminal law in general, as opposed to the interests of the state or the public at large, for

²⁵² Bassiouni, Cherif, *Crimes against Humanity in International Criminal Law*, 2nd ed., Kluwer, (1999), p. 345. According to Berglund, how we view reality in connection to sexuality will always be informed by e.g. sexual morality, sexual politics, sex, gender and power. See Berglund, Kerstin, *Gender and Harm*, p. 17.

²⁵³ Berglund, Kerstin, *Gender and Harm*, p. 17.

²⁵⁴ Spence, Ann T., *A Contract Reading of Rape Law: Redefining Force to Include Coercion*, 37 Colum. J. L. & Soc. Probs. 57, (2003), p. 76.

example public morals seeking to restrain the liberalisation of sexuality.²⁵⁵ This may in part be a result of the influence domestically of international human rights law, emphasising the basic protections of the individual and the restraints of government.

Sweden represents an example of where legislators have been concerned with the demand to separate current public morality on sexuality from the definition of rape, i.e. not to determine and delineate the crime based upon current morals.²⁵⁶ By removing moral evaluations of the autonomous individual, decriminalisation of homosexuality and criminalisation of rape in marriage has been a result.²⁵⁷ If the harm of rape is the violation of individual autonomy, the criminal statute must extend equally to all.

3.3 Can Sexuality be Harmed?

A variety of studies on rape argue that rape is not a sexual but an aggressive act, i.e. it does not fulfil a sexual function in the perpetrator's psyche. Rather, it is the humiliation of the victim and the sense of power and dominance over the woman or man that produces the satisfaction.²⁵⁸ In this respect, rape is rather an anti-sexual act in that the main focus is the expression of violence instead of sexuality. It is held that "rape is quintessentially a crime of aggression and hostility, not a form of sexual release"²⁵⁹ and a consequence of "power, dominance and humiliation" rather than of sexual gratification.²⁶⁰

²⁵⁵ Jareborg, Nils, *Allmän Kriminalrätt*, Uppsala, Iustus, (2001), p. 71.

²⁵⁶ Berglund, Kerstin, *Straffrätt och Kön*, p. 57. Homosexual acts *per se* cannot accordingly be criminalised, regardless of morals that consider homosexuality a sin.

²⁵⁷ Homosexual acts were decriminalised in 1944 and rape within marriage 1964. See discussion in Berglund, Kerstin, *Gender and Harm*, p. 15.

²⁵⁸ Seifert, Ruth, *The Second Front - the Logic of Sexual Violence in Wars*, Women's Studies International Forum 19 (1996), p. 36 and Seifert, Ruth, *War and Rape: a Preliminary Analysis*, in *Mass Rape: The War against Women in Bosnia-Herzegovina*, ed. Stiglmeier, Alexandra, University of Nebraska Press, (1994), p. 55.

²⁵⁹ Wertheimer, Alan, *Consent to Sexual Relations*, p. 4. See, however, Thornhill, Randy & Palmer, Craig, *A Natural History of Rape: Biological Bases of Sexual Coercion*, The MIT-Press, (2000), p. 131. Anthropologists have in the recent decade explored the causes of rape and argue that, contrary to sociocultural explanations, no rape could take place without any sexual motivation on behalf of the rapist. Consequently the goals that motivate behaviour and the tactics used to accomplish the goals must be distinguished. Palmer and Thornhill also point to the fact that multiple motivations can be involved in any human behaviour, and even in times of war during mass rape, soldiers are stimulated by sexual desire, which is apparent through the pattern of specifically targeting young women. They cite several studies which have found that rapists are often motivated by

Why is it important to accept rape as a sexual manifestation of aggression rather than an expression of sexuality, albeit in a violent form? Arguably this discussion, primarily among philosophers and feminist legal scholars, has lost some of its relevance since “everybody is more or less content to think of [rape] as both”.²⁶¹ However, whichever theory upon which the legislator bases the characterisation of rape may to a certain extent affect the construction of the definition of the crime. The assertion that rape is a sexual expression of aggression has, for example, led to a greater acknowledgment of the use of sexual violence as a tactic in armed conflicts, the aim of which may be to subjugate an enemy group. In turn, the recognition of rape as a war tactic has raised further awareness that rape in times of peace also are expressions of violence. Equating rape with violence could also serve to eradicate preconceived notions of sexuality and gender, further acknowledging the existence of male victims of rape.²⁶² The act of rape is as a result seen as a means of dominance and an exploitation of the unequal power of a group, be it women, an ethnic group or other characteristics. Classifying rape as a form of violence or abuse of power, rather than an act that serves sexual purposes, has also been important in placing sexual violence within the international human rights context. The prohibition of torture has chiefly concerned acts of a political nature, for example torture of political dissidents in detention, rather than acts that could entail a similar level of pain but is not conducted for one of the listed purposes. By understanding the manner in which sexual violence can be used as a tactic or as an instrument of systematic control, and not merely as a matter of private concern, rape has more readily been accepted as an international affair.

If it is accepted that rape is a form of aggression, is it logical to separate the offence from other forms of assault? Considering that all crimes are ‘border-crossings’ into one’s area of autonomy, what is it that makes certain forms of trespassing more serious? It has been established that individuals experience rape

sexual desire. See p. 135. The resistance against the anthropological explanation is understandable, since finding that rape, like sex, is motivated by desire would be one step closer to finding excuses for such behaviour.

²⁶⁰ Quénivet, Noëlle, *Sexual Offenses in Armed Conflict & International Law*, p. 42. Also: “Rape is not less sexual for being violent; to the extent that coercion has become integral to male sexuality, rape may be sexual to the degree that, and because, it is violent”. See MacKinnon, Catherine, *Feminism, Marxism, Method, and the State: Toward Feminist Jurisprudence*, in *The Feminist Standpoint Theory Reader*, ed., Sandra Harding, Indiana University Press, (1987), p. 141, Copelon, Rhonda, *Surfacing Gender: Reconceptualizing Crimes Against Women in Time of War*, p. 213.

²⁶¹ Halley, Janet, *Rape in Berlin: Reconsidering the Criminalisation of Rape in the International Law of Armed Conflict*, *Melbourne Journal of International Law*, Vol. 9, May 2008, Issue 1, p. 113.

²⁶² By acknowledging motives of aggression, male rape will not be seen as an expression of deviant homosexual conduct, not worthy of criminalisation.

differently as opposed to other forms of physical assault.²⁶³ What is then inherently more harmful in an assault of a sexual nature? Joan McGregor proposes that the level of gravity of an injury is judged by how close to the personal and intimate aspects of ourselves that the particular offence lies.²⁶⁴ Rape involves an obvious physical aspect in that it often entails physical injury as well as a risk of pregnancy or venereal disease. However, many current definitions of rape consider that the harm of the act goes beyond the physical and affects the victim in psychologically harmful ways. Studies show that apart from physical pain, rape is also an attack on a person's identity as well as dignity and can cause a sense of loss of self-determination and control over one's body.²⁶⁵ Andrea Dworkin emphasises that any human being's "struggle for dignity and self-determination is rooted in the struggle for actual control of one's own body, especially control over physical access to one's own body".²⁶⁶ The experience of non-consensual engagement in sex has been described as being "overtaken, occupied, displaced and invaded" by the physical urgency of another.²⁶⁷ Rape can make the victim feel dehumanised, the mere object of the sexual gratification of the attacker, as well as being denigrated and humiliated. It could be contended that sexual relationships make the participants more vulnerable and exposed than in other relationships.²⁶⁸

As noted by the UN Special Rapporteur on Violence against Women, rape is an intrusion into the most intimate parts of the woman's body and many victims experience feelings of annihilation, arising from the nature of rape as "a direct attack on the self".²⁶⁹ UN Secretary-General Ban Ki-Moon holds that "sexual violence is deeply dehumanizing, inflicts intense mental and physical trauma,

²⁶³ See the studies on the following pages.

²⁶⁴ McGregor, Joan, *Force, Consent and the Reasonable Woman*, in *In Harm's Way: Essays in Honor of Joel Feinberg*, eds. Coleman, Jules & Buchanan, Allen, Cambridge University Press, (1994), p. 234.

²⁶⁵ Seifert, Ruth, *The Second Front*, p. 41. A WHO world-report on violence and health emphasises that the effect on mental health can be as serious as its physical impact on victims of sexual violence and equally long lasting. Other potential harms following rape are suicide, HIV infection or 'honour' killings of victims. WHO World Report on Violence and Health, 2002, p. 149.

²⁶⁶ Dworkin, Andrea, *Pornography: Men Possessing Women*, Dutton, (1989), p. 243.

²⁶⁷ West, Robin, *Jurisprudence and Gender*, in *Feminist Legal Theory, Readings in Law and Gender*, ed. Bartlett, Katharine & Kennedy, Rosanne, Westview Press, (1991), p. 222.

²⁶⁸ *Ibid*, p. 224.

²⁶⁹ Report of the Special Rapporteur on Violence against Women, its Causes and Consequences, Ms. Rhadika Coomaraswamy, UN Doc. E/CN.4/1997/47, (12 February 1997), para. 19.

and is often accompanied by fear, shame and stigma”.²⁷⁰ Certain rape victims suffer from post-traumatic stress disorder, and studies further show that victims of rape are more likely than sufferers of other crimes to develop such a disorder, and that rape in general has a more negative impact than other crimes.²⁷¹ WHO points out that sexual violence also can affect the social well-being of victims, for example through stigmatisation and family ostracism.²⁷² Additionally, it is often maintained that the harm of rape is not solely experienced by the victim herself, but fear on the part of *potential* victims is also one of the relevant consequences of the crime.²⁷³ Since many women adjust their behaviour for fear of rape and manage their lives accordingly, such constraints on personal autonomy also constitute a form of harm to personal interests.

The notion that sexual violence is a more serious violation than other forms of violence has been contested by several legal scholars and philosophers, raising the question of what makes a sexual invasion culturally more harmful than other forms of intrusion. Michel Foucault suggests that we should strive to define rape as an act of violence, rather than of sexuality, since sexuality under no circumstances can be the object of punishment. According to Foucault, we reach a problematic area if rape is to be regarded as being more serious than a punch in the face “because what we’re saying amounts to this: sexuality as such, in the body, has a preponderant place, the sexual organ isn’t like a hand, hair or

²⁷⁰ Report of the Secretary-General pursuant to Security Council resolution 1820, UN Doc. S/2009/362, 15 July 2009, para. 4.

²⁷¹ Studies point to the fundamental trauma for the rape victim, e.g. a study from New Zealand, which states: “Rape is an experience which shakes the foundations of the lives of the victims. For many its effect is a long-term one, impairing their capacity for personal relationships, altering their behaviour and values and generating fear”. Young, W, *Rape Study - A Discussion of Law and Practice*, Dept. of Justice and Institute of Criminology, Wellington, New Zealand, (1983). Norris, Fran & Kaniasty, Krzysztof, *Psychological Distress Following Criminal Victimization in the General Population: Cross-Sectional, Longitudinal, and Prospective Analyses*, Journal of Consulting and Clinical Psychology, 1994, Vol. 62, No.1, pp. 111-123, Ayers, Susan, Baum, Andrew & McManus, Chris, *Cambridge Handbook of Psychology, Health and Medicine*, 2nd ed. Cambridge University Press, (2007), p. 840, Wertheimer, Alan, *Consent to Sexual Relations*, p. 104. However, several authors assert that the perception that rape produces long-term psychological effects is a myth. Harriet Baber proclaims that “there is no evidence to suggest that most rape victims are permanently incapacitated by their experiences nor that in the long run their lives are much poorer than they would otherwise have been”. Baber, H.E., *How Bad is Rape*, p. 130.

²⁷² WHO World Report on Violence and Health, 2002, p. 149.

²⁷³ McGregor, Joan, *Is it Rape?*, p. 219.

nose”.²⁷⁴ Philosopher H.E. Baber entreats us not to dramatise the effects of rape and proposes the idea that working is worse than being subjected to rape. The proposition is that people have a greater stake in their mental and emotional lives than they do in their sexuality and that being “raped” intellectually violates a more vital interest than being raped sexually.²⁷⁵ Certain arguments aim to diminish the harm of sexual violence based upon the fact that a constituent part of rape under normal circumstances is pleasurable for the individual, i.e. sex, and forceful sex is thus not as harmful as other forms of violence. Jeffrie Murphy, for example, draws an analogy between forced sexual intercourse and being forced to eat sushi, a normally pleasurable exercise if not forced upon the person.²⁷⁶ Such reasoning is also evident in the discussion on acquaintance rapes. If lacking in physical harm beyond the rape itself, such forms of rape are often treated by various justice systems as causing less harm to the individual.²⁷⁷

The notion that the harm of rape is distinctive has also been criticised from a feminist point of view. Susan Brownmiller considers it condescending to view the harm of rape as different from other types of assault, since it is “an injury to the victim’s bodily integrity, and not as an injury to the purity or chastity of man’s estate”.²⁷⁸ Accordingly, definitions of rape are often patronising towards

²⁷⁴ Foucault, Michel, *Confinement, Psychiatry, Prison*, in Michel Foucault, *Politics, Philosophy, Culture, Interviews and Other Writings*, Routledge, (1988), p. 201.

²⁷⁵ Baber, H.E., *How Bad is Rape?* p. 134. In this sense: “rape, like all crimes against the person is bad in part because it deprives the victim of some degree of freedom, being compelled to work is worse in this regard insofar as it chronically deprives the victim of the minimal amount of freedom requisite to the pursuit of other important interests which are conducive to his well-being”. Paglia holds that rape is “like getting beaten up. Men get beat up all the time”. Paglia, Camille, *Sex, Art, and American Culture: Essays*, Vintage, (1992), p. 64.

²⁷⁶ Murphy, Jeffrie, *Some Ruminations on Women, Violence and the Criminal Law*, in *Harm’s Way*, eds. Jules Coleman & Allen Buchanan, Cambridge, (1994), p. 214.

²⁷⁷ Studies, however, demonstrate that there is no difference in the impact on the victim whether he/she has been subjected to rape by a stranger or acquaintance. The levels of depression, anxiety and impact on relationships are equal. See e.g. Weihe, Vernon & Richards, Ann, *Intimate Betrayal: Understanding and Responding to the Trauma of Acquaintance Rape*, Sage Publications, (1995), Kilpatrick, Dean, Best, Connie, Saunders, Benjamin, Veronen, Lois, *Rape in Marriage and Dating Relationships: How Bad Is It for Mental Health?*, in *Human Sexual Aggression: Current Perspectives*, ed. Prentky, Quinsey, *Annals of the New York Academy of Sciences*, (1988), Temkin, Jennifer, *Rape and the Legal Process*, p. 52, McGregor, Joan, *Is it Rape?: On Acquaintance Rape and Taking Women’s Consent Seriously*, p. 67.

²⁷⁸ Brownmiller, Susan, *Against Our Will*, Simon and Schuster, (1975), p. 379. The male rape victim is likewise traumatised in a similar manner but may also experience additional harms, including a challenge to his sexual identity and masculinity. Shame may cause a reluctance to report the crime owing to the fear that any claims of consent will suggest his homosexuality.

women, continually cast in the role of victim, rather than advancing equality.²⁷⁹ Separating rape from sex by emphasising violence would also serve to “analogize rape to experiences that men can relate to, i.e. violence”, since sex is otherwise seen as inherently pleasurable.²⁸⁰ Proponents of equating rape with violence are more likely to encourage a definition that focuses on the force or threat of force employed.

One of the more interesting examples of domestic legislation is to be found in the Canadian criminal law. The law on sexual crimes underwent a major reform in 1983, redefining rape as ‘sexual assault’. The reason for this was to better acknowledge the violent aspect of the crime.²⁸¹ The Law Reform Commission held that the foremost principle was the protection of the integrity of the person and that rape is a crime of aggression rather than that of a sexual nature.²⁸² Sexual assault does not contain a separate definition but is considered a form of “assault”. Sexual violence is subsequently divided into an index of offences categorised by the level of severity.²⁸³

The gradation scheme centres on the level of violence applied or threatened, intending to classify rape as a crime of violence rather than an offence based upon sexual motives. The Canadian Law Reform Commission stated that one of the objectives of the reform was to “direct attention away from rape as a sexual offence and towards the right of every person to be free from physical assault”, whether or not there were sexual overtones.²⁸⁴ By concentrating on the violent aspects of the assault, it was also intended to demonstrate that the legislator did

²⁷⁹ McGregor, Joan, *Is it Rape?*, p. 76.

²⁸⁰ Torrey, Morrison, *Feminist Legal Scholarship on Rape: A Maturing Look at One Form of Violence Against Women*, p. 309.

²⁸¹ Freeman Marshall, Patricia, *Violence Against Women in Canada by Non-state Actors: the State and Women’s Human Rights*, in *Human Rights in the Twenty-First Century: A Global Challenge*, ed. Mahoney, Kathleen & Mahoney, Paul, Martinus Nijhoff Publishers, (1993), p. 322.

²⁸² Law Reform Commission of Canada, Report No. 10, *Sexual Offences*, (1978), p. 8.

²⁸³ This entails: a) without the consent of another person, he applies force intentionally to that other person, directly or indirectly, b) he attempts or threatens, by an act or gesture, to apply force to another person, if he has, or causes that other person to believe upon reasonable grounds that he has, present ability to effect his purpose; or c) while openly wearing or carrying a weapon or an imitation thereof, he accosts or impedes another person or begs. Criminal Code Section 27: 1) Sexual assault (level 1), 2) Sexual assault involving bodily harm, weapons, or Third Parties (level 2): Everyone who, in committing a sexual assault, a) carries, uses, or threatens to use a weapon or an imitation thereof, b) threatens to cause bodily harm to a person other than the complainant, c) causes bodily harm to the complainant or, d) is a party to the offence with any other person, 3) Aggravated sexual assault (level 3), Everyone commits an aggravated sexual assault who, in committing a sexual assault, wounds, maims, disfigures, or endangers the life of the complainant.

²⁸⁴ *Sexual Offences*, Ottawa: Law Reform Commission of Canada, 1978, 21.

not aim to prohibit all sexual activities but only the violent expressions of such. Arguably gradation would further lend a higher degree of recognition to non-violent assault because without a separation of offences there could be a reluctance by the justice system to identify an attack as rape without any evidence of violence. The criminality of such non-violent rapes would thus be recognised.²⁸⁵

The notion that rape is but one form of assault against the individual has naturally not escaped criticism by other feminist authors who claim that the sexual nature of the assault is essential and that the choice to express aggression in a sexual manner is not haphazard. According to Tong, the rapist's choice of "the vagina or anus as the object of aggression is not accidental, but essential...the rapist seeks to spoil, corrupt, or even destroy those aspects of a woman's person that should be a source of pride, joy and power for her rather than a source of shame, depression, and humiliation".²⁸⁶ One must also consider the fact that regardless of whether rape is an act of violence, it is violence of a *sexual* nature precisely because it targets the sexual organs. Disregarding that the central role of an individual's sexuality is implicated in the act of rape would further victimise the person concerned by not fully understanding the extent of the injury. MacKinnon also stresses that injury to the sexuality of the person is a separate violation from the physical injury sustained: "if we say these things [rape, sexual harassment etc] are abuses of violence not sex we fail to criticise what has been done to us through sex".²⁸⁷ It would also lead to difficulties in prosecuting rape lacking physical force or violence.²⁸⁸

The disadvantage of a definition such as the Canadian one is that in solely focusing on physical violence, it fails to recognise that rape is by definition a physical violation. Focusing only on outward displays of force ignores situations where the perpetrator uses emotional pressure or authority to overpower the victim. As such, the seriousness of non-violent rape is minimised. The UN Special Rapporteur on Violence has criticised the classifications of rape as assault because it undermines sexual violence that does not include overt physical violence. Furthermore, the Rapporteur has noted that victims of rape who have been subjected to physical violence in connection to the rape still

²⁸⁵ Temkin, *Rape and the Legal Process*, p. 154. Gradation allows for lower penalties for crimes of 2nd or 3rd degree assault. It was believed that this would encourage more female victims to report the crime since it was thought that certain women were reluctant to bring charges if the penalties were automatically severe.

²⁸⁶ Tong, Rosemarie, *Women, Sex, and the Law*, Rowman and Littlefield Publishers, (1994), p. 117.

²⁸⁷ MacKinnon, Catherine, *Feminism Unmodified: Discourses on Life and Law*, p. 86.

²⁸⁸ Torrey, Morrison, *Feminist Legal Scholarship on Rape: A Maturing Look at One Form of Violence Against Women*, p. 308.

experienced the act of sexual intercourse as the primary injury. Victims also felt that the physical injuries were of assistance in the criminal justice process, whereas the rape itself did not receive the centrality it deserved.²⁸⁹ Other academics have also criticised the notion that rape can be divided into various levels of gravity, arguing that sexual coercion is expressed in many different ways and that not all rapes involve violence.²⁹⁰ Additionally, most rape victims do not incur serious or otherwise physical injury apart from the rape itself and a gradation scheme such as the Canadian construction would fail to reflect that fact.²⁹¹ Furthermore, it does not address the *particular* wrong of rape as opposed to all forms of assault.²⁹²

3.4 Human Dignity and Sexual Autonomy

Many domestic laws and international bodies have increasingly referred to the autonomy of the victim as the protective interest. The notion of human dignity is frequently mentioned in the same context as the autonomy of the individual when discussing the harms of rape, not least in the jurisprudence of international adjudicatory bodies. This is not surprising since human dignity forms the basis of international human rights law and is a principal consideration in international criminal law. Most human rights treaties cite human dignity as the foundation of the human rights regime, for example in the UDHR as well as the ICESCR and the ICCPR.²⁹³ The preamble of the UDHR states as one of its goals “to reaffirm faith in fundamental human rights, in the dignity and worth of the human

²⁸⁹ UN Doc. E/CN.4/1997/47, para. 34. See, also, a study of rape victims from New Zealand which disclosed: “Victims who had been beaten felt that the act of sexual intercourse rather than the assault was the primary injury...”, Young, Warren. & Smith, Mel, & New Zealand. Dept. of Justice & Victoria University of Wellington Institute of Criminology, *Rape Study, A Study directed by Mel Smith and Warren Young and Undertaken by the Department of Justice and the Institute of Criminology*, The Department, Wellington, N.Z., (1983), p. 109.

²⁹⁰ Temkin, Jennifer, *Rape and the Legal Process*, pp. 153-154.

²⁹¹ See e.g. Wertheimer, Alan, *Consent to Sexual Relations*, Cambridge University Press, (2003), p. 91, Scalzo, Tereza, *Prosecuting Rape Cases*, in *Practical Aspects of Rape Investigation, A Multidisciplinary Approach*, 4th ed., eds. Robert Hazelwood & Ann Wolbert Burgess, CRC Press, (2009), p. 373, Bartol, Curt & Anne, *Introduction to Forensic Psychology*, Sage Publications, (2004), p. 207.

²⁹² Gardner, John & Shute, Stephen, *The Wrongness of Rape*, p. 211.

²⁹³ See Universal Declaration of Human Rights, G.A. Res. 217A, Preamble, Art. 1, 22-23, UN GAOR, 3d Sess, 1st plen. mtg., UN Doc A/810 (Dec. 10, 1948); International Covenant of Economic, Social and Cultural Rights (ICESCR), G.A. Res. 2200A(XXI), Preamble, Art. 13, UN. Doc. (Jan. 3, 1976); International Covenant on Civil and Political Rights (ICCPR), G.A. Res. 2200A(XXI), UN Doc. A/6316 (Mar. 23, 1976). Art. 10.

person...”.²⁹⁴ The concept is found in declarations and resolutions as well as a myriad of jurisprudence from international tribunals. In fact, the use of the term ‘dignity’ is so pronounced in the formation and expansion of human rights that it arguably has acquired “a resonance that leads it to be invoked widely as a legal and moral ground for protest against degrading and abusive treatment. No other ideal seems so clearly accepted as a universal social good.”²⁹⁵ The notion of dignity is also frequently referred to in IHL, combining the notion of dignity with military necessity.

Though widely accepted and used in the human rights discourse, and frequently referred to in the discussions on sexual violence as the core value to be protected, it is a vague notion. It has even been described as a “vacuous” concept, so indeterminate “that it is often used...by advocates on both sides of a moral divide to press their arguments”.²⁹⁶ Attempts to further define it have been made, since no definition is provided in international instruments. Though fundamentally a philosophical question and connected to natural law, human dignity translated into human rights language, according to Clapham, entails two components: 1) everyone’s humanity must be respected, 2) the conditions for everyone’s self-fulfilment must be created and protected.²⁹⁷ The quality of self-fulfilment can be said to be interchangeable with those of ‘autonomy’ and ‘self-realisation’. This means that rules demanding respect for human dignity not only concern the power of one individual over another, but also confer a responsibility to create conditions for an individual to develop autonomy.²⁹⁸ As Sir Isaiah Berlin declared: “if the essence of men is that they are autonomous beings, authors of values, of ends in themselves...then nothing is worse than to treat them as if they were not autonomous, but natural objects...whose choices can be manipulated...”.²⁹⁹

²⁹⁴ The Helsinki Final Act also states in Principle VII that all human rights and fundamental freedoms “derive from the inherent dignity of the human person”, i.e. not from the state or other entities. The Conference on Security and Co-operation in Europe, Final Act, Helsinki, 1 August 1975.

²⁹⁵ Schachter, Oscar, *Human Dignity as a Normative Concept*, 77 Am. J. Int’l L. 848, (1983), p. 849.

²⁹⁶ Bagaric, Mirko & Morss, John, *In Search of Coherent Jurisprudence for International Criminal Law: Correlating Universal Human Responsibilities with Universal Human Rights*, 29 Suffolk Transnat’l L. Rev. 157, (2006), p. 170.

²⁹⁷ Clapham, Andrew, *Human Rights in the Private Sphere*, Oxford University Press, (1996), p. 148.

²⁹⁸ Clapham understands self-fulfilment to be “the right to associate, to make love, to take part in social life, to express one’s intellectual, artistic, or cultural ideas, to enjoy a decent standard of living and health care”. Ibid, p. 149.

²⁹⁹ Berlin, Isaiah, *Two Concepts of Liberty*, pp. 136-37.

Schachter views autonomy as relying on Kantian arguments, with the general proposition being: “Respect for the intrinsic worth of every person should mean that individuals are not perceived or treated merely as instruments or objects of the will of others...The idea that people are generally responsible for their conduct is a recognition of their distinct identity and their capacity to make choices.”³⁰⁰ The general understanding of dignity as the precursor to human rights then appears to be a command to ensure autonomy for the individual to make decisions on matters affecting them. Ultimately, the worth of using such a vague term to accurately define a criminal act, such as rape, is doubtful. Protecting dignity could be fulfilled through a myriad of definitions of rape. However, if dignity is most closely interpreted to resemble sexual autonomy, the notion can still be useful in delineating an appropriate definition.

The term ‘sexual autonomy’ is also a fairly open concept. What is clear is that it does not inevitably involve an unrestrained positive sexual autonomy, i.e. the freedom to have sexual intercourse with whomever one chooses, since this would oblige another person to participate.³⁰¹ The law is certainly not designed to assure sexual access of the individual. Rather, the law aims to protect negative sexual autonomy, meaning the freedom from unwanted sexual access and control over one’s own sexuality, but also protection of the freedom to seek intimacy and sexual fulfilment with a willing partner.³⁰² As such, the state should construct legislation that guarantees the sexual boundaries of the individual, thereby protecting autonomy. The idea of sexual autonomy stems from the very core of personal liberty and is therefore a fundamental value. It is clear that in most societies the woman’s right to sexual autonomy is not absolute. A certain amount of coercion, aggression and inequality by men is accepted in sexual relations, which is reflected in laws on rape.³⁰³ What is evident is that harmful sexual activities do not encompass purely consensual but unenjoyable experiences of sexual activity. Neither is there in jurisdictions that focus on non-

³⁰⁰ Schachter, Oscar, *Human Dignity as a Normative Concept*, p. 849. Schachter, however, notes that its intrinsic meaning “has been left to intuitive understanding, conditioned in large measure by cultural factors”. This turn to the Kantian ideal that rape is violative because it treats human beings merely as means, is supported also by Gardner, John & Shute, Stephen, *The Wrongness of Rape*, p. 205.

³⁰¹ See below the discussion on the right to privacy in Chapter 7.3.

³⁰² Schulhofer, Stephen, *Unwanted Sex*, p. 15, McGregor, Joan, *Is it Rape?*, p. 95. The concept of autonomy may also be used to argue against the criminalisation of sexual violence. Libertarian views on sexuality propose that the state should not be involved in matters of the individual’s sexuality, but rather it should remain unregulated and the sexual autonomy of the individual private. See *ibid*, p. 81.

³⁰³ Evident for example in laws defining rape as forceful sexual relations, which allows a certain measure of coercion. Likewise laws requiring evidence of resistance allow force to the degree that it compels women to resist. See Schulhofer, Stephen, *Unwanted Sex*, p. 279.

consent or force a requirement that both parties actually enjoy the activity, since the law cannot regulate sexual relations to the point of inquiring whether or not a certain party is motivated by sexual arousal.

The notion of primarily guaranteeing autonomy through legislation on rape is not undisputed. What part should it be given in the criminal elements? The idea did not enter the legal discourse until the 1960s because, as MacKinnon observes, “dignitary harms, because nonmaterial, are remote to the legal mind”.³⁰⁴ Westen also emphasises that harms to dignity are never the primary harms in criminalising behaviour.³⁰⁵ Schulhofer, on the other hand, holds that “taking sexual autonomy seriously means at the very least making this core constituent of human freedom an explicit part of criminal law standards of permissible behaviour and recognizing that violations warrant condemnation and serious penalties”.³⁰⁶ He maintains that an adequate system of law must place sexual autonomy at the forefront and lend it the same comprehensive protection as all other rights that are central to the idea of a free person, including protection of property, the rights of labour and the right to vote.³⁰⁷ Similar to the discussion on why sexual assault is worse than so-called normal assault, this raises the question of why sexual autonomy deserves special protection from society. A limited number of feminist scholars even consider this to be a further instance of a paternalistic attitude.³⁰⁸ If no human interactions are free from pressure, why should sexual relations be a different case? Roberts, on the other hand, finds that the protection of sexual autonomy is a necessity in the general scheme of liberating women from conditions of subordination.³⁰⁹

³⁰⁴ MacKinnon, Catherine, *Feminism, Marxism, Method, and the State: Toward Feminist Jurisprudence*, p.170.

³⁰⁵ Westen, Peter, *The Logic of Consent; The Diversity and Deceptiveness of Consent As a Defense to Criminal Conduct*, p. 151. Westen notes that the harm of rape is not a strictly subjective experience, since rape includes acts of sex with persons who are unconscious. In the case of rape, the primary harm is simply “subjecting a person to sexual intercourse without her having subjectively and voluntarily chosen it for herself...under conditions of choice to which she is lawfully entitled”, i.e., the mental and physical consequences entailed in a man subjecting a woman to intercourse despite her non-acquiescence.

³⁰⁶ Schulhofer, Stephen, *Taking Sexual Autonomy Seriously: Rape Law and Beyond*, 11 Law & Phil. 35, (1992), p. 94.

³⁰⁷ Schulhofer, Stephen, *Unwanted Sex*, p. x.

³⁰⁸ See e.g. Berger, Vivian, *Not So Simple Rape*, 7 Crim. Just. Ethics 69, (1988), p. 77.

³⁰⁹ Roberts, Dorothy, *Rape, Violence and Women's Autonomy*, 69 CM-Kent Law Rev. 359, (1993), p. 387. She argues that in defining rape, the question is ultimately the issue of entitlement that reflects relationships of power in a society, i.e. the man's entitlement to sexual control and the woman's entitlement to the law's protection of her sexual autonomy. Ibid, p. 364.

Even if it is accepted that sexual autonomy forms the main protective interest, does it inform us of which elements of the crime of rape are most appropriate? An example expressing the consideration for autonomy is the Swedish *travaux préparatoires* of the definition of rape, which states that the harm lies in the violation of disregarding the victim's sexual autonomy and bodily integrity.³¹⁰ The argument is that since individual identity is closely linked to sexual identity in our culture, sexual violence represents an assault on the very core of a person's self.³¹¹ However, the definition of rape centres on force and coercion. The European Court of Human Rights in *M.C. v. Bulgaria* noted that states may also fulfil the protection of sexual autonomy through statutes requiring force or coercion if such terms are interpreted to include non-consensual acts.³¹² However, most scholars and case law from human rights courts and *ad hoc* tribunals find that sexual autonomy warrants a definition focusing on non-consent. Consent is viewed as a necessity in allowing individuals to act as moral agents, consent being a constituent of sexual autonomy.³¹³ According to Joan McGregor, the very nature of rape is non-consensual sex, and weapons, threats and intimidation are simply ways of exerting power over the victim.³¹⁴ Thus the essential wrong of rape is that sexual relations are *non-consensual*, not the force used to obtain sex.³¹⁵ This is based upon the theories of harm as a wrong to

³¹⁰ Prop. 2004/705:45.

³¹¹ Seifert, Ruth, *The Second Front - The Logic of Sexual Violence in Wars*, p. 41.

³¹² *M.C. v. Bulgaria*, (Application No. 39272/98), Judgment of 4 December, 2003.

³¹³ Cowan, Sharon, *Freedom and Capacity to Make a Choice*, A Feminist Analysis of Consent in the Criminal Law of Rape, in *Sexuality and the Law, Feminist Engagements*, ed. by Vanessa Munro and Carl F. Stychin, Routledge-Cavendish, (2007), p. 52.

³¹⁴ McGregor, Joan, *Force, Consent and the Reasonable Woman*, in *In Harm's Way: Essays in Honor of Joel Feinberg*, eds. Coleman, Jules & Buchanan, Allen, Cambridge University Press, (1994), p. 233.

³¹⁵ Berglund, Kerstin, *Gender and Harm*, p. 24. Shafer and Frye also argue that "we would not want to say that there is anything morally wrong with sexual intercourse *per se*, we conclude that the wrongness of rape rests with the matter of the woman's *consent*". Shafer, Carolyn & Frye, Marilyn, *Rape and Respect*, in Vetterling-Braggin, *Feminism and Philosophy*, p. 334. Lynne Henderson also states that the harm is "in the invasion and the denial of one's existence as a human being, not whether or not there is additional violence". Henderson, Lynne, *Getting to Know: Honoring Women in Law and Fact*, 2 Tex. J. Women and L. 41, (1993), p. 65. Gardner and Shute argue: "Rape, in the pure case, is the sheer use of a person. In less pure, but statistically more typical, cases this use is accompanied by violence, terror, humiliation etc. Our only point is that when someone feels humiliated by rape itself this feeling is justified. Rape is humiliating even when unaccompanied by further affronts, because the sheer use of a person, and in that sense the objectification of a person, is a denial of their personhood. It is literally dehumanizing." See Gardner, John & Shute, Stephen, *The Wrongness of Rape*, p. 205. See also discussion in McGregor, Joan, *Force, Consent and the Reasonable Woman*, p. 233.

sexual autonomy. Since the harm sustained is the transgression of an individual's sexual autonomy, it is logical to conclude that the primary harm of rape is non-consensual sex, and that the physical assault that may accompany it is to be taken as a consideration in determining e.g. the level of gravity, but not the existence of the crime itself. The UN Special Rapporteur on Violence against Women has concluded that the fact that the use of force is applied as a measure of the seriousness of various forms of sexual violence could well undermine the harm sustained and the victim's experience of the assault, as well as the seriousness of sexual violence that fails to be manifested by physical violence.³¹⁶

Similarly, scholars such as Dripps and Schulhofer assert that in order for criminal law to achieve the objective of protecting sexual autonomy, the law must distinguish such violations from violence. They refer to the association of rape with physical violence as a cause of the failure of criminal law to protect the sexual freedom of women.³¹⁷ Such a standard suggests that only force can overcome a woman's will. Since this disregards situations where women do not fight back physically during rape, for example because of fear of further violence, it has resulted in many occasions where women are left without protection when they exhibit no physical injury. As Schulhofer points out: "So long as rape is viewed as a crime of violence, the core issue remains, as it always was, the elusive one of determining when male conduct is sufficiently forcible to negate a verbal yes."³¹⁸ By distinguishing between violent and non-violent rape, one overlooks the common characteristics of both, since rape inherently involves both physical and mental harm. This question of the harm of rape as a mainly physical violation or an aspect of the protection of autonomy has been discussed by e.g. the ECtHR, the *ad hoc* tribunals and the ICC, as a matter for the determination of the appropriate definition of rape.

3.5 Cultural and Collective Harm

Is the harm of rape a reflection of our cultural values on sex or an "objective matter" independent of how it is viewed by society? This is in part relevant to the discussion on the possibility of establishing international obligations in relation

³¹⁶ Report of the Special Rapporteur on Violence against Women, its Causes and Consequences, Ms. Rhadika Coomaraswamy, UN Doc. E.CN.4/1997/47, para. 34. According to her studies: "...victims who had been beaten felt that the act of sexual intercourse rather than the assault was the primary injury. Some felt that the beating and bruising they received assisted them in the criminal justice process, while the rape itself was not accorded the centrality it deserved".

³¹⁷ Dripps, Donald, *Beyond Rape*, p. 1797 & Schulhofer, Stephen, *Taking Sexual Autonomy Seriously: Rape Law and Beyond*, p. 35. This would require creating separate crimes, one for physical assault and one for sexual autonomy. Violent rape would in this proposition be prosecuted as an assault and non-violent rape as a crime against sexual autonomy.

³¹⁸ Schulhofer, Stephen, *Taking Sexual Autonomy Seriously: Rape Law and Beyond*, p. 42.

to the elements of the crime of rape. The ideas of Foucault and Baber, as well as the enactment of the Canadian legislation raise the question of why an assault with a male sexual organ should be treated differently in the legal world from assault with another body part, such as a fist. McGregor, for example, notes that somehow sexual relationships are often considered to have a significance beyond the physical act.³¹⁹ Why is this? If one compares the gravity of rape with other assaults in terms of the actual physical injury inflicted, do we fully appreciate the distinct nature of this crime? Is the sole difference that most other forms of assault do not involve the penetration of a bodily orifice? If sexuality is not harmful in itself, can we separate sexual violence from other forceful behaviour? It raises necessary questions as to the nature of sexual violence and the aim of regulating intimate sexual relations. It also has bearing on how we define the *actus reus* of rape. Rape aims to prohibit acts of a *sexual* nature, and this has traditionally been restricted to penetration of the vagina by a male sexual organ. However, in the Rwanda conflict, bottles, weapons or batons were frequently used for penetration, leading the ICTR to widen the scope of the definition of rape to include also such acts.³²⁰ Determining whether an act is sexual may therefore also be context-based. The matter has also been raised concerning e.g. the inclusion of male victims of rape in the *actus reus*, who are excluded in jurisdictions that focus on vaginal penetration. It further concerns e.g. the question whether forced oral sex should be classified as rape. Why has there been a preoccupation with vaginal penetration?

A deeply intertwined relationship exists between sexual interactions, religion and culture. The wrong of forceful sex is argued to consist of violations of personal integrity, identity and dignity, because it touches one of the most intimate aspects of the human being.³²¹ Several authors have noted that the condemnation of non-consensual sex is directly linked to the social and religious disapproval of non-marital sex, for example, the placement of sexual behaviour as the source of Christian virtue.³²² In this sense, criminal laws on rape developed to determine whether or not a woman was to be excused for committing the wrongful act of adultery or fornication. Baber suggests that this has to do with the value that our culture places on the role of women in society, and that the view of rape as being something more harmful than other physical attacks is distinctly sexist. Since women are traditionally considered in connection with matters that centre on sexuality - as lovers, wives and mothers - it is commonly assumed that they have a “greater stake concerning sexuality than

³¹⁹ McGregor, Joan, *Force, Consent and the Reasonable Woman*, p. 235.

³²⁰ *The Prosecutor v. Jean-Paul Akayesu*, Judgment of 2 September 1998.

³²¹ McGregor, Joan, *Is it Rape?*, p. 223.

³²² Coughlin, Anne, *Sex and Guilt*, 84 Virginia Law Review I, (1998), pp. 6-7.

do men”.³²³ The idea gained some momentum in the feminist movement by authors who searched for ways of removing the sexual content of laws on rape in order to eradicate the question of the female victim’s culpability.³²⁴ In doing so, they intended to separate the concepts of sexuality and gender.

Sex is additionally linked to reproduction, and as a result, people expect to exercise the right of control over their reproductive autonomy. To an extent this explains the taboos and the particular status of sexuality. Reproductive autonomy is furthermore protected in international human rights law. However, the advancement of technology, as well as the shifting moral code in Western society, has led to increased opportunities for women in many countries to regulate and control their sexual autonomy in new ways. Contraception and abortion has expanded reproductive and sexual freedom, which is mirrored in the advancement of the concept of sexual autonomy. The reproductive consequences cannot therefore be emphasised as constituting the main harm. As Jeffrie Murphy indicates, the distinction between rape and other forms of assault is owing rather to the symbolism and mystique that culture places on sexuality itself, not only on reproduction.³²⁵ As societies change, as far as the influence of religion and the advancement of technology concerns, so to a certain extent do the consequences of rape.

As mentioned, the liberal theory on harm determines harm regardless of context. However, according to Berglund, sexuality must be considered in a societal context, where power structures and violence exist. The cultural meaning of rape is therefore an important indicator of what harm entails on the individual level.³²⁶ Jeffrie Murphy agrees that the importance placed on sex is essentially cultural and that, objectively, sexual assault is not more severe than non-sexual assault.³²⁷ Arguably, rape does not flow naturally from human sexuality, and sexual violence serves to maintain a certain cultural order between the sexes by regulating the unequal power relationships that exist.³²⁸ Failure to consider the context could, according to certain feminist authors, lead to harm being

³²³ Baber, H. E., *How Bad is Rape?*, p. 136.

³²⁴ Cahill, Anne, *Foucault, Rape, and the Construction of the Feminine Body*, *Hypatia*, Vol. 15, No. 1, (2000), p. 44.

³²⁵ Murphy, Jeffrie, *Some Ruminations on Women, Violence and the Criminal Law*, p. 214.

³²⁶ Berglund, Kerstin, *Gender and Harm*, p. 20.

³²⁷ Murphy, Jeffrie, *Some Ruminations on Women, Violence and the Criminal Law*, p. 214. Alan Wertheimer holds that the reasons individuals experience rape as painful has its origin in both our cultural value and evolutionary psychology. Wertheimer, Alan, *Consent to Sexual Relations*, p. 1.

³²⁸ Seifert, Ruth, *War and Rape: a Preliminary Analysis*, p. 57.

interpreted in a gendered manner. The construction of the autonomous individual must be evaluated, since it represents a vision of the normal person. This may embody different ideologies and often does not entail a gendered reality. Accordingly: "The autonomous individual represents an ideological framework that creates a setting in which the legal concepts are defined."³²⁹ The context of the power structure in most societies must consequently be taken into account. The construction of harm has historically not considered the harms suffered distinctively or disproportionately by women.³³⁰ An example is the failure to recognise marital rape, based upon the assumption that sexual intercourse with a partner cannot be harmful.

Most cultures and legal systems, regardless of their definition of rape, attach substantial importance to the protection of the individual's sexuality, demonstrating that the serious wrong of rape finds broad support in various cultures. As sexuality is imbued with cultural influences, violence in connection with sexuality has become a social construction and therefore requires a specific form of condemnation through criminalisation. The social importance attached to sex and the construction of sexuality must therefore be specifically acknowledged when discussing violence of a sexual nature. Though rape is a worldwide occurrence, its definition differs immensely domestically, depending on the values that each culture prescribes and what interests the particular society seeks to protect. Even the fundamental question of what the harm of rape actually is, differs from culture to culture.

In the *Celebici* case heard by the ICTY, the Tribunal noted that the mental harm of rape can be more severe in particular social and cultural contexts.³³¹ In the *Akayesu* decision, the ICTR also preferred a conceptual, wide definition of rape in order to spare witnesses the ordeal of providing explicit accounts of the

³²⁹ Berglund, Kerstin, *Gender and Harm*, pp. 15-16. See, further, on p. 26 where Berglund claims that power, as a structural problem, can be of relevance to the question of harm. The society's power structure between the genders informs what we view as harm. However, this applies to both men and women. See, also, discussion in Finley, Lucinda, *Breaking Women's Silence in Law: The Dilemma of the Gendered Nature of Legal Reasoning*, 64 Notre Dame L. Rev. 886, (1989), p. 887, which raises the question: "If the law has been defined largely by men, and if its definitions, which are presumed to be objective and neutral, shape societal judgments as to whether a problem exists or whether a harm has occurred, then can the law comprehend and adequately redress women's experiences of harm?"

³³⁰ Berglund, Kerstin, *Gender and Harm*, Thacker, Anne, *Women & the Law*, Deakin University Press, (1998), p. 20.

³³¹ *Prosecutor v. Delalic et al. (Celebici Camp)*, Case No. IT-96-21-T, ICTY, Judgment of 16 November 1998, para. 495: "The psychological suffering of persons upon whom rape is inflicted may be exacerbated by social and cultural conditions and can be particularly acute and long lasting."

violation - an especially sensitive issue in Rwandan culture.³³² In countries that connect the role of a woman to her sexual functions, such as mother and wife, female sexuality may be more highly revered and is subsequently more strictly regulated. Since the “hurt” may be experienced in dissimilar ways by victims even within the same locality, a logical conclusion would be that rape is perceived to be more harmful in certain societies than in others. Women may for example be perceived as “damaged goods” after being raped, as a source of shame to the family with few marriage prospects, and may even be forced to marry the rapist.³³³ Rape is then primarily seen as a violation of morality rather than a crime of violence. In many Muslim and Latin American countries, the primary harm of rape is still the injury to the woman’s ‘honour’.³³⁴ Honour is both a measurement of the woman’s moral qualities and a reflection of the family in relation to the community. The emphasis in e.g. Islamic law lies in the preservation of chastity and deterrence of sexual immorality.³³⁵ Thus, in several countries in the Middle East, such as Jordan, as well as Latin American countries, the rapist can be exonerated if he marries the victim. The UN Committee Against Torture has for example in its conclusions on the periodic report of Cameroon criticised the exemption from punishment of a rapist if he subsequently marries his victim.³³⁶ In Costa Rica, the offender can be exonerated even if the victim refuses the offer of marriage.³³⁷ The honour of the female

³³² *The Prosecutor v. Jean-Paul Akayesu*, Judgment of 2 September 1998, para. 687. Gardam and Jarvis also note that in cultures where sexual purity is highly valued, women may find it especially difficult to talk about sexual violence, e.g. in South Africa, Bosnia and Kosovo. However, they argue that this was used as an excuse in the Rwanda conflict not to investigate sexual violence, since investigators stated that women would not talk to them because of the attached stigma. Gardam, Judith & Jarvis, Michelle, *Women, Armed Conflict and International Law*, p. 221.

³³³ See e.g. Report of the Special Rapporteur on Violence against Women, its Causes and Consequences, Ms. Rhadika Coomaraswamy, submitted in accordance with Commission resolution 1997/44, UN Doc. E/CN.4/1998/54, 26 January 1998 and Violence against Women in the Family, Report of the Special Rapporteur on Violence against Women, its Causes and Consequences, Ms. Radhika Coomaraswamy, Submitted in Accordance with Commission on Human Rights Resolution 1995/85, UN Doc. E/CN.4/1999/68, March 10, 1999.

³³⁴ Mayer, Ann Elizabeth, *Issues Affecting the Human Rights of Muslim Women*, in *Women and International Human Rights Law*, vol. 3, Transnational Publishers, ed. Kelly Askin & Dorean Koenig, (2001), p. 373.

³³⁵ Ibid, p. 373. See, also, Quaraishi, Asifa, *Her Honor: An Islamic Critique of the Rape Laws of Pakistan from a Woman-Sensitive Perspective*.

³³⁶ Committee against Torture, Conclusions and Recommendations of the Committee against Torture: Cameroon, 20 November 2003, UN Doc. CAT/C/CR/31/6. para. 7 (c).

³³⁷ Bunch, Charlotte, *The Progress of Nations Report, UNDP, (1997), The Intolerable Status Quo: Violence Against Women and Girls*, p. 43.

victim and the family would thereby remain intact. Sexual violence is subsequently viewed largely as a social problem, i.e. the ‘unmarriagability’ of the female that can be resolved, rather than an offence against the person. In this sense, the social *cost* of sexual violence is dependent on the culture in question.

Alan Wertheimer does not find the notion of cultural varieties of harm disconcerting, rather, that the particular harms that women suffer and endure in certain societies should be addressed.³³⁸ Gardner and Shute also argue that “the justification of the penetration condition in the modern law of rape does involve some attention to social meaning”.³³⁹ This leads to controversies in creating obligations on states in international law to adopt a particular definition of rape, evident also in the process of developing the definition of rape in the Elements of Crimes of the ICC at the Rome Conference.³⁴⁰

An interesting point in relation to the generalisation of harms is the notion of individual and group harm. In the case law of the *ad hoc* tribunals discussed below, the harm of rape is often described as an offence against the community or group, i.e. has a cultural component. This may be a natural consequence concerning the crime of genocide, since it requires an attack against a group. However, a single case of rape can also constitute genocide, depending on the circumstances. Furthermore, the international crimes of crimes against humanity and war crimes do not require a nexus to a specific group. Despite this, the violation of the act of rape is described as a disintegrating factor that demoralises the group, e.g. preventing births.³⁴¹ This interprets the harm of rape in the context of the patriarchal family or society, i.e. rape can constitute genocide particularly *because* rape leaves victims in certain communities “unmarriageable” or because communities are patrilineal.³⁴² A risk is that the harm of rape is analysed from the standpoint of the consequences in a patriarchal society, in a way defining the harms from a male perspective.³⁴³

³³⁸ Wertheimer, Alan, *Consent to Sexual Relations*, p. 109. Wertheimer, however, acknowledges that although the importance does vary culturally, the general significance of sex and aversion to non-consensual intercourse does not display a wide variety of responses. *Ibid*, p. 113.

³³⁹ Gardner, John & Shute, Stephen, *The Wrongness of Rape*, in *Oxford Essays on Jurisprudence*, Fourth Series, ed. Jeremy Horder, Oxford University Press, (2000), p. 210.

³⁴⁰ See Chapter 9.3.5.

³⁴¹ See e.g. *The Prosecutor v. Jean-Paul Akayesu*, Judgment of 2 September 1998, discussed in chapter 9.2.

³⁴² Dixon, Rosalind, *Rape as a Crime in International Humanitarian Law: Where to from Here?*, p. 703 ff. Dixon raises the point that this, however, can lead to an “ethnicization” of the harms of rape.

³⁴³ *Ibid*, p. 705.

Human rights courts have also noted the cultural impact on the harm of rape. In the *Gonzalez Perez Sisters Case* of the Inter-American Commission on Human Rights, concerning the rape of three sisters belonging to the Tzeltal community in Mexico, the Commission declared that their membership of that group aggravated their humiliation and suffering. As a consequence of the sexual violence, the sisters were disowned by their community, which was a relevant factor to consider.³⁴⁴ As noted in the history surrounding the prohibition of rape, the evolution of laws on the offence point to an increased movement towards individualisation of the harm of rape, from being viewed as a crime against the family or community to an offence against the person. However, the case law of the *ad hoc* tribunals indicates a return to acknowledging again the harm caused to the community. It could also be argued that the acknowledgement of rape as a form of sex discrimination in the human rights regime recognises sexual violence as a group-based harm, where women as a collective are harmed.³⁴⁵

In conclusion, international human rights law and international criminal law are increasingly directing states to consider and protect human dignity in different forms. In the context of sexual violence, dignity is most frequently equated with sexual autonomy - that is, the ability to choose whether or not to engage in sexual relations. This is not uncontroversial from a cultural perspective and it does not automatically indicate which definition of rape is the most appropriate to protect this interest. However, it can be assumed that autonomy is closely related to the individual's consent and that force and coercion are examples of precursors negating a person's consent. This will be further discussed below in connection with the elements of the crime of rape.

³⁴⁴ *Ana, Beatriz, and Celia González Pérez (Mexico)*, Case 11. 565, Report No. 53/01, 4 April 2001, IACHR, para. 95.

³⁴⁵ Edwards, Alice, *Violence against Women as Sex Discrimination: Judging the Jurisprudence of the United Nations Human Rights Treaty Bodies*, p. 51.

4. Elements of the Crime of Rape

4.1 The Principle of Legality

As will be examined in subsequent chapters, though a prohibition of rape has been in existence for some time in international human rights law, IHL and in international criminal law, efforts to define the criminal offence of rape have only been undertaken in the past decade. Such endeavours have been highly fragmented and primarily conducted by regional human rights courts as well as *ad hoc* tribunals adjudicating international criminal law. The result is that various definitions have developed through judicial decisions, providing both substance and specificity to the generally worded statutes or treaties. Concerns, however, have been raised that the process of defining the crime on an *ad hoc* basis, particularly in international criminal law, jeopardises the principle of legality in failing to provide the requisite level of foreseeability. Although judges are allowed a certain amount of interpretation of crimes, e.g. the substance of crimes against humanity, the question is whether the tribunals/courts have crossed the line of interpretation and created new crimes. By applying different definitions of the crime of rape in the same tribunal, a lack of consistency is a result. The following chapter will, however, make clear that the principle of legality is generally not as strict in international law as in domestic criminal law and will therefore aim to determine the scope of the principle in relation to the specific nature of international law. What does the requirement of “foreseeability” demand of the process of defining rape?

The aim of the principle of legality is to assure the legal certainty of the individual, which in turn requires certain distinguishing qualities of a legal

provision.³⁴⁶ Offences must be clearly and specifically defined so as to make prosecution foreseeable (*lex certa*), statutes must be accessible to the public and not be retroactively applied.³⁴⁷ A vague definition of a crime may in practice lead to retroactive punishment. The principle also prohibits the establishment of punishment by analogy.³⁴⁸ The principle inhibits the judiciary from arbitrary prosecution, punishment of individuals as well as the creation of new offences through judicial interpretation. Vagueness of the definition of crimes affords a greater discretion to the judiciary and enforcement agencies, in extreme cases leading to an abandonment of the rule of law.³⁴⁹ The purpose of the principle is thus to enhance the certainty of the law, to ensure justice and fairness for the accused, and to prevent abuse of power on the part of the government. Legality is also linked to the general purposes of criminal law, such as deterrence of the crime and increased compliance.³⁵⁰ The principle of legality assumes that the deterrent effect of a law and its power to influence the decision-making of an

³⁴⁶ Gallant has identified eight principles included in the concept of legality, though not all of them apply in all societies: 1) non-retroactive application of criminal law, 2) non-retroactive application of penalty, 3) no act may be punished by a court whose jurisdiction was not established at the time of the act, 4) no act may be punished on the basis of lesser or different evidence from that which could have been used at the time of the act, 5) the law must be sufficiently clear to provide notice that the act is prohibited, 6) interpretation and application of the law should be done on the basis of consistent principles, 7) collective punishment may not be imposed for individual crimes and 8) everything not prohibited by law is permitted. See Gallant, Kenneth, *The Principle of Legality in International and Comparative Criminal Law*, p. 11. The principle is codified in both human rights law and IHL/ICL: Art. 11 UDHR, Art. 15 ICCPR, Art. 7 ECHR, Art. 9 ACHR, Art. 7(2) ACHPR, Art. 65 of Geneva Convention IV, Art. 99 Geneva Convention III, Art. 75 (4) (c) Additional Protocol I, Art. 6 (2) Additional Protocol II. The principle of legality in human rights treaties pertains to domestic laws and establishes rules for such provisions. See further discussion in Boot, Machteld, *Genocide, Crimes against Humanity, War Crimes: Nullum Crimen Sine Lege and the Subject Matter Jurisdiction of the International Criminal Court*.

³⁴⁷ Ferdinandusse, Ward N., *Direct Application of International Criminal Law in National Courts*, p. 222, Haveman, Roelof, *The Principle of Legality*, in *Supranational Criminal Law: A System Sui Generis*, eds. Haveman, Kavran, Nicholls, Intersentia, (2003), p. 50.

³⁴⁸ Haveman, Roelof, *The Principle of Legality*, p. 40.

³⁴⁹ Broomhall, Bruce, *International Justice & The International Criminal Court*, Oxford University Press, (2003), p. 26.

³⁵⁰ Bassiouni, Cherif, *Crimes against Humanity in International Criminal Law*, p. 124. Gallant, Kenneth, *The Principle of Legality in International and Comparative Criminal Law*, p. 19. It substantively protects life, liberty and property and provides the procedural protection of prior notice. It restrains arbitrary governmental power over persons. Boot, Machteld, *Genocide, Crimes against Humanity, War Crimes: Nullum Crimen Sine Lege and the Subject Matter Jurisdiction of the International Criminal Court*, p. 85.

individual arises from the law's clarity. These requirements must be met in order to inform the individual in advance of what is acceptable versus unacceptable behaviour and of the consequences of unacceptable acts. The basis of the formulation and definition of any crime is therefore the *foreseeability* made available to the individual.

4.1.1 The Principle in International Law

Though a principle established primarily in domestic law, it is also relevant in international law, especially with regard to regulations relating to criminal law. The principle is now part of international customary law.³⁵¹ As Theodor Meron holds: "The prohibition of retroactive penal measures is a fundamental principle of criminal justice, and a customary, even peremptory, norm of international law that must in all circumstances be observed in all circumstances by national and international tribunals."³⁵² It serves both as a legislative constraint and as a rule of judicial interpretation.³⁵³

Albeit relevant also to international law, the principle is not applied as strictly in international human rights law and international criminal law. As regards international human rights law as a regime, it does not create any direct implications for the individual since the state is the subject for which the obligations are created, apart from unequivocally expressing the prohibition of retroactively enforced laws. Most international human rights provisions are notoriously broad, often leaving a rather wide margin of appreciation in determining the manner of domestic implementation.³⁵⁴ It is therefore expected that each state reformulates its international obligations, when implementing

³⁵¹ Werle, Gerhard & Jessberger, Florian, *Principles of International Criminal Law*, p. 32. Gallant, Kenneth, *The Principle of Legality in International and Comparative Criminal Law*, p. 38.

³⁵² Meron, Theodor, *War Crimes Law Comes of Age*, Oxford University Press, (1998), p. 244. The principle also forms part of human rights law, as stated in UDHR (Art. 11.2), ICCPR (Art. 15.1), the African Charter on Human and People's Rights (Art. 7.2), the American Convention on Human Rights (Art. 9) and the European Convention on Human Rights (Art. 7). See further discussion in Bassiouni, Cherif, *Principles of Legality in International and Comparative Criminal Law*, van Schaack, Beth, *Crimen Sine Lege: Judicial Lawmaking at the Intersection of Law and Morals*, Haveman, Roelof, *The Principle of Legality, in Supranational Criminal Law: A System Sui Generis*.

³⁵³ Bassiouni, Cherif, *Principles of Legality in International and Comparative Criminal Law*, in *International Criminal Law*, ed. Bassiouni, Brill, (2008), p. 73. An example of the latter is the use of analogy of crimes.

³⁵⁴ See e.g. Cryer, Friman, Robinson & Wilmschurst, *An Introduction to International Criminal Law and Procedure*, p. 11, who argue that human rights norms are necessarily broad and liberal in their interpretation to achieve their objectives and purposes, whereas international criminal law must take into account the rights of suspects and consequently must be strictly construed.

crimes, according to domestic rules of legality.³⁵⁵ Though this margin of appreciation to a certain extent has been restricted regarding the prohibition of rape, at least in the European human rights system, states are nevertheless provided with a great deal of flexibility in the domestic interpretation of human rights provisions. Specificity of human rights norms is thus not in their nature. International criminal law, on the other hand, creates consequences for the individual such as criminal liability. Such rules must therefore be more specific and abide by the criminal law principles of legality, including legal certainty.

The principle of legality has not been applied as rigidly in international criminal law as in national criminal law. International criminal law has developed on an *ad hoc* basis and has frequently been exposed to wide lacunas, which has not been conducive to coherence and predictability. Arguments such as the decency of humanity and the interests of the international community were e.g. considered overriding concerns in the Nuremberg trials.³⁵⁶ This is apparent even in the European Convention on Human Rights and the ICCPR, which allow for exceptions to the prohibition of the retroactive application of the law. Article 7 of the European Convention states that the principle of non-retroactivity “shall not prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognized by civilized nations”.³⁵⁷ Furthermore, international law, as primarily a state-centric body of law, has greater difficulty in adapting its processes and practices to the principle of legality than domestic legal systems. This, according to Bassiouni, is due to the novelty of the international legal system and that it therefore lacks the mature characteristics of national legal systems such as “legitimacy, predictability, consistency, cohesion and

³⁵⁵ Bassiouni, Cherif, *Principles of Legality in International and Comparative Criminal Law*, p. 88 and p. 95. It must, however, be born in mind that certain states apply international law directly and international criminal rules should therefore meet the same level of specificity as national rules.

³⁵⁶ The Nuremberg Tribunal stated regarding complaints of violations of the *nullum crimen sine lege* principle: “The maxim *nullum crimen sine lege* is not a limitation of sovereignty, but is in general a principle of justice. To assert that it is unjust to punish those who in defiance of treaties and assurances have attacked neighbouring States without warning is obviously untrue, for in such circumstances the attacker must know that he is doing wrong, and so far from it being unjust to punish him, it would be unjust if his wrong was allowed to go unpunished”. *Nuremberg IMT Judgment 1947*, 41 AJIL 172, at 217.

³⁵⁷ ECHR Article 7 (2). See also Article 15 (2) of the ICCPR which holds: “Nothing in this article shall prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognized by the community of nations.”

fairness”.³⁵⁸ It lacks a central criminal court and the specification of its substance has been decentralised.³⁵⁹ It has also been assumed that international criminal law norms will be implemented at the national level where the national requirements of the legality principle will be fully taken into account.³⁶⁰ Owing to the sporadic development of this field of law, much of the substance has been uncoded in treaties, and has developed at the customary level.

The criticism of the retroactive application of law at the Nuremberg trials, however, has created an impetus to abide by the principle of legality in more recent tribunals. The ICC has created a document entitled Elements of Crimes, which defines the crimes within the Court’s jurisdiction. Also, when drafting the Statute of the ICTY, the UN Secretary-General stated: “The application of the principle of *nullum crimen sine lege* requires that the international tribunal should apply rules of international humanitarian law which are beyond any doubt part of customary law...”.³⁶¹ However, the *ad hoc* tribunals have invoked a mixture between “immorality, illegality, and criminality” in their case law.³⁶² The ICTY has stated:

³⁵⁸ Bassiouni, Cherif, *The Philosophy and Policy of International Criminal Justice*, p. 66. Bassiouni argues that the principle of legality must by its nature be different in international law since it requires a balance between the preservation of justice of the accused and world order, taking into account the nature of international law and the *ad hoc* process of legal drafting. See *ibid*, p. 88.

³⁵⁹ Cassese, Antonio, *International Criminal Law*, Oxford University Press, 2nd ed. (2008), p. 43.

³⁶⁰ Bassiouni, Cherif, *Crimes against Humanity in International Criminal Law*, p. 144. Further, the statutes and treaties have frequently been drafted by diplomats, rather than specialists in ICL, lacking technical drafting skills. See van Schaack, Beth, *Crimen Sine Lege: Judicial Lawmaking at the Intersection of Law and Morals*, p. 17.

³⁶¹ Statute of the International Tribunal for the Former Yugoslavia, adopted 25 May 1993 by UN Security Council Resolution S/RES/827, UN Doc. S/25704, para. 34. The ICTY also stated in the Celebici case that the prohibition of the non-retroactive application of criminal sanctions and against *ex post facto* criminal laws “...are the solid pillars on which the principles of legality stands. Without the satisfaction of these principles no criminalisation process can be accomplished and recognised”. *Prosecutor v. Delalic et al.*, (Celebici Camp), Judgment of 16 November 1998, para. 402.

³⁶² van Schaack, Beth, *Crimen Sine Lege: Judicial Lawmaking at the Intersection of Law and Morals*, p. 15. According to Beth van Schaack, the current *ad hoc* tribunals are “...updating and expanding historical treaties and customary prohibitions, upsetting arrangements carefully negotiated between states, rejecting political compromises made by states during multilateral drafting conferences, and adding content to vaguely-worded provisions that were conceived more as retrospective condemnations of past horrors than as detailed codes for prospective penal enforcement.” See p. 5.

“it is not certain to what extent [the principles of legality] have been admitted as part of the international legal practice, separate and apart from the existence of the national legal system”.³⁶³

“Whereas the criminalisation process in a national criminal justice system depends upon legislation which dictates the time when conduct is prohibited and the content of such prohibition, the international criminal justice system attains the same objective through treaties or conventions, or after a customary practice of the unilateral enforcement of a prohibition by States. It could be postulated, therefore, that the principles of legality in international criminal law are different from their related national legal systems with respect to their application and standards.”³⁶⁴

Similarly, the ICTR has held that “...given the specificity of international criminal law, the principle of legality does not apply to international criminal law to the same extent as it applies in certain national legal systems”.³⁶⁵ Accordingly, rather than disregarding the principle, it is often referred to in case law but with the understanding that it must be adapted to the international law context.

It should also be noted that international law is not predicated on previous jurisprudence in the same manner as law applied by national courts, i.e., the *stare decisis* principle has generally not been applied to the same extent.³⁶⁶ The ICTY for example has stated:

“The Tribunal is not bound by precedents established by other international criminal courts such as the Nuremberg or Tokyo tribunals, let alone by cases brought before national courts adjudicating international crimes. Similarly, the Tribunal cannot rely on a set of cases, let alone a single precedent, as sufficient to establish a principle of law: the authority of precedents (*auctoritas rerum similiter judicatarum*) can only consist in evincing the possible existence of an international rule. More specifically, precedents may constitute evidence of a customary rule in that they are indicative of the existence of *opinio iuris sive necessitatis* and international practice on a certain matter, or else they may be indicative of the emergence of a general principle of international law. Alternatively, precedents may bear persuasive authority concerning the existence of a rule or principle, i.e. they may persuade the Tribunal that the decision taken on a prior

³⁶³ *Prosecutor v. Delalic et al, (Celebici Camp)*, Judgment of 16 November 1998, para. 403.

³⁶⁴ *Ibid*, paras. 404-405.

³⁶⁵ *Prosecutor v. Karemera*, ICTR-98-44-T, ICTR, Decision on the Preliminary Motions by the Defence of Joseph Nzirorera, Edouard Karemera, André Rwanakakuba and Methieu Ndirumpatse Challenging Jurisdiction in Relation to Joint Criminal Enterprise, 11 May 2004, para. 43.

³⁶⁶ Ferdinandusse, Ward N., *Direct Application of International Criminal Law in National Courts*, p. 113.

occasion propounded the correct interpretation of existing law. Plainly, in this case prior judicial decisions may persuade the court that they took the correct approach, but they do not compel this conclusion by the sheer force of their precedential weight. Thus, it can be said that the Justinian maxim whereby courts must adjudicate on the strength of the law, not of cases (*non exemplis, sed legibus iudicandum est*) also applies to the Tribunal as to other international criminal courts.”³⁶⁷

Does this mean that the tribunals have been given free reign to disregard previous case law? The ICTY discussed this question in the *Aleksovski* case, stating: “...in the interests of certainty and predictability, the Appeals Chamber should follow its previous decisions, but should be free to depart from them for cogent reasons in the interests of justice”.³⁶⁸ This restricts the departure from previous case law in the following manner:

“Instances of situations where cogent reasons in the interests of justice require a departure from a previous decision include cases where the previous decision has been decided on the basis of a wrong legal principle or cases where a previous decision has been given *per incuriam*, that is a judicial decision that has been wrongly decided, usually because the judge or judges were ill-informed about the applicable law.

“It is necessary to stress that the normal rule is that previous decisions are to be followed, and departure from them is the exception. The Appeals Chamber will only depart from a previous decision after the most careful consideration has been given to it, both as to the law...and the facts.

“What is followed in previous decisions is the legal principle (*ratio decidendi*), and the obligation to follow that principle only applies in similar cases, or substantially similar cases. This means less that the facts are similar or substantially similar, than that the question raised by the facts in the subsequent case is the same as the question decided by the legal principle in the previous decision. There is no obligation to follow previous decisions which may be distinguished for one reason or another from the case before the court.”³⁶⁹

In international human rights law, the possibility of departing from previous case law appears to be even wider, partly due to the fact that it does not concern

³⁶⁷ *Prosecutor v. Kupreskic*, Case No. IT-95-16-T, ICTY, Judgment of 14 January 2000, para. 540.

³⁶⁸ *Prosecutor v. Zlatko Aleksovski*, IT-95-14/1-A, ICTY, Appeal Judgment of 24 March 2000, para. 107.

³⁶⁹ *Ibid*, paras. 108-110.

individual criminal responsibility. The European Court of Human Rights interprets the European Convention “in the light of present-day conditions”, maintaining a dynamic approach which for example considers the evolution of morals in relation to sexuality.³⁷⁰ In *Christine Goodwin v. The United Kingdom*, the Court stated:

“While the Court is not formally bound to follow its previous judgments, it is in the interests of legal certainty, foreseeability and equality before the law that it should not depart, without good reason, from precedents laid down in previous cases. However, since the Convention is first and foremost a system for the protection of human rights, the Court must have regard to the changing conditions within the respondent State and within Contracting States generally and respond, for example, to any evolving convergence as to the standards to be achieved.”³⁷¹

A similar approach has been adopted by the Inter-American Court of Human Rights.³⁷² Thus, although it is generally held that it is in the interest of foreseeability to abide by previous case law, both international criminal law and international human rights law allows for departure is if due to “cogent” or “good” reasons.

4.1.2 The Extent of Interpretation

What, then, is required of criminal provisions, both nationally and internationally, in order to assure the legality of regulations? The legislator is responsible for making the law clear and foreseeable. The retroactive creation of new crimes is prohibited as well as the creation of crimes by analogy.³⁷³ According to the principle of specificity, criminal rules must be as detailed as possible, concerning both the objective and subjective elements of any crime.³⁷⁴

³⁷⁰ *Christine Goodwin v. The United Kingdom*, (Application No. 28957/95), Judgment of 11 July, 2002, paras. 74-75. See also *Tyrer v. United Kingdom*, (Application No. 5856/72), Judgment of 25 April, 1978, para. 31, *Selmouni v. France*, (Application No. 25803/94), Judgment of 28 July 1999, para. 101, of the ECtHR.

³⁷¹ *Christine Goodwin v. The United Kingdom*, para. 74.

³⁷² Inter-American Court of Human Rights, Advisory Opinion of OC-10/89, 14 July 1989, para. 37: “...it is appropriate to look to the inter-American system of today in the light of the evolution it has undergone since the adoption of the Declaration, rather than to examine the normative value and significance which that instrument was believed to have had in 1948”.

³⁷³ Gallant, Kenneth, *The Principle of Legality in International and Comparative Criminal Law*, p. 357.

³⁷⁴ Cassese, Antonio, *International Criminal Law*, Oxford University Press, 2nd ed. (2008), p. 41.

The principle requires a clear and unambiguous identification of the prohibited conduct.³⁷⁵ In international criminal law the basic principle of legality is e.g. codified in Article 22 of the Rome Statute, stating with regard to clarity that “the definition of a crime shall be strictly construed and shall not be extended by analogy. In case of ambiguity, the definition shall be interpreted in favour of the person being investigated, prosecuted or convicted”.³⁷⁶

In *Veeber v. Estonia*, the European Court of Human Rights argued that Article 7 in relation to the rule of law

“...is not confined to prohibiting the retrospective application of the criminal law to an accused’s disadvantage: it also embodies, more generally, the principle that only the law can define a crime and prescribe a penalty...and the principle that the criminal law must not be extensibly construed to an accused’s detriment. From these principles it follows that an offence must be clearly defined in the law. This requirement is satisfied where the individual can know from the wording of the relevant provision and, if need be, with the assistance of the courts’ interpretation of it, what acts and omissions will make him criminally liable”.³⁷⁷

The ICTY discussed the nature of the principle in relation to international criminal law in the *Vasiljevic* case. This concerned the possibility of holding an individual responsible for the crime of “violence to life and person” and whereas the tribunal did find that 1) customary norms can impose criminal liability and 2) customary international law regulated this crime, it also emphasised that the offence in question must be clearly defined:

“From the perspective of the *nullum crimen sine lege* principle, it would be wholly unacceptable for a Trial Chamber to convict an accused person on the basis of a prohibition which, taking into account the specificity of customary international law and allowing for the gradual clarification of the rules of criminal law, is either insufficiently precise to determine conduct and distinguish the criminal from the permissible, or was not sufficiently accessible at the relevant time.”³⁷⁸

³⁷⁵ Bassiouni, Cherif, *Principles of Legality in International and Comparative Criminal Law*, p. 100.

³⁷⁶ Albeit no explicit provisions exist in the statutes of the ICTY, ICTR and SCSL on the principle of legality, the principle was applied in drafting the statutes and in the jurisprudence. See Gallant, Kenneth, *The Principle of Legality in International and Comparative Criminal Law*, p. 304.

³⁷⁷ *Case of Veeber v. Estonia (No.2)*, (Application No. 45771/99), ECtHR, Judgment of 21 January 2003, para. 31.

³⁷⁸ *Prosecutor v. Vasiljevic*, Case No. IT-98-32-T, ICTY, Judgment of 29 November 2002, para. 193.

Finding that customary law did not provide a sufficiently clear definition of the offence, it did not convict the defendant on this charge.

Though the judicial creation of crimes is contrary to the prohibition of the retrospective application of law, the specificity requirement does not preclude courts from developing principles through *interpretation*. All legal concepts are in one way or another indefinite and must be interpreted.³⁷⁹ Definitions of crimes tend to be formulated in abstract terms to cover a multitude of scenarios and interpretation is therefore a natural exercise.³⁸⁰ Also, Kenneth Gallant argues that despite the fact that human rights treaties prohibit the retroactive analogical creation of crimes, this does not prohibit prospective statements expanding the definition of crimes by the judiciary.³⁸¹ Accordingly, he asserts: “If an act can reasonably be construed as within the ambit of definition of crime existing at the time of the act (whether statutory, common law, or international law), the actor is sufficiently warned...This is true even if no case decided before the act was committed had held the specific act to be criminal.”³⁸²

In the *Aleksovski* case of the ICTY, the defence submitted that the principle of legality prevented the tribunal from relying on a previous decision as a statement of the law, since that decision would have been made after the commission of the crimes in question. The Appeals Chamber responded that the principle of legality “...does not prevent a court, either at the national or international level, from determining an issue through a process of interpretation and clarification as to the elements of a particular crime; nor does it prevent a court from relying on previous decisions which reflect an interpretation as to the meaning to be ascribed to particular ingredients of a crime”.³⁸³

³⁷⁹ Boot, Machteld, *Genocide, Crimes against Humanity, War Crimes: Nullum Crimen Sine Lege and the Subject Matter Jurisdiction of the International Criminal Court*, p. 103. As Boot notes: “Even if a text seems clear on its face, the legal meaning of a statutory paragraph can be different from what would follow from the natural understanding of the words.”

³⁸⁰ Haveman, Roelof, *The Principle of Legality*, p. 45.

³⁸¹ Gallant, Kenneth, *The Principle of Legality in International and Comparative Criminal Law*, p. 223. See, also, Bassiouni, Cherif, *Principles of Legality in International and Comparative Criminal Law*, p. 89, who contends that the principle allows for analogous applications in international criminal law, however, not retroactively. An important point is that though a tribunal or court may violate the principle of legality in a particular case, it may not in subsequent cases, if it has developed the law to be applied in the future. *Ibid*, p. 361.

³⁸² Gallant, Kenneth, *The Principle of Legality in International and Comparative Criminal Law*, p. 360.

³⁸³ *Prosecutor v. Zlatko Aleksovski*, IT-95-14/1-A, ICTY, Appeal Judgment of 24 March 2000, paras. 127-128.

The European Court of Human Rights has more specifically discussed the principle in relation to the crime of rape. The case of *C.R. v. The United Kingdom* concerned the British legislation on rape that prohibited “unlawful” non-consensual intercourse, which until 1990 had been interpreted to exclude marital rape. This changed in practice and C.R. was prosecuted for the rape of his estranged wife. The complainant claimed that, at the time of the alleged rape, the British courts had not acknowledged marital rape. The Court held that the expansion of the definition of rape was legitimate and that the European Convention could not be read as “...outlawing the gradual clarification of the rules of criminal liability through judicial interpretation from case to case, provided that the resulting development is consistent with the essence of the offence and could reasonably be foreseen”.³⁸⁴ Furthermore, “...there was an evident evolution, which was consistent with the very essence of the offence, of the criminal law through judicial interpretation towards treating such conduct generally as within the scope of the offence of rape. This evolution had reached a stage where judicial recognition of the absence of immunity had become a

In *Ojdanic*, the ICTY further held that the principle of legality “...does not prevent a court from interpreting and clarifying the elements of a particular crime. Nor does it preclude the progressive development of the law by the court. But it does prevent a court from creating new law or from interpreting existing law beyond the reasonable limits of acceptable clarification. This Tribunal must therefore be satisfied that the crime or the form of liability with which an accused is charged was sufficiently foreseeable and that the law providing for such liability must be sufficiently accessible at the relevant time...”. *Prosecutor v. Milutinovic*, Case No. IT-99-37-AR72, ICTY, Decision on Dragoljub Ojdanić’s Motion Challenging Jurisdiction: Joint Criminal Enterprise, 21 May 2003, paras. 37-38. Also the ECtHR has similarly argued in the following manner regarding whether a violation of the freedom of expression was “prescribed by law”: “Firstly, the law must be adequately accessible: the citizen must be able to have an indication that is adequate in the circumstances of the legal rules applicable to a given case. Secondly, a norm cannot be regarded as ‘law’ unless it is formulated with sufficient precision to enable the citizen to regulate his conduct: he must be able - if need be with appropriate advice - to foresee, to a degree that is reasonable in their circumstances, the consequences which a given action may entail. “Those consequences need not be foreseeable with absolute certainty: experience shows this to be unattainable. Again, whilst certainty is highly desirable, it may bring in its train excessive rigidity and the law must be able to keep pace with changing circumstances. Accordingly, many laws are inevitably couched in terms which, to a greater or lesser extent, are vague and whose interpretation and application are questions of practice.” See *The Sunday Times v. the United Kingdom*, (Application No. 6538/74), Judgment of 26 April 1979, ECtHR, para. 49.

³⁸⁴ *C.R. v. The United Kingdom*, (Application No. 48/1994/495/577), ECtHR, Judgment of 27 October, 1995, para. 34.

reasonably foreseeable development of the law”.³⁸⁵ The Court emphasised the nature of rape, stating that

“the essentially debasing character of rape is so manifest that...[it]...cannot be said to be at variance with the object and purpose of Article 7...What is more, the abandonment of the unacceptable idea of a husband being immune against prosecution for rape of his wife was in conformity not only with a civilised concept of marriage but also, and above all, with the fundamental objectives of the Convention, the very essence of which is respect for human dignity and human freedom”.³⁸⁶

The ECtHR has clearly applied a more teleological interpretative approach, focusing on the aim of the regulation.³⁸⁷ Similarly, in the *Furundzija* case, the ICTY interpreted rape to include forced oral sex despite the lack of international jurisprudence on the matter and varying domestic rules, basing the decision upon the principle of human dignity, which permeates the prohibition of rape. It held that it was not contrary to the general principle of *nullum crimen sine lege*, since:

“...The Trial Chamber is of the opinion that it is not contrary to the general principle of *nullum crimen sine lege* to charge an accused with forcible oral sex as rape when in some national jurisdictions, including his own, he could only be charged with sexual assault in respect of the same acts. It is not a question of criminalising acts which were not criminal when they were committed by the accused, since forcible oral sex is in any event a crime, and indeed an extremely serious crime.”³⁸⁸

Does this mean that the Tribunal is satisfied as to the foreseeability of the crime simply by referring to the fact that oral sex would, at any event, constitute another form of sexual violence, i.e. that it is an illegitimate act? This is argued by Christopher Greenwood:

“the principle of *nullum crimen* does not preclude all development of criminal law through the jurisprudence of courts and tribunals, so long as those developments do not

³⁸⁵ *C.R. v. The United Kingdom*, para. 41.

³⁸⁶ *Ibid*, para. 42.

³⁸⁷ See more on various interpretative methods in Haveman, Roelof, *The Principle of Legality*, p. 46.

³⁸⁸ *Prosecutor v. Furundzija*, Judgment of 10 December 1998, para. 184. Judge Shahabuddeen notes that both the ECtHR and the ICTY might have breached the principle of legality in its strict sense in the *C.R. v. the United Kingdom* and the *Furundzija* cases. See Shahabuddeen, Mohamed, *Does the Principle of Legality Stand in the Way of Progressive Development of Law?* p. 1016.

criminalise conduct which, at the time it was committed, could reasonably have been regarded as legitimate. That principle is not infringed where the conduct in question would universally be acknowledged as wrongful and there was doubt only in respect of whether it constituted a crime under a particular system.”³⁸⁹

According to this argument, the fact that conduct is universally seen as illegitimate is sufficient to provide foreseeability also as to the international crime, including in the domestic law of the country in question, in this case Rwanda. However, the domestic and international jurisdictions must be kept separate. Furthermore, the fact that oral sex could be prosecuted as sexual assault does not support the inclusion in a definition of rape, which is considered a graver offence.

It is important to note that the rule *nullum crimen sine praevia lege scripta* (no crime without a written law) does not, as of yet, appear to be customary international law.³⁹⁰ This means that a crime does not necessarily need to be defined in a statute if it exists in other forms of law, for example in customary international law or general principles. One must bear in mind that though the process of customary norm creation or determination of general principles appears to provide courts with greater flexibility in their judicial interpretations, the principle of legality applies regardless of the source used. The ICTY has clearly stated that a crime does not necessarily have to be drawn from its Statute, but may exist in customary international law:

“As to foreseeability, the conduct in question is the concrete conduct of the accused; he must be able to appreciate that the conduct is criminal in the sense generally understood, without reference to any specific provision. As to accessibility, in the case of an international tribunal such as this, accessibility does not exclude reliance being placed on a law which is based on custom.”³⁹¹

³⁸⁹ Greenwood, Christopher, *The Development of International Humanitarian Law by the International Criminal Tribunal for the Former Yugoslavia*,” Max Planck Yearbook of United Nations Law, Vol. 2, 1998, pp. 132-133.

³⁹⁰ Gallant, Kenneth, *The Principle of Legality in International and Comparative Criminal Law*, p. 356, Cryer, Friman, Robinson & Wilmschurst, *An Introduction to International Criminal Law and Procedure*, p. 14.

³⁹¹ *Prosecutor v. Hadzihasanovic*, Case IT-01-47-AR72, ICTY, Decision on Interlocutory Appeal Challenging Jurisdiction in Relation to Command Responsibility, 16 July 2003, para. 34. See also Bassiouni, Cherif, *Principles of Legality in International and Comparative Criminal Law*, p. 99.

The possibility of applying the legality principle to such sources has been met with concern by some, due to their often vague content.³⁹² It must be noted that it appears, at times, that the tribunals have not been strict as to the sources of customary international law, relying more heavily on *opinio iuris* and less on state practice.³⁹³ This poses legal difficulties, since the requisite level of foreseeability may not be reached. As for general principles, the *ad hoc* tribunals at times appear to have solely cited various domestic laws as a source, drawing analogies between “common crimes” and international crimes that require such elements as an armed conflict or discriminatory intent.³⁹⁴

According to these sources, a definition of the crime in question must exist, though judicial interpretation and development is permitted to the point that it corresponds with the *essence* of the crime. It must also have been foreseeable that the act was criminal. How does this apply to the international crimes? Ferdinandusse argues that the principle of foreseeability does not require knowledge of the exact definition of a crime and that the principle may still be assured even when lacking a precise definition of, for example, rape or murder. In support of this claim he notes that various national laws contain open rules of reference to e.g. war crimes without defining the actual violation. The “manifest illegality” of such crimes is then deemed to be a more important factor than the specific definition in establishing foreseeability of prosecution.³⁹⁵

³⁹² Boot, Machteld, *Genocide, Crimes against Humanity, War Crimes: Nullum Crimen Sine Lege and the Subject Matter Jurisdiction of the International Criminal Court*, p. 20. Boot notes that customary international law and general principles of law tend to make practitioners of criminal law nervous, since “these notions are rather vague and their content is difficult, if not impossible, to establish conclusively”. According to Beth van Schaack, it is difficult to see that the precise elements of crimes can be gleaned from the divergent conduct of the multiplicity of states coupled with their subjective attitudes toward the practice. See van Schaack, Beth, *Crimen Sine Lege: Judicial Lawmaking at the Intersection of Law and Morals*, p. 43.

³⁹³ Meron, Theodor, *War Crimes Law Comes of Age*, Oxford University Press, (1998), pp. 263-264.

³⁹⁴ van Schaack, Beth, *Crimen Sine Lege: Judicial Lawmaking at the Intersection of Law and Morals*, p. 45.

³⁹⁵ Ferdinandusse, Ward N., *Direct Application of International Criminal Law in National Courts*, p. 242, quoting the US Supreme Court, *Ex Parte Quirin*, 1943, 317 US 1, p. 29-30. See e.g. the Swedish Penal Code, *Brottsbalken* (1962:700), § 22:6, which allows for the prosecution of violations of IHL, taking into consideration of both treaty law and international customary law. In a case against Jackie Arklöv for said crimes on 18 December 2006, the Swedish court considered customary law, e.g. by referring to the ICRC and UN resolutions. This has been criticised as possibly jeopardising the principle of legality. Case: *Stockholms tingsrätt, mål nr. B 4084-04*, 18 December 2006 (Jackie Arklöv). See discussion in Klamberg, Mark, *Fråga om Tillämpning av Legalitetsprincipen Beträffande Folkkrätsbrott*, SvJT, 2007-08 NR 1.

Judge Shahabuddeen of the ICTY further maintains that the requirement of specificity does not stand in the way of the progressive development of international law. Accordingly, the principle of *nullum crimen sine lege* entails that the law can evolve if it retains the “very essences of the original crime even though not corresponding to every detail of it”.³⁹⁶ Consequently, “...provided that the acts alleged bore the fundamental criminality of the crime charged, it does not appear to be necessary to show that, at the time at which they were done, they exhibited every detail of that crime”.³⁹⁷ Gallant further argues that the requirement of foreseeability is qualified by being *reasonable*. Thus, a certain indeterminacy of language always exists regarding which precise acts are included in the definition of crimes.³⁹⁸ Is this convincing? It is perhaps questionable when one considers that the fundamental understanding of the foreseeability of a crime is not simply that it is criminalised but also that its scope is understood and relayed to the individual, without which the crime concerned would consist merely of a title with no substance. Otherwise extensive demands would be imposed on the individual. The ECtHR, for example, has even interpreted foreseeability to include an awareness that the law would change, leading to substantial impediments for the individual.³⁹⁹ Bearing in mind the profound consequences for the individual, at least international criminal law should adhere to the same strict level of legality as domestic laws.

As set out below, the interplay and divergent interpretations of the crime of rape between international bodies and national jurisdictions has encumbered the foreseeability for the individual. At the present time, rules pertaining to the international crimes exist in a variety of documents, coupled with a growing body of jurisprudence from international tribunals with views not always in accordance with one another. The conflicting approaches to the definition of rape and torture are prime examples of the existing patchwork of international law, leading to substantial confusion for the individual. However, it appears that international criminal law is now exhibiting a growing tendency to abide by principles of legality, in which the Rome Statute and the Elements of Crimes are

³⁹⁶ Shahabuddeen, Mohamed, *Does the Principle of Legality Stand in the Way of Progressive Development of Law?*, 2 J. Int'l Crim. Just. 1007, (Dec. 2004), p. 1007.

³⁹⁷ *Ibid.*, p. 1010.

³⁹⁸ Gallant, Kenneth, *The Principle of Legality in International and Comparative Criminal Law*, p. 362. How states or courts interpret or measure foreseeability is, however, not always specified. See also Cryer, Friman, Robinson & Wilmschurst, *An Introduction to International Criminal Law and Procedure*, p. 15, where it is argued: “...clarification of the ambit of offences through case law does not inherently fall foul of the *nullum crimen* principle. Judicial creation of crimes...would”.

³⁹⁹ *C.R. v. The United Kingdom*, Judgment of 27 October, 1995.

important contributions.⁴⁰⁰ As mentioned, the Rome Statute also explicitly includes the principle of legality and the demand that the definition of the crime be interpreted in favour of the accused. As such, “the concepts of rule of law, accountability, and legality can be expected to form an increasingly entrenched part of international discourse as a standard of legitimacy”.⁴⁰¹ However, the crimes of the ICC are also at times defined in an open-ended fashion, and concern has been raised that particularly gender-related crimes may pose problems of interpretation, since it is far from universally agreed upon e.g. what ‘force’, ‘threat of force’ or ‘coercion’ entails in relation to rape.⁴⁰²

An additional problem is that despite the fact that international law binds the individual, for example at the customary level, the implementing laws domestically may not reflect the international obligations of the state and the individual may therefore assume that in abiding by the domestic provisions, he is also in conformity with international law. As such, it is encouraged that the domestic regulations, despite the rather wide margin of appreciation in implementation mechanisms, resemble as closely as possible international rules in order to assure foreseeability for the individual. This e.g. concerns the definition of rape in the Elements of Crimes of the ICC, although it is not binding on state parties to the Court. Ferdinandusse furthermore notes that the national formulations of the principle of legality generally are stricter than their international equivalents.⁴⁰³ With regard to international crimes, a more rigorous review of the provision domestically may then impede the prosecution of a particular crime if it is not implemented satisfactorily.

The chapters on the prohibition and definition of rape in international human rights law, IHL and international criminal law will consider whether the requisite levels of specificity and coherence have been applied in these areas.

4.2 Substantive Elements of the Definition of Rape

4.2.1 Introduction

In the following, the elements of the crime of rape most commonly applied to construct a definition of rape, domestically and internationally, will be discussed in order to provide more substance to the analysis on rape as a violation of international law. Naturally, not only the formal enactment of certain elements of

⁴⁰⁰ McGoldrick, Dominick, Rowe, Peter, Donnelly, Eric, *The Permanent International Criminal Court: Legal and Policy Issues*, p. 46.

⁴⁰¹ Broomhall, Bruce, *International Justice & The International Criminal Court*, p. 189.

⁴⁰² Haveman, Roelof, *The Principle of Legality*, p. 62.

⁴⁰³ Ferdinandusse, Ward N., *Direct Application of International Criminal Law in National Courts*, p. 263.

the crime of rape on the domestic level is of relevance in the thesis. Also the application and interpretation of the elements may e.g. reinforce a gender-bias, and lead to ineffective protection or exclusion of certain groups. Thus, the discussion on the elements of the crime in this thesis also extends to the *substance* of such terms.

In international criminal law and human rights law, the adjudicatory bodies have balanced similar elements of the crime as in domestic criminal laws, albeit with certain different considerations. The international community is thus faced with many of the same dilemmas in defining rape as domestic judicial systems.⁴⁰⁴ In fact, general principles of international law have to a great extent been transposed from municipal laws in the case law of the *ad hoc* tribunals, due to the lack of a prohibition of rape in treaty law.⁴⁰⁵ This has been a difficult process considering the differences between common law and civil law systems. For example, in order to locate such general principles, the *ad hoc* tribunals have conducted surveys of domestic laws criminalising rape to e.g. establish whether ‘force’ or ‘non-consent’ is a more predominant element of the crime or whether the *actus reus* of rape should include a wider range of acts than intercourse.⁴⁰⁶ This has caused concern that the tribunals have relied on particularly certain legal traditions. For example, the ICTY in the *Kunarac* case, a case which has had a substantial impact in developing the elements of the crime of rape on the international level, arguably relied heavily on the definition of rape in common law countries.⁴⁰⁷ Because of the clear influence of domestic law, and bearing in mind the relatively recent development on the international level, it is appropriate to study the elements of the crime of rape in the doctrine of various national sources where the legal discourse is more advanced. The perspective of international law will only be briefly raised where appropriate, since this subject will be more thoroughly developed in subsequent chapters.

It should be noted pertaining to international law that few cases heard by regional human rights courts or UN treaty bodies have elaborated on the elements of rape, and these have primarily concerned the issue of ‘non-consent’

⁴⁰⁴ Fitzgerald, Kate, *Problems of Prosecution and Adjudication of Rape and other Sexual Assaults under International Law*, p. 638.

⁴⁰⁵ Cassese, Antonio, *International Criminal Law*, 2nd ed., p. 7.

⁴⁰⁶ See e.g. *The Prosecutor v. Jean-Paul Akayesu*, Judgment of 2 September 1998 (ICTR), *Prosecutor v. Furundzija*, Judgment of 10 December 1998 (ICTY), *Prosecutor v. Kunarac, Kovac and Vukovic*, Case No. IT-96-23 & 23/1, Judgment of 22 February 2001 (ICTY).

⁴⁰⁷ *Prosecutor v. Kunarac, Kovac and Vukovic*, Judgment of 22 February 2001 (ICTY), para. 453 ff. See discussion in Kalosieh, Adrienne, *Consent to Genocide? The ICTY's Improper Use of the Consent Paradigm to Prosecute Genocidal Rape in Foca*, p. 132.

or ‘force’.⁴⁰⁸ International criminal law tribunals/courts have on the other hand greatly expounded upon the elements of the offence in a multitude of cases, intermittently adopting a wide, conceptual approach or a mechanical descriptions of the *actus reus*, and developing either a force-, non-consent or coercion-based approach. The particular context in which rape occurred has informed the various adopted constructions and provided evidence as to the elements, e.g. whether it was committed in an armed conflict or captivity and if it consisted of acts beyond intercourse such as the insertion of objects in the genital areas. Also such factors as the cultural taboo in publicly recanting the events of the sexual assault have been borne in mind, influencing the definition of the offence. In fact, because of the nature of international criminal law, the contextual elements are often more prominent than discussed in domestic laws. All international crimes in the Rome Statute of the ICC contain specific qualifications, e.g. that the act occurred in the context of a widespread or systematic attack, genocide or an armed conflict, in order to constitute an international crime.⁴⁰⁹ These contextual elements often create presumptions regarding coercion. Rape in international criminal law is therefore often discussed in different terms than rape in peacetime because the prevailing circumstances and motives of the perpetrators are deemed to influence the definition of the crime. A chapter on contextual approaches often referred to concerning rape, i.e. coercion in the form of armed conflicts or gender hierarchies, is therefore presented.

4.2.2 The Elements of the Crime

In general, a definition of a crime consists of both material elements (the *actus reus*) and mental elements (the *mens rea*), i.e. both objective and subjective requirements. The *actus reus* designates which sexual acts are included within the boundaries of the crime of rape as well as, most commonly, elements of non-consent or force. The mental elements describe the awareness of the perpetrator of the non-consensual/forceful sexual acts.⁴¹⁰ These elements are also mentioned with regard to the definition of rape in international law.

⁴⁰⁸ *M.C. v. Bulgaria*, Judgment of 4 December, 2003, ECtHR, List of Issues and Questions with Regard to the Consideration of Periodic Reports, Czech Republic, UN Doc. CEDAW/C/CZE/Q/3, February 22, 2006, UN Doc A/57/38 (2002); Estonia, (CEDAW), para. 98, UN Doc. A/55/38 (2000); Lithuania, para. 151. UN Doc. A/57/38 (2002); Hungary, (CEDAW), para. 333-334. In the *Case of the Miguel Castro-Castro Prison v. Peru*, 25 November, 2006, IACtHR, the *actus reus* of rape is also discussed in a limited fashion.

⁴⁰⁹ Articles 6-8 of the Rome Statute.

⁴¹⁰ Jefferson, Michael, *Criminal Law*, 7th ed, Pearson, (2006), p. 41, Schabas, William, *Mens Rea and the International Criminal Tribunal for the Former Yugoslavia*, 37 New Eng. L. Rev. 1015, (2002-2003), p. 1015.

The terms non-consent, coercion and force are often used interchangeably and with definitions that include similar concepts. Force is typically understood to entail physical force, albeit certain states include other forms of pressures. Force has been given various interpretations, from restricting the movement of a person, to requiring physical assault, and in certain jurisdictions viewing it in a manner similar to non-consent.⁴¹¹ Coercion is in certain domestic laws restricted to force, but may also include non-physical forms of pressure.⁴¹² Non-consent focuses on the subjective or performative non-consent of the victim. This, however, can be inferred from force or wrongful pressure that vitiates genuine consent, i.e. coercion.⁴¹³ Force and non-consent frequently overlap, e.g. certain jurisdictions judge non-consent based on the physical resistance displayed by the victim. The concept of non-consent was, in fact, traditionally linked to the use of force in the common law definition of rape where consent was presumed in the absence of proof of physical resistance.⁴¹⁴ Certain states find that pressure beyond force solely constitutes the crime of “sexual coercion” rather than rape.⁴¹⁵ A study from 2009 on criminal laws on rape in Europe found that there is an even split between legislation basing its definition on force and non-consent. However, many states have such a broad understanding of force that the definitions are increasingly similar and cover the same behaviour as non-consent.⁴¹⁶ For example, though it is generally understood that definitions focusing on non-consent are wider in scope, Sweden, albeit defining rape in

⁴¹¹ Schulhofer, Stephen, *Unwanted Sex: The Culture of Intimidation and the Failure of Law*, p. 98, Westen, Peter, *The Logic of Consent; The Diversity and Deceptiveness of Consent As a Defense to Criminal Conduct*, p. 342 and the Swedish Penal Code (Brottsbalken) 6:1, which solely requires the restriction of movement.

⁴¹² Spence, Ann T., *A Contract Reading of Rape Law: Redefining Force to Include Coercion*, p. 59.

⁴¹³ Westen, Peter, *The Logic of Consent; The Diversity and Deceptiveness of Consent As a Defense to Criminal Conduct*, Dingwall, Gavin, *Addressing the Boundaries of Consent in Rape*, 13 K.C.L.J. 31, (2002), Spence, Ann T., *A Contract Reading of Rape Law: Redefining Force to Include Coercion*, p. 61.

⁴¹⁴ Boon, Kristen, *Rape and Forced Pregnancy Under the ICC Statute: Human Dignity, Autonomy, and Consent*, p. 655.

⁴¹⁵ See e.g. the Swedish Penal Code, Brottsbalken, (1962:72), §§ 6:1, 6:2.

⁴¹⁶ *Different Systems, Similar Outcomes? Tracking Attrition in Reported Rape Cases Across Europe*, Lovett, Jo & Kelly, Liz, funded by the European Commission Daphne II Programme, CWASU, (2009), pp. 103, 111.

terms of force, is understood to have one of the broadest definitions of the crime in Europe.⁴¹⁷

The elements of the crime of rape are continuously subject to reform in domestic jurisdictions, in part parallel to the advancement of women's rights and political power. As the individual's right to sexual autonomy is increasingly acknowledged in the domestic and international arenas, so the grey area of appropriate sexual behaviour is expanded. To a certain extent, the vagueness of the concept of rape is part of its *proper* use.⁴¹⁸ The continuous re-evaluation and restructuring of the definition of rape, be it in domestic criminal legislation or in international law, is therefore a natural exercise since it to a certain extent develops alongside society's view on gender roles and sexuality. For example, international treaties, especially the European Convention on Human Rights, are often referred to as "living documents" to be interpreted in light of current morality and contemporary ideologies and thereby allowing adaptation to contemporary views on sexuality.

How is then a determination made of what are legitimate ways of expressing sexual autonomy in an ever-changing society? Certainly not every constraint on such autonomy is illegal or even immoral. Autonomy can never be unrestricted since we must protect the interests of others. Felson suggests that the definition of sexual coercion should not be based on beliefs about its legitimacy or its legality, since one would then enter a zone of questioning the moral aspect of various encounters.⁴¹⁹ The definition would then become an exercise in creating distinctions based on the morality of such forms of pressures as economic and authoritarian power, which may influence an individual's decision to engage in sex. That leaves us with the question of where to draw the line between mere immorality and illegal coercion. When does immoral behaviour reach the limit of what society necessarily must criminalise?

Part of the difficulty in drawing the line between where sex ends and rape begins lies in the fact that the act of sex can be both legitimate and illegitimate. Few other crimes have this characteristic. Physical contact is inherent in sex, whether criminal or non-criminal. People have sexual relations in their everyday

⁴¹⁷*Different Systems, Similar Outcomes? Tracking Attrition in Reported Rape Cases Across Europe*, Lovett, Jo & Kelly, Liz, p. 101. The definition of rape is: "A person who, by violence or threat involving or appearing to the treated person as imminent danger, forces the latter to have sexual intercourse or to engage in a comparable sexual act...Having intercourse with a person who is unconscious, sleeping, intoxicated, handicapped or in a similarly helpless state shall be regarded as equivalent to rape by threat or violence." See Chapter 6 §1 of the Swedish Penal Code.

⁴¹⁸ Reitan, Eric, *Rape as an Essentially Contested Concept*, Hypatia, Vol. 16, No. 2, Spring 2001, p. 45.

⁴¹⁹ Felson, Richard, *Violence and Gender Re-examined*, p. 122.

lives and therefore engage in the same act that under certain circumstances can be considered criminal. A further complication is that coercive behaviour often occurs in connection to consensual sexual activity.⁴²⁰ An additional difficulty in determining what is a “normal” interaction is that it changes over time and depends on the culture in question, but also on *who* defines what is normal behaviour. This may, for example, be a gendered construction.

The understanding of the harm of rape informs the definition of the crime. Jurisdictions that regard the physical intrusion and violence of the body as the foremost violation primarily choose a definition focusing on ‘force’, whereas legal systems that view sexual violence as mainly an intrusion of the sexual autonomy centre the definition on the individual’s non-consent.⁴²¹ The penalisation of rape has also been frequently influenced by other disciplines such as psychology, sociology and anthropology in order to ascertain the harm and consequences of rape. This has influenced the determination of where immoral behaviour reaches the level of requiring criminalisation, as well as issues such as the common behaviour of victim and attacker. Early studies, for instance, indicated that some level of aggression, and the initiative, is expected as part of the male role in sexual encounters, affecting the definition of rape at the time.⁴²² Studies on the typical behaviour and reactions of men and women are still considered. For example, reports have shown that women frequently submit to intercourse for fear of being subjected to greater harm, an awareness that has only been taken into account in fairly recent discussions on the concept of ‘non-consent’.⁴²³

4.2.3 Non-Consent

⁴²⁰ Felson, Richard, *Violence and Gender Re-examined*, p. 123.

⁴²¹ Gardner, John & Shute, Stephen, *The Wrongness of Rape*. See also *Prosecutor v. Kunarac, Kovac and Vukovic*, Case No. IT-96-23 & 23/1, Judgment of 22 February 2001, para. 457 ff.

⁴²² Schulhofer, Stephen, *Unwanted Sex*, p. 62. In an early article in the Yale Law Journal, an author described the normal woman as confused and of an ambivalent character when it comes to sex and that a “woman’s need for sexual satisfaction may lead to the unconscious desire for forceful penetration, the coercion serving neatly to avoid the guilt feelings which might arise after willing participation...”. See *Forcible and Statutory Rape: An Exploration of the Operation and Objectives of the Consent Standard*, Yale Law Journal 62:55-83, (Dec. 1952) p. 67.

⁴²³ Fitzgerald, Kate, *Problems of Prosecution and Adjudication of Rape and other Sexual Assaults Under International Law*, p. 644. See also *M.C. v. Bulgaria*, ECtHR.

“It is in the nature of law that law can and must determine whether consent has occurred, even though no one is sure just what consent is.”⁴²⁴

The concept of consent embodies what it means to be an autonomous moral agent. Therefore: “[i]f autonomy resides in the ability to will the alteration of moral rights and duties, and if consent is normatively significant precisely because it constitutes an expression of autonomy, then it must be the case that to consent is to exercise the will.”⁴²⁵ Competent adults have an autonomous right to control what happens to their bodies, evident also in the ability to consent to sexual activity. Consent in some ways forms an authorisation for another person to act and is a common basic principle in criminal law, in the sense that it is a useful mechanism to measure “border-crossings” of body or property.⁴²⁶

Consent has been described as possessing “moral magic”, in that it has the power to change the moral and legal relationships between individuals who engage in a certain act.⁴²⁷ Consent can be said to transform crimes into non-crimes, e.g. rape into sexual intercourse and theft into giving a belonging to another person.⁴²⁸ Petter Asp finds that the term ‘transformative’ is a misrepresentation since it implies that an instance of rape is ‘transformed’ into intercourse by adding consent. Instead, it is used as a *distinction*, between rape and consensual intercourse.⁴²⁹ While acknowledging its transformative or distinguishing power, consent does not guarantee that the intercourse is fulfilling but, rather, that it is deemed *tolerable* by the law.⁴³⁰ As such, consent may cover a range of mindsets from desire to reluctant acquiescence. However, to fully ensure the goal of autonomy, consent must be voluntary and purposeful since it changes the rights and obligations of the individuals involved.⁴³¹ Consent must therefore satisfy certain criteria in order to ascertain that appropriate prerequisites for consenting existed. Certain circumstances will undermine the ability to give consent by incapacitating the victim, e.g. large consumptions of

⁴²⁴ Sherwin, Emily, *Infelicitous Sex*, Legal Theory 2, (1996), p. 229.

⁴²⁵ Hurd, Heidi, *The Moral Magic of Consent*, p. 124.

⁴²⁶ McGregor, Joan, *Is it Rape?*, p. 107.

⁴²⁷ Hurd, Heidi, *The Moral Magic of Consent*, p. 121.

⁴²⁸ Wertheimer, Alan, *Consent to Sexual Relations*, Cambridge University Press, (2003), p. 119.

⁴²⁹ Asp, Petter, *M.C. v. Bulgaria - A Swedish Perspective*, Scandinavian Studies in Law, Volume 54, Criminal Law, Stockholm Institute for Scandinavian Law, (2009), p. 208.

⁴³⁰ Westen, Peter, *The Logic of Consent; The Diversity and Deceptiveness of Consent As a Defense to Criminal Conduct*, p. 22.

⁴³¹ Wertheimer, Alan, *Consent to Sexual Relations*, pp. 2-3.

alcohol, as well as external constraints that may affect the possibilities of genuinely consenting, such as the context of an armed conflict.⁴³²

4.2.3.1 Performative and Subjective Consent

Defining the concept of ‘consent’ is a complicated exercise, as it entails manifestly different understandings in national jurisdictions. In short, it refers to the response by an individual to sexual interactions. The evaluation of this from an outside perspective is, however, fraught with difficulty. Consent often becomes imbued with considerations of social and cultural mores on sexual behaviour, as well as assumptions on the desire of the individual. Consent has in fact been described as an “impoverished concept” in need of legislative intervention in national jurisdictions, precisely because of its indeterminative nature.⁴³³

The difficulty in defining ‘consent’ is partly due to the fact that its interpretation varies greatly between its factual and everyday use and its various legal definitions. The concept of consent thus encompasses a broad range of normative judgments. Consent can be used both *factually* to refer to certain empirical factors as well as *legally*.⁴³⁴ Peter Westen delineates two forms of *legal* consent - *prescriptive* and *imputed* consent - which are used in various forms by legal systems in defining rape.⁴³⁵ *Prescriptive* consent is a form of legal consent that incorporates elements of factual consent, either the individual’s subjective or expressive acquiescence. However, prescriptive consent may also require that certain conditions are met in order to transform the consent into a legally valid concept, e.g. that the acquiescence is formed with competence, knowledge and freedom. A 13-year old acquiescing to intercourse is factually, but not legally consenting because of her underage status. In contrast, *imputed* consent is a form of legal consent that does not incorporate elements of the factual forms of acquiescence, but rather creates a fiction of consent without the person feeling or expressing such assent. Athletes in organised competitions are e.g. deemed to have consented to the risk of certain forms of physical injury as part of the game. Only legal consent can transform crimes into non-crimes. Thereby, a form of acquiescence by an individual constitutes *legal* consent if it partially or

⁴³² See e.g. the Elements of Crimes of the ICC, Article 7 (1) (g)-1, rape as a crime against humanity.

⁴³³ Fitzgerald, Kate, *Problems of Prosecution and Adjudication of Rape and other Sexual Assaults Under International Law*, p. 643.

⁴³⁴ Westen, Peter, *The Logic of Consent; The Diversity and Deceptiveness of Consent As a Defense to Criminal Conduct*, p. 294.

⁴³⁵ *Ibid*, p. 107.

completely negates someone's criminal responsibility. Otherwise it is merely factual consent.

Though factual acquiescence in some form is a necessary component to constitute legal consent, it is not sufficient since the act may occur under conditions that negate a person's autonomy, e.g. at gunpoint. Westen therefore concludes that jurisdictions, in specifying consent as a partial defence to criminal responsibility, understand consent as three separate conceptions: (1) a certain *mental state* of acquiescence, (2) a certain *expression* of a mental state or (3) a *legal fiction* of one or the other.⁴³⁶ Jurisdictions may therefore interpret consent in ways that are not automatically apparent from the wording of the statute. Examples of legal structures include 'valid consent', 'meaningful consent', 'effective consent', 'informed consent' and 'genuine consent'. The majority of penal codes that define rape as non-consensual sex fail to clarify whether they are referring to mental states or expressions of acquiescence.⁴³⁷

Solely the legal form of consent is of relevance in this study and the question whether it contains a *subjective* or a *performative* approach. The *subjective* view understands consent as a mental state of the alleged victim and is therefore exclusively psychological. A particular manifestation of the victim's non-consent is therefore not necessary. The *performative* view requires an outward demonstration or verbal display as to non-consent. Both may serve legitimate functions in criminal law. Thus, defining offences of non-consent in terms of the absence of a mental state of consent of the victim "is to define offenses of non-consent by reference to harms that actors *actually* inflict, while defining offenses of non-consent in terms of absence of expressions of consent on an alleged victim's part is to define them by reference to harms that actors should *assume* they are inflicting".⁴³⁸ There is a tendency among jurisdictions that define rape as non-consensual sex to view consent as the mental state of the victim, even in jurisdictions that claim to regard the expressive elements.⁴³⁹

What kinds of internal motivation are then required to determine that an individual has consented? Attitudinal consent may range from desire to grudging acquiescence.⁴⁴⁰ Consent does not automatically entail that the sexual intercourse is enjoyable for both parties. Valid consent may be given for other reasons than sexual arousal, such as affection, feelings of obligation within a marriage or

⁴³⁶ Westen, Peter, *The Logic of Consent; The Diversity and Deceptiveness of Consent As a Defense to Criminal Conduct*, p. 15.

⁴³⁷ Ibid, p. 169.

⁴³⁸ Ibid, p. 338.

⁴³⁹ Ibid, p. 148.

⁴⁴⁰ Kazan, Patricia, *Sexual Assault and the Problem of Consent*, in *Violence against Women, Philosophical Perspectives*, ed. French, Teays & Purdy, Cornell University Press, (1998), p. 28.

sympathy. Studies demonstrate that people, particularly in relationships, do consent to sexual acts despite not actually experiencing a genuine will.⁴⁴¹ Consent may thus either take the form of *preference* or *indifference*. *Indifference* must be separated from *indecisiveness*. Jurisdictions might well conclude that an individual who is indifferent to whether sex occurs is consenting, since the person may still be willing to engage in the intercourse. An indecisive person on the other hand feels that the decision whether to have sex does matter, and cannot be seen as consenting.⁴⁴²

Certain scholars argue that since the legal concept of consent is a normative expression of an individual's autonomy, its definition should focus on his/her mental state. It is suggested that this serves the function of basing the offence of non-consent on the actual harm to the victim, which is not solely a physical, but perhaps chiefly a psychological invasion.⁴⁴³ Thus, the victim's feelings determine whether he/she has suffered the harm that the criminalisation seeks to prevent.⁴⁴⁴ Subjective consent is perhaps consent in its truest form, but it creates obvious complications of an evidentiary nature. Not only is it impossible to read a person's mind without any outward display of intent, but it may even be contrary to the principle of legal security to punish an individual who receives no indication that the sex is non-consensual. As Bryden submits, if one defines consent purely subjectively: "then the physical act of rape would be

⁴⁴¹ A Swedish study shows that as many as 28 percent of women and 15 percent of men have engaged in sexual activities that they in all actuality did not want to take part in, for the sake of the wishes of their partner. See SOU 2001:14: Sexualbrotten. Ett ökat skydd för den sexuella integriteten och angränsande frågor, p. 130. A study in the US showed that as many as 90 percent of men and women have engaged in unwanted sexual activity on at least one occasion. The most common reasons included that they had been enticed, it was an altruistic act for their partner or they were intoxicated. See also Felson, Richard, *Violence and Gender Re-Examined*, p. 126.

⁴⁴² Westen, Peter, *The Logic of Consent; The Diversity and Deceptiveness of Consent As a Defense to Criminal Conduct*, p. 30.

⁴⁴³ *Ibid*, p. 146.

⁴⁴⁴ In for example Canada, a woman must subjectively acquiesce to the sexual intercourse for legal consent to exist. The Supreme Court has stated: "for the purposes of the *actus reus*...consent means that the complainant in her mind wanted the sexual touching to take place". *R v. Ewanchuk*, (1999) 1 S.C.R. 330, Supreme Court of Canada, para. 48. British courts have also ruled that consent in rape cases does not consist of something that is demonstrated or communicated, but of 'a state of mind', however, it is not sufficient in itself. *Regina v. Olugboja*, Court of Appeal (Criminal Division), (1982) QB 320. See also section 74 of the Sexual Offences Act, Article 137 of the Criminal Code of Georgia, Article 38 of the Criminal Code of Portugal, in Legislation in the member States of the Council of Europe in the field of violence against women, Council of Europe, (2009), p. 123 (vol. 1), p. 59 (vol. II).

indistinguishable from ordinary intercourse; criminality would turn on the parties' subjective states of mind".⁴⁴⁵ Critics raise concern over the fact that an individual's feelings towards engaging in sex can be highly indecisive, and that such a base for criminal responsibility is too indeterminate.⁴⁴⁶ Some feminist legal scholars furthermore argue that an attitudinal form of consent is harmful to the victim in so far as it places the complainant on trial, often leading to questions on previous sexual history, revealing clothes and promiscuity, to evince whether the person has a liberal attitude towards sex. It is argued that a sexist approach focusing on behaviour and utterances should be supplanted by a more objective determination.⁴⁴⁷

The understanding of consent as *performative* recognises the difficulty in judging the mental state of an alleged victim and requires an outwardly manifestation of his/her wishes. Certain jurisdictions use such terminology as 'communicative consent', 'manifest consent' or 'express consent'.⁴⁴⁸ By disassociating performative consent from the subjective, it is in fact concluded that a person can grant permission against his/her will. An individual can thereby consent to something he/she does not want.⁴⁴⁹ Similarly, individuals might experience sexual desire and thus subjectively consent, but withhold performative consent on the basis of e.g. morality.⁴⁵⁰ The argument for a performative approach is that because legal consent negates what would otherwise be a crime, it ought to be interpreted as an objective act according to which individuals can adjust their actions. Otherwise there is a risk that rape carries with it strict liability. As Feinberg suggests, an actor "does not have any direct insight into...[the victim's] mental states, so the question of his responsibility must be settled by reference to the presence or absence of explicit

⁴⁴⁵ Bryden, David, *Redefining Rape*, 3 Buff. Crim. L. Rev. 317, (2000), fn. 376. See also Naffine, N, *Windows on the Legal Mind: the Evocation of Rape in Legal Writings*, 18 Melbourne University Law Review 741, (1992), p. 758 who argues that "the same physical action can be defined either as pleasurable and lawful or violent and unlawful, at the whim of the victim. She therefore controls the definition of the incident because it is she who can say there was no consent".

⁴⁴⁶ Bryden, David, *Redefining Rape*, pp. 382-383.

⁴⁴⁷ Kazan, Patricia, *Sexual Assault and the Problem of Consent*, p. 29.

⁴⁴⁸ An example is the Wisconsin statute on rape, which specifies consent to mean "words or overt actions by a person...indicating a freely given agreement to have sexual intercourse or sexual contact". Section 940.225, Wisconsin Statute, US and Italy: Supreme Court of Appeal, III Section (Sentence N.4532/2008). See Legislation in the member States of the Council of Europe in the field of violence against women, Council of Europe, (2009), p. 164 (vol. II).

⁴⁴⁹ Kazan, Patricia, *Sexual Assault and the Problem of Consent*, p. 31.

⁴⁵⁰ *Ibid*, p. 31.

authorization...”.⁴⁵¹ The burden on the victim to prove non-consent through actions, which does not exist to the same extent regarding crimes of e.g. robbery and assault, is often explained by the fact that consensual sex is part of everyday life and it is therefore more difficult to distinguish between consent and non-consent.⁴⁵²

However, performative consent also leads to difficulties in determining which actions constitute such manifestations. Naturally, all expressions presuppose social conventions and social roles.⁴⁵³ Two people may have varying assumptions of what constitutes consent. Furthermore, it is not uncommon for the victim to appear to consent, the primary reason being to avoid injuries, for example based on a general fear or due to previous abuse.⁴⁵⁴ Evaluating non-consent becomes an exercise in reviewing a victim’s behaviour based on the stereotypical behaviour of a woman or man in that particular culture. Such consent can include “a statement in language, or a communication by gesture or conduct understood by a symbolic convention to express consent”.⁴⁵⁵ However, consent has in many legal systems been intimated from silence or the non-resistance by the victim. Nevertheless, particularly the resistance requirement has been abolished in an increasing number of jurisdictions. The question also arises from which standpoint such a manifestation should be interpreted - what the observer actually understands or *should* understand? This overlaps with the concept of *mens rea*. An approach adopted in several domestic laws and implied in the jurisprudence of the ICTY is the examination of circumstances by the standards of a reasonable man. A normative element of observing social conventions for expressing preferences is then implied.⁴⁵⁶

Certain feminist scholars argue that sexual intercourse should only occur after verbal permission has been granted. According to this view, consent is an

⁴⁵¹ Feinberg, Joel, *Harm to Self*, p. 173. See, also, Brett, Nathan, *Commentary*, in *Legal Theory Meets Legal Practice*, Academic Printing, (1988), p. 255, who argues that consent is not “a subjective attitude but a performative concept-something we do”, and that “there is simply no way that a purely subjective fact concerning [a person’s] attitude can...make any change in normative relations to [other persons]”.

⁴⁵² Estrich, Susan, *Rape*, p. 1126.

⁴⁵³ Westen, Peter, *The Logic of Consent; The Diversity and Deceptiveness of Consent As a Defense to Criminal Conduct*, p. 68.

⁴⁵⁴ Quéniwet, Noëlle, *Sexual Offenses in Armed conflict & International Law*, p. 31.

⁴⁵⁵ Feinberg, Joel, *Harm to Self*, p. 176.

⁴⁵⁶ *Prosecutor v. Kunarac, Kovac and Vukovic*, Judgment of 22 February 2001, para. 646. See also discussion in Westen, Peter, *The Logic of Consent; The Diversity and Deceptiveness of Consent As a Defense to Criminal Conduct*, p. 77, McGregor, Joan, *Is it Rape?: On Acquaintance Rape and Taking Women’s Consent Seriously*, p. 202, Hubin, Donald & Healy, Karen, *Rape and the Reasonable Man*, *Law and Philosophy J.* Vol. 18, No. 2, March 1999.

affirmative choice of the individual, whereas in practice consent is often presumed unless otherwise shown.⁴⁵⁷ Pineu maintains that the problem with the current perception of consent is that it “sets up sexual encounters as contractual events in which sexual aggression is presumed to be consented to unless there is some vigorous act of refusal”.⁴⁵⁸ In this sense, a woman’s freedom from non-consensual sex is a privilege rather than a right and implies that a woman who does not resist causes the rape. Several authors propose a standard where a lack of verbal communication of consent is presumed to indicate non-consent.⁴⁵⁹ Silence and ambivalence would therefore not constitute permission, and it would be the partners responsibility to proceed only after he/she has received these signals.

Requiring an affirmative response would perhaps best acknowledge an individual’s right to sexual autonomy. This idealistic definition presumes an understanding communication between two partners. How this would function practically in determining if miscommunication has taken place is left unexplored. As Heidi Malm asserts, a law that defines all sexual activity as rape if it is not preceded with a question and answer period would, in fact, be farcical

⁴⁵⁷ Malm writes: “In all but a few jurisdictions...a woman is presumed to have consented unless she has provided a clear expression of dissent. Thus, the utter absence of any positive sign of consent would not be enough to establish non-consent...”. See Malm, Heidi, *The Ontological Status of Consent, Legal Theory and Its Implications for the Law on Rape*, 2 Legal Theory 147, (1996), p. 155. Remick also argues: “only under the law of rape is the person whose rights may potentially be violated burdened with the obligation of conveying her non-consent affirmatively”. Remick further holds that requiring the woman to show her acquiescence in overt actions has the consequence that “a woman’s right to control sexual access to her body is not absolute, but attaches only upon her affirmative assertion of a desire to deny that access on a given occasion” and that “the burden of proving nonconsent is not satisfied by a showing of a lack of affirmative consent; instead, affirmative nonconsent must be proven”. Remick, Lani Anne, *Read her Lips: An Argument for a Verbal Consent Standard*, p. 1111. Estrich insists on the unreasonableness of treating women as “spectators at sporting events (where consent is presumed)” rather than owners of property. Estrich, Susan, *Rape*, p. 1127.

⁴⁵⁸ Pineau, Louis, *Date Rape: A Feminist Analysis*, In *Applications of Feminist Legal Theory to Women’s Lives*, ed. Weisberg, Kelly, Temple University Press, (1996), p. 490. In her understanding it requires that a man, when initiating sexual relations with a woman, has an obligation “to ensure that the encounter really is mutually enjoyable, or to know the reasons why she would want to continue the encounter in spite of her lack of enjoyment”.

⁴⁵⁹ Remick, Lani Anne, *Read her Lips: An Argument for a Verbal Consent Standard*, p. 1105 & Schulhofer, Stephen, *The Feminist Challenge in Criminal Law*, 143 U.P.A. L. Rev. 2151, p. 2181.

and unrealistic.⁴⁶⁰ This interpretation has only been applied in a limited manner by domestic jurisdictions and by no international adjudicatory bodies.⁴⁶¹

4.2.3.2 Appropriate Antecedents and Consent

The starting point for an analysis of the definition of rape is the question of the harms it caused to the potential victim. Harm as viewed as a wrongful set-back to a person's interests, and the question remains which acts lead to such set-backs. The question is only in part answered by such elements as 'force' or 'non-consent', since the prohibited conduct subsumed under such terminology is rather elusive. The moral ideal is that all sexual activity should be consensual without any element of coercion or pressure. As discussed in subsequent chapters, certain feminist scholars argue that this can only be fulfilled in a society where there is economical and social equality between the genders and that genuine consent does not exist under the current conditions of gender inequality.⁴⁶² Other imbalances of power beyond gender also exist, e.g. age and economic resources. It could also be the oppressive context of an armed conflict. Bearing in mind such inequalities, one might find wrongful pressures that are

⁴⁶⁰ Malm, Heidi, *The Ontological Status of Consent, Legal Theory and Its Implications for the Law on Rape*, p. 162. According to Malm, "some clearly consensual sexual encounters have no verbal exchange at all and others have no distinction between a pursuer and pursued".

⁴⁶¹ In the Washington statute consent is defined as "...at the time of the act of sexual intercourse there are actual words or conduct indicating freely given agreement to have sexual intercourse". Wash. Rev. Code Ann. § 9A.44.010 (7). See also New Jersey, USA. *State in the Interest of MTS*, New Jersey Supreme Court 129 NJ 422, 609 A.2d 1266 (1992).

⁴⁶² MacKinnon questions whether we can know if consent has not been influenced by the disparity of power in society and challenges why consent is lauded as women's control over intercourse, since this is not equal to the custom of male initiative. MacKinnon, Catherine, *Toward a Feminist Theory of the State*, p. 192. MacKinnon also argues that we cannot draw a line between acceptable behaviour and abuse since "rape is defined as distinct from intercourse, while for women it is difficult to distinguish the two under conditions of male dominance". Ibid, p. 174. See, further, Burgess-Jackson, Keith, *Statutory Rape: A Philosophical Analysis*, Canadian Journal of Law and Jurisprudence, Vol. VIII, No. 1, Jan. 1995, p. 149 : "consent under conditions of inequality (of which patriarchy is but one manifestation) is worthless, a sham, and should not provide the touchstone for what distinguishes intercourse and rape". MacKinnon's theories have been criticised by other feminist authors, finding that the denigration of women's ability to tell the difference between sex and rape is oversimplified and implausible. Henderson, Lynne, *Getting to Know: Honoring Women in Law and Fact*, p. 56. It is argued that such theories could impede legal reforms rather than advance it since it erases the differences between the kinds of pressure that society must find permissible and the kinds that it may forbid. See e.g. Schulhofer, Stephen, *Unwanted Sex*, p. 56.

morally reprehensible beyond force. This is where the concepts of non-consent and coercion frequently overlap.

Certain scholars emphasise the need to focus on the *surrounding environment* of a sexual encounter to determine if it is conducive to genuine consent.⁴⁶³ This would lead to a contextual approach where such circumstances provide evidence as to e.g. coercion or non-consent. According to this view, consent in simple terms constitutes behaviour caused by legitimate antecedents. Alan Wertheimer e.g. disapproves of the importance that scholars place on defining ‘non-consent’, arguing that the main question rather is which *pressures* negate consent and are morally reprehensible.⁴⁶⁴ Other scholars agree that ‘force’ or ‘non-consent’ are redundant concepts and should be supplanted by the question of which pressures have been employed.⁴⁶⁵ Westen proclaims that the whole normative discussion on whether the main requirement should be ‘force’ or ‘non-consent’ is based on a fallacy that in cases where the woman has been pressured into sex, force is independent of the concept of consent. Accordingly, since there has to be an inquiry into whether an individual’s consent has been formed under conditions of freedom, knowledge and competence, it is inevitable to investigate the forms of pressure a person has been subjected to. In the end, jurisdictions necessarily as a matter of course make judgments on which pressures are wrongful.⁴⁶⁶ The line

⁴⁶³ MacKinnon, Catherine, *Defining Rape Internationally; A Comment on Akayesu*, 44 Colum. J. Transnat’l L 940, (2006), p. 956.

⁴⁶⁴ Wertheimer, Alan, *Consent to Sexual Relations*, p. 4. See also Tadros, Victor, *No Consent: A Historical Critique of the Actus Reus of Rape*, p. 334.

⁴⁶⁵ Westen, Peter, *Some Common Confusions About Consent in Rape Cases*, p. 357. Westen argues that one cannot meaningfully say that an individual is *not* a victim of sexual intercourse by wrongful force, but she *is* a victim of sexual intercourse without prescriptive consent. He poses the example that a professor requires sexual favours in order to give a female student her deserved grade. This will in most jurisdictions not be considered rape, simply because she chooses to engage in the sexual intercourse under conditions that the jurisdictions regards as free of wrongful force. The discussion should therefore focus on whether to expand the wrongful acts included in force. Consent, in his opinion, therefore entails all the same wrongful conduct as can be found in the term ‘force’. He does, however, accept that defining rape in terms of non-consent is less circuitous. However, this presumes that all conduct performed by a man after the woman has subjectively or expressly non-consented is the equivalent to what is considered with the word ‘force’.

⁴⁶⁶ Westen, Peter, *The Logic of Consent; The Diversity and Deceptiveness of Consent as a Defense to Criminal Conduct*, p. 233. Many jurisdictions consider it a sexual offence to have sex obtained through *fraud in the factum*. This may e.g. occur when a doctor claims to be inserting an instrument into a woman, when instead inserting his penis. Inducing someone to engage in sexual activities by lying about one’s feelings, marital status or economic wealth, so called fraud in the inducement, may be morally wrong but is not behaviour that is deemed to be within the scope of criminalisation. Dripps is also of the view that it is impossible to “escape the need to inquire into the pressures brought to bear by the defendant simply by restating the naïve view of consent in the statutory language”. Dripps, Donald, *Beyond Rape*, footnote 30.

between sex and legally reprehensible intercourse therefore becomes an exercise in determining what forms of pressure - physical and mental - are unacceptable. This leads to an examination of the antecedents of the sexual act as well as the surrounding circumstances.

Which actions are illegitimate prior to intercourse is cause for disagreement. In most jurisdictions, principally the *violent* constraint of sexual autonomy has been the focus of criminal law. Generally, it is not as well accepted that psychological pressure can be equally invalidating as physical force.⁴⁶⁷ As Schulhofer maintains, the majority of existing laws place virtually no restriction on assertive male sexuality so long as it steers clear of physical violence.⁴⁶⁸ Though sexual mores and the approach to personal autonomy have changed, many laws have not adapted to such social transformations, a development which may require a wider scope of inquiry into fairness and the abuse of power.⁴⁶⁹ However, establishing whether consent is formed without any outside pressure is difficult. This will ultimately require that the law specifies that the presence or absence of certain conditions is relevant for a determination of whether a person's choices are autonomous.⁴⁷⁰

Included in e.g. a non-consent based standard is a wide variety of coercive but non-forcible sexual encounters. This leads to a definitional quagmire where one

⁴⁶⁷ Conly, Sarah, *Seduction, Rape, and Coercion*, Ethics 115 (October 2004): 96-121, p. 98.

⁴⁶⁸ Schulhofer, Stephen, *Unwanted Sex*, p.x.

⁴⁶⁹ Spence, Ann T., *A Contract Reading of Rape Law: Redefining Force to Include Coercion*, p. 74.

⁴⁷⁰ Schulhofer exemplifies this with a desperate mother who is offered financial support in exchange for a sexual relationship and thereby relinquishes her sexual autonomy. The mother has more limited choices than a woman with a good economic standard, but since the man in this case simply takes advantage of an unfair situation rather than creating it, he cannot be said to sexually abuse the woman in question. It begs the question whether true voluntary consent in fact exists for any individual. Schulhofer, Stephen, *Unwanted Sex*, p. 84. Certain authors draw analogies to contract law and note that both areas typically provide protection for incapacity and prohibit physical violence, but laws on rape often do not consider non-physical coercion in the form of duress and undue influence. Spence, Ann T., *A Contract Reading of Rape Law: Redefining Force to Include Coercion*, p. 65. Dripps asserts that violence is the only illegitimate inducement to sex, whereas Schulhofer is open to the possibility of other forms of pressure. According to Schulhofer, protection of a woman's sexual autonomy better considers women's needs than the protection against violence. Rather than focusing solely on bodily injury, we should thus evaluate meaningful consent based on the notion of human dignity. Forceful behaviour would only be one relevant point, and all acts that violate the freedom of choice would be included. Dripps, Donald, *Beyond Rape: An Essay on the Difference Between the Presence of Force and the Absence of Consent*, p. 1787 & Schulhofer, Stephen, *Taking Sexual Autonomy Seriously: Rape Law and Beyond*, p. 70.

has to distinguish sexual coercion from non-coercive means used to persuade ambivalent individuals. This is particularly relevant in situations where the victim and defendant know each other. It is difficult to find a truly neutral environment and form choices free of outside pressure or influence. Threats of negative outcomes other than physical force might coerce a person to comply sexually. Economic pressure can influence a person's decision to engage in sex, a partner may threaten to break off a relationship with his girlfriend if she does not comply or a husband might show anger when his wife refuses sex. Such pressures are usually not considered criminal, even if under certain circumstances, immoral. According to Felson, the methods to influence a person's decision to have sex are the same used for any form of social influence: persuasion, deception and the exchange or promise of rewards.⁴⁷¹ If there is a difference in power involved it is even more difficult to determine the coercive factor, e.g. a teacher who threatens to lower a student's grade unless she performs certain sexual favours. In this case, most jurisdictions might view it as sexual coercion and not rape. It must be borne in mind that autonomy as a legal entitlement does not consider inequality that the individual or her sexual partner is neither directly or indirectly responsible for, such as economic disparity or weakness of will.⁴⁷² The question remains of the extent of declaring sexual relations illegal as soon as one of the partners has more power. As Schulhofer describes the problem: "if sexual interaction is ruled legally out of bounds every time one of the parties has any possible source of power over the other, our opportunities to find companionship and sexual intimacy shrink drastically".⁴⁷³ It is impossible to create a legal barrier to all relationships that are not equal.

It is, however, presumed that individuals are capable of making rational and informed choices, provided they do so in a neutral environment.⁴⁷⁴ It is clear that external factors affect a person's ability to make choices and courts have recognised the importance of such factors when determining if consent has been

⁴⁷¹ He exemplifies this with a man who treats his date to an expensive dinner and promises a future reward and who expresses his love for the woman even though he may not feel it, all with the aim of persuading her to sex. Of course his behaviour, no matter how insincere, will have an influence on how the woman perceives him and may lead to sex, but it cannot be viewed as coercive. Felson, Richard, *Violence and Gender Reexamined*.

⁴⁷² Ibid, p. 110 ff.

⁴⁷³ Schulhofer, Stephen, *Unwanted Sex: The Culture of Intimidation and the Failure of Law*, p.14.

⁴⁷⁴ Ibid, p. 654.

voluntarily given in fields such as torts and contract law.⁴⁷⁵ Minimal requirements of providing valid consent to sexual intercourse must be a guarantee of a certain level of freedom and that the consent is not a result of either wrongful threats or oppression. Regardless of the interpretation of the concept of consent, it is often understood that the consent must be 1) deliberate and 2) voluntarily given.⁴⁷⁶ A certain level of knowledge is also required in order to establish a voluntariness of acquiescence. Deception about facts that are relevant to an individual's consent is included.⁴⁷⁷ Deliberate consent may either take the form of verbal assent or that a lack thereof is evinced from a person's gestures.

Voluntary consent presupposes an autonomous individual in non-coercive circumstances that freely decides whether to engage in sexual relations. This excludes certain categories of persons traditionally judged to be unable to form such opinions, e.g. the elderly, persons under a certain age or persons with mental disabilities.⁴⁷⁸ In the *ad hoc* tribunals, the vulnerable position or inferior situation of the victim is particularly emphasised since the context is one of widespread violence or armed conflicts. The ICTY has e.g. noted that consent must "be given voluntarily, as a result of the victim's free will, assessed in the context of the surrounding circumstances". The likelihood of finding non-voluntary consent therefore appears greater in such contexts. However, as will be discussed, merely the existence of an armed conflict must not automatically

⁴⁷⁵ For example in the area of bioethics, informed consent entails that the individual should be so "situated as to be able to exercise free power of choice, without the intervention of any elements of force, fraud, deceit, duress, over-reaching, or other ulterior form of constraint or coercion." See Boon, Kristen, *Rape and Forced Pregnancy Under the ICC Statute: Human Dignity, Autonomy, and Consent*, p. 654.

⁴⁷⁶ Quéniwet, N.R Noëlle, *Sexual Offenses in Armed Conflict & International Law*, p. 21.

⁴⁷⁷ Westen, Peter, *The Logic of Consent; The Diversity and Deceptiveness of Consent As a Defense to Criminal Conduct*, p. 189. Westen mentions the example of a man lying about being HIV-positive as such a fraud as to negate a defence of consent, since it precludes a person from deciding whether it is in her interest to engage in sexual intercourse.

⁴⁷⁸ Canada e.g. defines consent and specifies situations where such consent is vitiated. The list of situations is non-exhaustive. Force is seen as evidence of non-consent. According to section 273.1 of the Criminal Code "consent" means "the voluntary agreement of the complainant to engage in the sexual activity in question."

Non-consent is defined as situations where: (a) the agreement is expressed by the words or conduct of a person other than the complainant; (b) the complainant is incapable of consenting to the activity; (c) the accused induces the complainant to engage in the activity by abusing a position of trust, power or authority; (d) the complainant expresses, by words or conduct, a lack of agreement to engage in the activity; or (e) the complainant, having consented to engage in sexual activity, expresses, by words or conduct, a lack of agreement to continue to engage in the activity.

preclude the possibility of forming genuine consent. This would indicate that persons cease being autonomous agents in such situations.

As mentioned, certain authors presume that even a consent-based standard fails to consider gender imbalances. Whereas consent is seen as an exercise of individualistic decision-making, it is dependent on social interactions.⁴⁷⁹ Jane Larson for example argues that women will always be the weaker party in sexual interactions, partly because of biology and partly because of history, considering that men are stronger, immune from pregnancy, have greater economic resources than women and are the “beneficiaries of millennia of assumptions that they belong on top”.⁴⁸⁰ Similarly, women will frequently allow “sexual access under terms of emotional, physical, and financial disadvantage”.⁴⁸¹ A feminist approach to consent would thus focus on questions of freedom and capacity to form genuine choices.

4.2.4 Coercion

A particular form of illegitimate antecedents is coercion. The term ‘coercion’ is usually understood to provide a wider scope of unacceptable behaviour than sheer physical force. Coercion can include psychological intimidation, extortion or other threats.⁴⁸² A coercion-based definition of rape sees the violation as essentially a crime of inequality, either through physical force, status or relationships.⁴⁸³ It is, however, defined inconsistently in many states, certain jurisdictions equating it with physical force.⁴⁸⁴ Certain countries separate rape from the crime of coercive sexual relations, which is viewed as less grave.⁴⁸⁵ Coercion might also lead to a contextual evaluation, both regarding the surrounding circumstances but also such facts as the relationship history between the two individuals, e.g. if it was marked by violence.⁴⁸⁶ MacKinnon finds a

⁴⁷⁹ Cowan, Sharon, *Freedom and Capacity to Make a Choice, A Feminist Analysis of Consent in the Criminal Law of Rape*, p. 52. Consent can thus be interpreted as a narrow liberal idea, based on the subject as a rational choice maker, or with feminist values, as also encompassing mutuality, relational choice and communication. See p. 53.

⁴⁸⁰ Hirshman, Linda & Larson, Jane, *Hard Bargains: The Politics of Sex*, Oxford University Press, (1998), p. 262.

⁴⁸¹ Ibid, p. 262.

⁴⁸² WHO, World Report on Violence and Health, 2002, p. 149.

⁴⁸³ MacKinnon, Catherine, *Defining Rape Internationally; A Comment on Akayesu*, p. 941.

⁴⁸⁴ Spence, Ann T., *A Contract Reading of Rape Law: Redefining Force to Include Coercion*.

⁴⁸⁵ See e.g. Sweden, Brottsbalken 6:1 and 6:2.

⁴⁸⁶ Kazan, Patricia, *Sexual Assault and the Problem of Consent*, p. 38.

coercion-based standard particularly appropriate since it contextualises sexual violence and views it against the objective surrounding realities. In armed conflicts it may be such factors as rape being used as a tactic of war and in peacetime societal gender inequality.⁴⁸⁷ The gravity of coercive circumstances such as detention or prison-settings has also been emphasised by regional human rights courts.⁴⁸⁸ A *strict* non-consent based standard would accordingly focus on the acts of the victim rather than the coercive antecedents leading to consent.⁴⁸⁹

The definition of rape in times of armed conflict will often place a greater emphasis on the notion of coercion and has, as will be discussed in relation to the case law of the *ad hoc* tribunals, at times coercion has been presumed because of the existence of an armed conflict. In this particular context, the *ad hoc* tribunals and the ICC have been more willing to find that rape has occurred without the express use of force since armed conflicts can create a “fear of violence, duress, detention, psychological oppression, or abuse of power”. Such circumstances can be used to obtain acquiescence or a lack of resistance on the part of the victim.⁴⁹⁰ An outward appearance of consent may under such circumstances rather be an expression of survival and does not constitute genuine consent.⁴⁹¹ The *ad hoc* tribunals and the ICC have stated that captivity e.g. in so-called rape camps, is

⁴⁸⁷ MacKinnon, Catherine, *Defining Rape Internationally; A Comment on Akayesu*. According to this theory, inequality of power is understood as a form of coercion of which gender is such a social hierarchy. Though she does not propose that all sexual relations between unequals shall be considered coerced, claims of unwanted sex should be interpreted against the context of gender inequality. See also MacKinnon, Catherine, *Women’s Lives, Men’s Laws*, Harvard University Press, (2007), p. 247. MacKinnon argues that rape should be understood as a physical attack of a sexual nature under coercive circumstances. See further Estrich e.g. argues that a gender-sensitive interpretation of coercion would include the abuse of power, economic and psychological pressure, fraud and misrepresentation, in Estrich, Susan, *Real Rape*.

⁴⁸⁸ *Aydin v. Turkey*, ECtHR, *The Miguel Castro-Castro Case*, IACtHR. See discussion in Chapter 7.2.

⁴⁸⁹ Tadros, Victor, *No Consent: A Historical Critique of the Actus Reus of Rape*, p. 328.

⁴⁹⁰ The Elements of Crimes of the ICC, Article 7 (1) (g)-1 (2). *The Prosecutor v. Akayesu*, para. 688: “Threats, intimidation, extortion and other forms of duress which prey on fear or desperation may constitute coercion, and coercion may be inherent in certain circumstances, such as armed conflict or the military presence of Interahamwe among refugee Tutsi women at the bureau communal.”

⁴⁹¹ *Prosecutor v. Kunarac, Kovac and Vukovic*, Judgment of 22 February 2001, para. 464: “where the victim is ‘subjected to or threatened with or has reason to fear violence, duress, detention or psychological oppression’ or ‘reasonably believed that if (he or she) did not submit, another might be so subjected, threatened or put in fear’, any apparent consent which might be expressed by the victim is not freely given.” See more in Chapter 9.2.2.

inherently coercive.⁴⁹² This may indicate that the consent expressed or implied was not deliberate. For example, in the *Kunarac* case the ICTY evaluated the whole situation in order to evince coercion, noting that the raped women were

“held in de facto military headquarters, detention centres and apartments maintained as soldiers’ residences. As the most egregious aspect of the conditions, the victims were considered the legitimate sexual prey of their captors. Typically the women were raped by more than one perpetrator and with a regularity that is nearly inconceivable. Such detentions amount to circumstances that were so coercive as to negate any possibility of consent”.⁴⁹³

Stiglmeier has found that whereas women were often severely beaten in initial sexual attacks in former Yugoslavia, such injuries were often not found in subsequent rapes, indicating a passive consent in the form of submission in order to avoid injuries.⁴⁹⁴ As a consequence, non-consent as the basis of a rape definition has been considered inappropriate in war-time settings in limited case law of the *ad hoc* tribunals as well as by certain legal scholars.⁴⁹⁵ Arguably, the existence of an armed conflict, genocide or a widespread or systematic attack has been deemed as “almost universally coercive” and sufficient to automatically vitiate consent.⁴⁹⁶ The notion that non-consent should be evaluated in this context, considering the gravity of the international crimes, e.g. genocide, has in fact offended some authors.⁴⁹⁷ It is apparent that under circumstances of coercion or threats, which put the victim in a state of fear, a person’s ability to consent is clearly diminished. However, it is in general rather perilous to deduce an individual’s subjective intentions from solely surrounding circumstances. This could lead to speculation e.g. on how the “normal” woman would react in certain situations. Though it is of course important to examine events preceding the

⁴⁹² See below Chapter 9.

⁴⁹³ *The Prosecutor v. Kunarac, Kovac and Vukovic*, Judgment 12 June 2002, para. 132.

⁴⁹⁴ Stiglmeier, Alexandra, *The Rapes in Bosnia-Herzegovina*, in *Mass Rape: The War Against Women in Bosnia-Herzegovina*, ed. Stiglmeier, Alexandra, University of Nebraska Press, (1994), pp. 90-91.

⁴⁹⁵ See e.g. Kalosieh, Adrienne, *Consent to Genocide? The ICTY’s Improper Use of the Consent Paradigm to Prosecute Genocidal Rape in Foca*, p. 121.

⁴⁹⁶ *The Prosecutor v. Jean-Paul Akayesu*, Judgment of 2 September 1998. However, also force has been deemed inappropriate as a standard since it does not include taking advantage of coercive circumstances and is too restrictive in its approach. A force-based standard has also been held by the *ad hoc* tribunals to fail in focusing on the autonomy of the individual. See *Prosecutor v. Kunarac, Kovac and Vukovic*, Judgment of 22 February 2001.

⁴⁹⁷ See below Chapter 9.2.

intercourse in respect of whether they affected the individual's consent, it cannot be the sole criteria.

4.2.5 Force or Threat of Force

As with non-consent and coercion, the understanding of the concept of force varies greatly among countries and legal scholars. In certain jurisdictions, force is the main requirement for establishing rape, whereas in others it may be an indication of non-consent, while not itself a necessary element. The threshold of what constitutes force is often purposefully flexible. It may range from a high threshold of force, implying a resistance requirement, to e.g. the Swedish regulation which also covers situations where the perpetrator impeded the victim's movements, e.g. by pinning down the victim's arms or body, applying body weight or forcing the victim's legs apart.⁴⁹⁸ A jurisdiction can frame 'force' so as to include all wrongful pressures that are not welcomed by the other party. In certain jurisdictions, the term 'force' is simply used to connote 'without legal consent' and thereby replicates a non-consent standard.⁴⁹⁹ However, most statutes prohibiting rape do not consider non-physical forms of force.⁵⁰⁰ Certain states have created lesser offences where force or the threat of force are not included, labelling the act sexual assault or sexual coercion rather than rape.⁵⁰¹ Force is then considered to be an aggravating factor, rather than the main component of the crime.

Force as an element of rape generally implies force beyond the acts involved in intercourse.⁵⁰² It thus does not refer to the general use of force in sex, which may be consented to, but rather force used to overcome an individual's non-consent.⁵⁰³ In this sense, even where the legislation focuses on force rather than non-consent, the issue of consent is still relevant. Schulhofer points to the

⁴⁹⁸ Prop. 2004/05:45 En ny sexualbrottslag, p. 35.

⁴⁹⁹ Westen, Peter, *The Logic of Consent; The Diversity and Deceptiveness of Consent As a Defense to Criminal Conduct*, p. 342.

⁵⁰⁰ Spence, Ann T., *A Contract Reading of Rape Law: Redefining Force to Include Coercion*, p. 59. Westen, Peter, *The Logic of Consent; The Diversity and Deceptiveness of Consent As a Defense to Criminal Conduct*, p. 209.

⁵⁰¹ In Sweden, the crime is called "sexual coercion", where the acts are coercive but do not reach the level of force or threat of force. See 6:1, Brottsbalken, Section 217, Danish Penal Code (Straffeloven), Article 139 Georgian Penal Code, Section 177, German Penal Code (Strafgesetzbuch).

⁵⁰² Schulhofer, Stephen, *Unwanted Sex: The Culture of Intimidation and the Failure of Law*, p. 4. Westen, Peter, *The Logic of Consent, The Diversity and Deceptiveness of Consent As a Defense to Criminal Conduct*, p. 229.

⁵⁰³ Westen, Peter, *Some Common Confusions About Consent in Rape Cases*, Ohio State Journal of Criminal Law, Vol. 2, No. 1 (2004), p. 350.

impossibility of prohibiting all forms of physical force with penal codes on rape, since “physical activity, some of it forcible, is inherent in sexual intercourse”.⁵⁰⁴ However, certain jurisdictions have expanded the ‘force’ requirement to entail force inherent in non-consensual sex.⁵⁰⁵ In general, a definition centring on force is more restrictive than one focusing on non-consent. For example, a force-based standard would not consider sexual relations subsequent to verbal protests alone as rape without the use of force.⁵⁰⁶ Similarly, with a requirement of force or threat of force, it is generally not illegal behaviour to gain consent to sexual relations by fraud, misrepresentation or deceit.⁵⁰⁷

4.2.6 Implications of Non-Consent or Force Standards

What are the implications of a non-consent-based standard? Critics of defining rape as non-consensual sex argue that legal proceedings will ultimately concentrate on the victim and his/her behaviour preceding the intercourse in order to determine whether he/she expressed consent.⁵⁰⁸ An individual’s consent is often inferred from his/her actions and non-verbal behaviour, and may even arise in the face of verbal non-consent. This may lead to increased weight being put on to e.g. the way in which the woman dressed or the nature of their previous

⁵⁰⁴ Schulhofer, Stephen, *Unwanted Sex: The Culture of Intimidation and the Failure of Law*, p. 279.

⁵⁰⁵ The Supreme Court of New Jersey has held that “physical force in excess of that inherent in the act of sexual penetration is not required for such penetration to be unlawful”. It rejected the “concept of force over and above the coercion implicit in denying sexual freedom of choice”. *State ex rel. M.T.S.*, 609 A.2d 1266 (N.J.1992).

⁵⁰⁶ A case often referred to in doctrine, from the Pennsylvania Supreme Court of the US, *Commonwealth v. Berkowitz*, provides an example of the scope of the requirements of force v. non-consent and its relation to sexual autonomy. Both force and non-consent are elements of rape in the state statute. In the case, the complainant’s non-consent was undisputed by the court. The defendant had locked the door, the complainant had sought to leave the room on numerous occasions and had said ‘no’ throughout the encounter. However, the Pennsylvania Supreme Court concluded that while there was sufficient evidence of non-consent, there was a lack of evidence of force or threat of force and therefore could not convict the defendant. *Commonwealth v. Berkowitz*, Superior Court of Pennsylvania, 1992.415 Pa. Super. 505, 609 A.2d 1338. Similarly, the Supreme Court of North Carolina in *State v. Alston* reversed a rape conviction, meanwhile stating that it was clear that the victim had not consented and that the intercourse was against her will, but there was no force. The victim in the case had a general fear of the defendant which was also justifiable, but since there was no explicit force or threats, the verdict was reversed. 310 N.C 399, 312 S.E2d 470 (1984).

⁵⁰⁷ Wertheimer, Alan, *Consent to Sexual Relations*, p. 18.

⁵⁰⁸ UN Doc. E/CN.4/1995/42, para. 182.

relationship, if any, and divert attention from the behaviour of the accused.⁵⁰⁹ This severely limits the scope of a person's actions, since he/she in order to maintain the legal right to sexual autonomy must refrain from certain behaviour that may be interpreted as consent, or assume the risk of non-consensual intercourse. In cases of non-stranger rape, an even broader range of behaviour may be considered in support of establishing consent. Importance will e.g. be placed on if the victim and the accused had been dating, if she allowed the man home or whether they had previously engaged in sexual intercourse. In fact, the majority of the feminist reformers in the US during the 1970s argued that the most victim-friendly approach was to remove the requirement of non-consent from the statutes, an idea also viewed in the work of certain later feminist scholars.⁵¹⁰ Feminist authors have also argued that true consent is not possible since women have a subordinate position in society.⁵¹¹ However, similar issues are also of importance in jurisdictions where force is the main requirement. Furthermore, the claim that the main focus of a non-consent standard is the behaviour of the victim is only valid to a certain degree. The crucial question in most cases is whether the behaviour of the alleged assailant rendered the complainant's consent *invalid*, necessitating an inquiry into his actions. An example is whether the consent is offered in response to impermissible threats.⁵¹²

As mentioned, particularly in the context of armed conflicts the argument has been raised that a non-consent based definition of rape is inappropriate, since the coercive circumstances of a conflict causes a presumption of non-consent,

⁵⁰⁹ SOU 2001:14, p. 126.

⁵¹⁰ Schulhofer, Stephen, *Unwanted Sex*, p. 31. MacKinnon finds the consent standard disturbing since "women consent to sex with force all the time". Consent would therefore not serve to erase the unequal balance of power that exists between the genders. In fact, our cultural appreciation for force and dominance as erotic has led to the belief that "the legal concept of consent can coexist with a lot of force". According to this argument, women accept more force in sexual relations than should be tolerable, and it is expected that women do consent to this level of violence. But would the culturally tolerated level of force be higher with a consent standard rather than the concept of 'force'? Do not these cultural assertions influence both standards? See MacKinnon, Catherine, *Reflections on Sex Equality Under Law*, 100 Yale L.J. 1281, (1991), p. 1303. Victor Tadros argues that a consent-based standard implies that the role of the woman during intercourse is passive, to accept or reject the advances of an active male. See Tadros, Victor, *No Consent: A Historical Critique of the Actus Reus of Rape*, 3 Edinburgh L. Rev. 326, (1999), p. 327.

⁵¹¹ Torrey, Morrison, *Feminist Legal Scholarship on Rape: A Maturing Look at One Form of Violence Against Women*, p. 306.

⁵¹² To a certain extent, problems that ensue with a definition focusing on the victim's non-consent, such as the focus on the victim's behaviour, can be solved through other means, such as changing the procedural rules pertaining to corroboration and the sexual history of the victim.

rendering such an inquiry superfluous.⁵¹³ Because the jurisdiction of the *ad hoc* tribunals and the ICC evaluate rape in the context of three international crimes - genocide, war crimes and crimes against humanity - genuine consent is arguably impossible and should not be a legal requirement. The argument is that rape should be viewed in the same manner as other sub-categories of the international crimes, e.g. torture and enslavement, which does not require an analysis of the non-consent of the victim.⁵¹⁴ However, later case law from the *ad hoc* tribunals has affirmed the necessity of applying a non-consent based standard since it places emphasis on the sexual autonomy of the individual.⁵¹⁵

The justification for centring the definition on non-consent has traditionally been that it best protects female sexual autonomy and self-determination. It provides flexibility and implies a wide range of illegal behaviour. The violation of rape is not merely a physical harm but also one of the victim's autonomy. The experienced violation may therefore be just as grave where there is no element of force involved. A regulation that requires force only acknowledges the harm of physical injury but does not guarantee the right to sexual self-determination. Statistics from a variety of countries show that acts beyond force are frequently employed in rape and weapons are seldom used.⁵¹⁶ As Remick insists, the non-existence of force in a particular case of sexual intercourse may be a reflection that no force was required in order to overcome the victim. Remick exemplifies: "if a woman is inordinately afraid, too embarrassed to defend herself, or simply indisposed to resist in any situation she may submit to non-consensual sex even in the absence of a display of force or threat of force by the defendant".⁵¹⁷ The ICTY in the *Kunarac* case rejected a force-based standard since certain situations would not be covered, e.g. the victim being brought into a state of being unable to resist, having a physical or mental incapacity or being deceived by surprise or misrepresentation.⁵¹⁸ As such, force may be one indication of non-consent but other forms of coercive behaviour can also lead to unwanted sexual relations and

⁵¹³ UN Doc. E/CN.4/Sub.2/1998/13, para. 25. See also below discussion on the jurisprudence from the *ad hoc* tribunals.

⁵¹⁴ Schomburg, Wolfgang & Peterson, Ines, *Genuine Consent to Sexual Violence Under International Criminal Law*, p. 128. See, also, Kalosieh, Adrienne, *Consent to Genocide? The ICTY's Improper Use of the Consent Paradigm to Prosecute Genocidal Rape in Foca*, p. 121, MacKinnon, Catherine, *Defining Rape Internationally; A Comment on Akayesu*, p. 952, De Brouwer, Anne-Marie, *Supranational Criminal Prosecution of Sexual Violence: The ICC and the Practice of the ICTY and the ICTR*, p. 121.

⁵¹⁵ *Prosecutor v. Kunarac, Kovac and Vukovic*, Judgment of 22 February 2001.

⁵¹⁶ See further in Chapter 3.

⁵¹⁷ Remick, Lani Anne, *Read her Lips: An Argument for a Verbal Consent Standard in Rape*, p. 1118.

⁵¹⁸ *Prosecutor v. Kunarac, Kovac and Vukovic*, Judgment of 22 February 2001, para. 458.

restricting a definition to solely force would omit a multitude of acts that are experienced as rape by the victim. A non-consent based standard would therefore encompass more sexual acts that the individual typically experiences as unwanted than a definition requiring force.

Force-based definitions of rape have also been criticised by many feminist legal scholars. Though the resistance requirement has been abolished in most Western states, a force prerequisite certainly encourages evidence of resistance. Susan Estrich observes that “the force standard guarantees men freedom to intimidate women and exploit their weaknesses, as long as they [the women] don’t fight with them”,⁵¹⁹ and “the prohibition of ‘force’ or ‘forcible compulsion’ ends up being defined in terms of a woman’s resistance”.⁵²⁰ In fact, the force standard “makes clear that the responsibility and blame for [intimidating] seductions belong with the woman”.⁵²¹ However, as noted by the UN Special Rapporteur on Violence against Women, “research from all jurisdictions indicates that any woman who has to prove that she did not consent will face enormous difficulty unless she shows signs of fairly serious injury,”⁵²² thus indicating that in practice force is still often the focus even in states with a non-consent based standard. The suitability of the elements of non-consent, coercion and force has been particularly subject to discussion by the *ad hoc* tribunals, and to a limited extent, regional human rights courts. This indicates that mainly these elements of the offence have been controversial and are sensitive to the question of context, e.g. the difference in character of IHL/international criminal law and international human rights law. This issue will be provided ample space in later chapters.

4.2.7 Actus Reus

The *actus reus* of a crime delineates which acts form the basis of an offence. In the case of rape, this entails which physical acts of a sexual nature that reach the requisite level of harm.⁵²³ A great variety of definitions exist domestically as

⁵¹⁹ Estrich, Susan, *Rape*, p. 1118

⁵²⁰ Estrich, Susan, *Real Rape*, p. 60. Lynne Henderson argues that if male coercion without force, even overriding the woman’s wishes, is simply seduction, much dominant and forceful behaviour will fall outside of the definition of rape. See Henderson, Lynne, *Getting to Know: Honoring Women in Law and Fact*, p. 52. According to Joan McGregor, force and resistance are *evidence* of the fact that there was no consent but that there is a continuum of illegal behaviour. See McGregor, Joan, *Force, Consent and the Reasonable Woman*, p. 239.

⁵²¹ Estrich, Susan, *Rape*, p. 1118.

⁵²² UN Doc. E/CN.4/1995/42, para. 182.

⁵²³ Jefferson, Michael, *Criminal Law*, 7th ed., p. 41.

well as in the jurisprudence of international tribunals regarding such questions as whether rape is confined to heterosexual penetration or also includes acts between two persons of the same sex, and whether or not it includes anal or oral sex or the insertion of objects.

The definition of rape is often considered broader in countries based on civil law in comparison to common law systems when it comes to the specific acts that are included. Common law definitions often require penile penetration of the vagina, not including oral penetration, i.e. a female victim and male perpetrator.⁵²⁴ In such cases, forced acts of anal or oral sex would fall beyond the scope of the definition. According to the UN Sub-Commission on Human Rights, the greatest difference between domestic jurisdictions concerns the criminalisation of forced oral penetration.⁵²⁵ Certain countries distinguish between intercourse and oral/anal sexual acts. Though the latter acts may be considered forms of sexual assault, in certain jurisdictions they are not classified as rape. An example is Estonia where penetration was previously defined as “ordinary rape” whereas oral and anal rape was considered “sexual desire in an unnatural manner”.⁵²⁶ Most forms of male rape would in effect thus be excluded.⁵²⁷ In fact, in many countries homosexual acts are not included in the rape definition but may be criminalised in a separate provision. In e.g. Albania, rape is defined as “violent, unlawful sexual intercourse with adult women.”⁵²⁸ Romanian criminal law on rape defines it as “sexual intercourse with a person of female gender by using force or taking advantage of the inability of the person in question to defend herself or explain her wishes”.⁵²⁹ In the DRC, there was previously even a requirement of ejaculation, defining rape as “a male organ penetrated a female organ with ejaculation”.⁵³⁰ The South African Constitutional

⁵²⁴ Administration of Justice, Rule of Law and Democracy, Report of the Sessional Working Group on the Administration of Justice, Chairperson-Rapporteur: Ms. Antoanella-Iulia Motoc, UN Doc. E/CN.4/Sub.2/2004/6, 9 August 2004, para. 23.

⁵²⁵ UN Doc. E/CN.4/Sub.2/2004/12, 20 July 2004, p. 6, para. 20.

⁵²⁶ Legislation in the member States of the Council of Europe in the field of violence against women, (vol. I), Council of Europe, (2001), p. 68.

⁵²⁷ Cases where a man is forced to engage in intercourse with a woman would still be included. See e.g. the jurisprudence of the Special Court for Sierra Leone, Chapter 9.2.4.

⁵²⁸ Law No. 8733. See Legislation in the member States of the Council of Europe in the field of violence against women, (vol. I), Council of Europe, (2004), p. 7. “Unlawful homosexual intercourse by using violence with adults” is instead a separate crime.

⁵²⁹ Article 197, Romanian Penal Code, Slovak Republic, para. 241 Penal Code: “any person who by violence, threat of violence or by use of the victim’s defencelessness, compels a woman to intercourse...”. Legislation in the member States of the Council of Europe in the field of violence against women, (vol. II), Council of Europe, (2004), p. 101.

⁵³⁰ Irin PlusNews, “DRC: Help and Justice for Raped, Displaced Women”, 1 August 2006.

Court in 2007 discussed whether the definition of rape should be widened from vaginal intercourse to include anal penetration of female and male victims. Though the court found that non-consensual penetration of men is equally degrading and traumatic, it held that it “does not mean that it is unconstitutional to have a definition of rape which is gender-specific” and only included females as possible victims.⁵³¹ Many laws exclude not only male victims but also certain categories of women, frequently spouses. In such countries, conjugal duties may explicitly include sexual relations.⁵³²

It is argued in many states that penetration, not restricted to solely vaginal penetration, is more traumatic than other forms of sexual acts and that such acts must be distinguished, whether it is in the form of a gradation scheme or other legislative solutions.⁵³³ In Sweden, it was previously held by the legislator that intercourse is the most harmful kind of sexual violence a woman can experience.⁵³⁴ Temkin argues that the preoccupation with solely vaginal penetration in many jurisdictions might be attributed to the early origins of defining rape and the perceived harm of the offence. Historically, criminal laws on rape were chiefly concerned with the theft of a woman’s virginity.⁵³⁵ Other forms of sexual acts were therefore dismissed or charged as offences of lesser gravity. Also the UN Special Rapporteur on Sexual Slavery holds: “the historic focus on the act of penetration largely derives from a male preoccupation with assuring women’s chastity and ascertaining paternity of children”.⁵³⁶ The consequences, e.g. in the form of pregnancy, can thus be more severe as a result of vaginal penetration. However, it has been noted by the UN Special Rapporteur on Violence against Women that, in fact, “frequently, the offender is unable or chooses not to penetrate his victim in this manner, but may force her to perform acts of oral sex, penetrate her with other parts of the body or other objects or demean her in other ways”.⁵³⁷ This was also evident in the witness testimonies of the *ad hoc* tribunals. Consequently, restricting rape to solely penetration of the vagina not only excludes offences between persons of the same sex, but also the most common forms of sexual violence of women.

⁵³¹ *Masiya v. Director of Public Prosecutions Pretoria and Another* (CCT54/06), 10 May 2007. A Bill was, however, introduced following the case to include male rape in the definition of rape.

⁵³² See e.g. Afghanistan, Yemen (The Yemen Personal Status Act No. 20 of 1992), Ethiopia.

⁵³³ Temkin, Jennifer, *Rape and the Legal Process*, p. 157. Sweden 6:1 Brottsbalken.

⁵³⁴ SOU 1953:14, p. 231.

⁵³⁵ Temkin, Jennifer, *Rape and the Legal Process*, p. 57.

⁵³⁶ UN Doc. E/CN.4/Sub.2/1998/13, 22 June 1998, para. 24.

⁵³⁷ Report of the Special Rapporteur on Violence Against Women, Its Causes and Consequences: Mission to Indonesia and East-Timor on the Issue of Violence Against Women, UN. Doc.E/CN.4/1999/68/add.3, 21 January 1999, para. 36.

Several jurisdictions have, however, revised the definition to include acts beyond vaginal penetration, emphasising the demeaning and violent aspects of rape rather than its purely sexual nature.⁵³⁸ A shift can be noted towards focusing on the sexual autonomy of the person.⁵³⁹ The majority of states in Europe now have gender-neutral definitions of rape.⁵⁴⁰ Such amendments also concern e.g. the inclusion of penetration through the insertion of objects, however, still focusing on a form of penetration.⁵⁴¹

A limited number of countries have removed any requirement of penetration, e.g. the Polish Criminal Code which states: “any act intended to satisfy some sexual needs in the attacker is sufficient”.⁵⁴² Certain laws are wide in their description of the *actus reus*, e.g. Belgium: “Any act of sexual penetration, of whatever nature and by whatever means, committed in respect of a person who has not given consent, constitutes rape. In particular, consent does not exist where the act employed violence, duress or trickery, or was made possible by the victim’s infirmity or physical or mental disability”.⁵⁴³ This includes oral, anal sexual relations or penetration by objects.⁵⁴⁴ The wider focus of the *actus reus* in many states have led to challenges in determining which acts are of a *sexual* nature. In Sweden, acts that are equivalent to intercourse “based on the nature of the violation or the prevailing conditions” are included in the *actus reus*.⁵⁴⁵ This has led to problems of interpretation, raising concerns as to possible gender biases. For example, the forceful penetration of the vagina of a victim with fingers has been considered rape, whereas the forceful masturbation of a man by another man did not reach the level equivalent to intercourse.⁵⁴⁶ It is held that

⁵³⁸ UN Doc. E/CN.4/1995/42, 22 November 1994, para. 180.

⁵³⁹ De Brouwer, Anne-Marie, *Supranational Criminal Prosecution of Sexual Violence: The ICC and the Practice of the ICTY and the ICTR*, p. 110.

⁵⁴⁰ *Different Systems, Similar Outcomes? Tracking Attrition in Reported Rape Cases Across Europe*, Lovett, Jo & Kelly, Liz, funded by the European Commission Daphne II Programme, CWASU, (2009), p. 103.

⁵⁴¹ E.g. Art. 222-23 of the French Penal Code & 6:1 Brottsbalken (Sweden).

⁵⁴² Art. 168 (1), Council of Europe, Proceedings of the Forum: Ending Domestic Violence: Action and Measures, Bucharest Nov. 26-28, 1998, p. 63.

⁵⁴³ Law 4/07/1989, Article 375 of the Criminal Code. See Legislation in the member States of the Council of Europe in the field of violence against women, (vol. I), Council of Europe (2001), p. 22.

⁵⁴⁴ Ibid. More examples: Slovakia where rape is defined as: “When the sexual aggression consists in carnal knowledge by vaginal, anal or oral means or the insertion of objects by either of the first two means...”. Article 179 of Penal Code.

⁵⁴⁵ 6:1 Brottsbalken (Sweden).

⁵⁴⁶ NJA 2008 s. 482 I and II. See discussion by Asp, Petter, *Grader av Kränkning - Våldtäkt eller Sexuell Tvång?*, JT, årgång 220, 2008-09, Nr. 1.

penetration is more harmful and a more serious violation of sexual autonomy.⁵⁴⁷ The fact that the focus lies on penetration has been criticised as basing the definition of rape on a traditional heterosexual male perspective.⁵⁴⁸

In Canada, sexual assault is subsumed under all forms of assault and is thus a gender neutral offence and contains various forms of acts, e.g. rape, incest and sexual touching. It does not specify which acts are included, e.g. penetration, oral sex, intrusion by an object, in order not to restrict the assault to specific body parts but rather be determined by the level of violence. Anal sex is, however, a separate offence.⁵⁴⁹ Though the Canadian law aims to equate rape with regular acts of physical assault, sexual assaults are still separated as a category carrying heavier penalties. This raises a particular problem in that sexual assault is not defined separately yet offer stricter sentences, which has lead to a multitude of cases where the courts have been left with the task of determining when an assault is sexual.⁵⁵⁰

In certain countries the link to morality is explicit, e.g. in Poland: “anyone who uses force, threats or illegal means to compel another person to perform or submit to an act contrary to morality is liable to imprisonment...”.⁵⁵¹ In Croatia, sexual offences were previously denoted as “criminal offences against dignity and morality” until the reform of the Criminal Act classifying such crimes as

⁵⁴⁷ According to the *travaux préparatoires*, oral and anal sex is included as well as penetration with an object, fingers or a fist. Masturbation is explicitly mentioned as not included. See Prop. 2004/05:45 pp. 46, 59, 135.

⁵⁴⁸ Asp, Petter, *Grader av Kränkning - Vårdäkt eller Sexuellt Tvång?*, p. 81.

⁵⁴⁹ Canadian Criminal Code, section 265.

⁵⁵⁰ In the case of *Chase*, the Supreme Court held that sexual assault was perpetrated if it was committed in circumstances of a sexual nature such that the sexual integrity of the victim was violated, based on the view of a reasonable person. Again, the body parts used were less important than the surrounding circumstances and in this case, the touching of the woman's breasts were considered sexual assault. *R v. Chase*, (1987) 37 CCC (3d) 97 (SCC).

⁵⁵¹ Article 168 of the Criminal Code. Legislation in the member States of the Council of Europe in the field of violence against women, (vol. II), Council of Europe (2001), p. 35. See also Côte d'Ivoire, where rape can be charged as attacks on modesty, *attentat à la pudeur*. See UN Doc. S/2009/362, para. 23. Despite the reform of the categories of crimes emphasising autonomy, the definitions of rape may still be restrictive. The Greek criminal code previously codified rape in a chapter that protected social morality which was redefined as a crime against sexual liberty and a crime of exploitation of sexual life. The definition is, however: “the coercion of another to extra-marital intercourse...”, excluding marital rape and oral/anal rape. In the German Strafgesetzbuch, sexual violence is referred to as “crimes against sexual self-determination”. However, it still defines rape as intercourse or other sexual acts due to force or threat of violence constituting a danger to life or limb. Strafgesetzbuch, § 177. See Legislation in the member States of the Council of Europe in the field of violence against women, (vol. I), Council of Europe (2001), p. 118.

“criminal offences against sexual freedom and sexual gender distinction”.⁵⁵² This emphasises the protection of a woman’s honour and in a number of states have led to provisions allowing for the exoneration of rapists if the victim marries the offender subsequent to the rape, thereby removing the dishonour of the victim.⁵⁵³ Similarly, though not distinctly related to the *actus reus* of the offence, rape in the 1949 Geneva Conventions is prohibited as a violation against the honour of a woman.⁵⁵⁴

The debate on the international law level, as discussed by the various *ad hoc* tribunals and the Rome Statute, has also concerned whether to restrict the definition to specific body parts or to construct a wide definition that may encompass various forms of acts while focusing on the *nature* of sexual violence.⁵⁵⁵ According to the latter argument, the specific acts that occur are subsidiary to the harm caused and the intention of the act, evident in the *Akayesu* case.⁵⁵⁶ In *Akayesu*, rape was defined as a physical invasion of a sexual nature under coercive circumstances. Such a definition clearly takes a victim-friendly approach in that the experience by the victim, and not body parts, become the focus of the definition. For example, as was seen in the Rwanda conflict, it was a practice to insert objects, such as weapons, bottles or branches into the vagina of the victim. The traditional definitions of rape in domestic legislation would fall short of acknowledging the sexual nature of such acts. By not specifying the *actus reus* or restricting it to penetration, it was anticipated that a detailed inquiry during trial into the specific sexual acts, such as penetration, would not be necessary.⁵⁵⁷ However, the lack of clarity and foreseeability of the *Akayesu* decision, and laws similar to it, have been criticised for not enabling the individual to adjust his/her behaviour accordingly. A concern has also been raised that it may deter some victims from making a complaint since they may be uncertain whether the assault they have experienced is contained in the provision.⁵⁵⁸ The provision in that sense becomes unrelatable to the victim and

⁵⁵² Legislation in the member States of the Council of Europe in the field of violence against women, Council of Europe, EG (2001), 3 rev. vol.1, Strasbourg, Nov. 2002, p. 37. Sexual violence in Luxembourg is classified as “crimes and offences against family order and against public morality”. Prior to the introduction of the current law, case law had defined rape as “the ultimate attack on a person’s privacy, likely to lead to pregnancy”. See Legislation in the member States of the Council of Europe in the field of violence against women, (vol. I), Council of Europe, EG (2001), p. 198.

⁵⁵³ HRC, General Comment No. 28, UN Doc. CCPR/C/21/2 Rev.1/Add.10 (2000), para. 24.

⁵⁵⁴ Article 27 of the 4th Geneva Convention. See further discussion on p. ...

⁵⁵⁵ See Chapter 9.

⁵⁵⁶ *The Prosecutor v. Jean-Paul Akayesu*, Judgment of 2 September 1998, para. 687 ff.

⁵⁵⁷ Temkin, *Rape and the Legal Process*, p. 160

⁵⁵⁸ *Ibid*, p. 161

the discretion of the police and the legal system wide. A more specific definition is generally considered to better accommodate such principles as foreseeability and specificity.

The definitions of rape developed by the ICTY have accordingly opted for a more specific *actus reus*, delineating rape as a physical invasion of the vagina or anus of the victim, by a penis or an object. Oral sex is also included.⁵⁵⁹ Similarly, the Elements of the Crimes of the ICC is more specific in the details of the *actus reus* of rape.⁵⁶⁰ Gender-neutrality in the definition of the offence has been stressed by the tribunals/ICC been. As opposed to certain domestic regulations, the definition also pertains equally to all persons and does not exclude certain groups, such as spouses.

4.2.8 Mens Rea and Criminal Responsibility

Aside from the criminal act itself, in order to establish criminal responsibility most legal systems require evidence of the requisite mental state of the perpetrator in relation to the crime. The purpose of requiring substantiation of the *mens rea* of the perpetrator is that it is generally believed as unjust to punish an individual without the requisite frame of mind and culpability.⁵⁶¹ In general, the requirement of *mens rea* in a rape definition entails that the perpetrator proceeded knowing that the sexual act was non-consensual, alternatively, that the sexual act occurred owing to the application of force.⁵⁶² If the person was not aware of this, he/she may not be convicted of rape. In a sense, the focus is removed from the harm of the victim to the perpetrator's perception of whether the victim acquiesced. However, depending on the legal system, other forms of mental states than intent can be sufficient. The *mens rea* can consist of a range of purpose, knowledge, recklessness or negligence in relation to the act and the non-consent of the putative victim.⁵⁶³ The penal code on rape in Norway e.g. covers not only acts where intent can be proven but also acts where gross

⁵⁵⁹ *Prosecutor v. Furundzija*, Judgment of 10 December 1998, *Prosecutor v. Kunarac, Kovac and Vukovic*, Judgment of 22 February 2001.

⁵⁶⁰ Article 7 (1) (g)-1. Rape as a crime against humanity.

⁵⁶¹ Van der Vyver, Johan, *The International Criminal Court and the Concept of Mens Rea in International Criminal Law*, 12 U. Miami Int'l & Comp. L. Rev. 57, (2004), p. 57.

⁵⁶² Jefferson, Michael, *Criminal Law*, 7th ed., p. 41.

⁵⁶³ McGregor, Joan, *Force, Consent and the Reasonable Woman*, p. 197, Van der Vyver, Johan, *The International Criminal Court and the Concept of Mens Rea in International Criminal Law*, 12 U. Miami Int'l & Comp. L. Rev. 57, (2004), p. 61. Knowledge: the actor knows, or should know that the results will reasonably occur. Recklessness: the actor foresees that a particular consequence may occur and proceeds with disregard whether the result will occur or not. Negligence: the person is unaware of the consequences of his actions but a reasonable man would have been.

negligence has occurred.⁵⁶⁴ This would arguably more closely examine the actions of the perpetrator rather than the victim in evaluating what the person should have realised. Certain crimes are strict liability offences, e.g. statutory rape, which entails that a crime is committed when a person has sexual relations with an individual under a specific age, regardless if he/she believed that the person was older.⁵⁶⁵

The evaluation of *mens rea* can be exemplified with the Canadian justice system, where it is understood as the knowledge, recklessness or negligence of the actor in his disregard of the fact that the person is not subjectively acquiescing. In this sense there are two independent defences to rape. Consent is a defence to the *actus reus* of rape and negates the crime when the putative victim subjectively acquiesces to sex, whereas a lack of wrongful intent is a defence of *mens rea*. The understanding of consent may also differ depending on whether it is referred to from the victim's standpoint or the *mens rea* of the accused. The case *Queen v. Ewanchuk* from Canada highlights this point:

"There is a difference in the concept of 'consent' as it relates to the state of mind of the complainant (in respect of) the *actus reus* of the offence and the state of mind of the accused in respect of the *mens rea*. For the purposes of the *actus reus*, 'consent' means that the complainant in her mind wanted the sexual touching to take place. In the context of *mens rea* - specifically for the purposes of the honest but mistaken belief in consent - 'consent' means that the complainant had affirmatively communicated by words or conduct her agreement to engage in sexual activity with the accused."⁵⁶⁶

Mens rea raises similar questions as non-consent, i.e. whether to perform a subjective or objective evaluation. The objective test concerns cases where *mens rea* is imputed to the accused, primarily in cases of negligence. It has been held to better circumvent sexism within the criminal law system since a subjective test would prevent the conviction of an individual who honestly held unreasonable and sexist beliefs.⁵⁶⁷ From a practical standpoint, the *actus reus* has frequently been deemed to have proved the *mens rea*, particularly in jurisdictions that have a force-based standard. Thus if the defendant used or threatened force to obtain sex, it is evident that he/she knowingly had non-consensual sexual

⁵⁶⁴ Norwegian Penal Code (Straffeloven), section 19, § 192. It carries a lower sentence than other forms of rape.

⁵⁶⁵ Schabas, William, *Mens Rea and the International Criminal Tribunal for the Former Yugoslavia*, 37 New Eng. L. Rev. 1015, (2002-2003), p. 1015.

⁵⁶⁶ *R. v. Ewanchuk*, 1 S.C.R. 330, (1999), para. 48.

⁵⁶⁷ Byrnes, Craig, *Putting the Focus Where it Belongs: Mens Rea, Consent, Force, and the Crime of Rape*, p. 295.

relations.⁵⁶⁸ *Mens rea* therefore poses particular difficulties in cases of acquaintance rape.

The mistaken belief defence is allowed in many legal systems and several approaches exist.⁵⁶⁹ Some hold that a *reasonable* mistaken belief is exculpatory and can be evinced from words or conduct of the complainant.⁵⁷⁰ The reasonable belief standard is based on the belief of an average man in the community. The reasonable man standard has received ample criticism.⁵⁷¹ Certain jurisdictions apply a strict liability where a belief in consent is not exculpatory, regardless of whether it is honest or reasonable. Still other systems hold that even unreasonable beliefs as to the victim's consent can be exculpatory.⁵⁷²

⁵⁶⁸ Kinports, Kit, *Rape and Force: The Forgotten Mens Rea*, 4 Buff. Crim. L. Rev. 755, (2001), p. 759.

⁵⁶⁹ Primarily in common law countries. Temkin, Jennifer, *Rape and the Legal Process*, p. 127, Illsey, Thea, *The Defence of Mistaken Belief in Consent*, SACJ, (2008).

⁵⁷⁰ See e.g. *DPP v Morgan*, (1976) AC 182. The case from the United Kingdom is widely discussed. The House of Lords held that an honest mistake concerning a woman's consent is a defence to the accusation of rape. Morgan invited three strangers to have sexual intercourse with his wife. According to the three defendants, Morgan had instructed that his wife was "kinky" and was likely to struggle during the intercourse in order to get "turned on". All four subsequently had sexual intercourse with her, using violence to overcome her resistance. The three strangers argued that they believed the woman had consented. The House of Lords held that where a man honestly believes that the woman has consented, regardless of whether it was based on reasonable grounds, he may not be convicted. Following a public outcry, the parliament adopted a statute that dispelled the honest mistake defence and limited the defence of mistake of fact to mistaken beliefs that were not reckless, i.e. not consciously unreasonable beliefs. The Canadian Supreme Court has further expounded on the issue of a mistaken belief in consent, stating that it is not sufficient that the defendant asserts a belief in consent, but that it must be supported by sufficient evidence to give it "an air of reality". There must therefore be a "real factual basis of the claim", ideally supported by independent corroborative evidence. See *Pappajohn v. The Queen* (1980) 2 S.C.R.120, para. 18.

A mistaken belief in consent is thereby relegated to circumstances where the defendant had taken reasonable steps to ascertain the complainant's consent and does not use 'a reasonable man test' as in several common law countries. The reasonable steps standard does contain elements of an affirmative consent standard since it requires the accused to have taken reasonable steps to ascertain that the other person freely agreed to the sexual activity. The difficulty remains, as discussed above, by which standards to evaluate the reasonableness, e.g. whether to take into consideration the cultural background of the accused. The standard suggests an objective prism through which to evaluate the reasonableness, with a homogenous national reasonableness as an evaluating factor.

⁵⁷¹ Certain jurisdictions in Australia and the US. In the UK it must be "honest and reasonable". Joan McGregor e.g. argues that the standard of mistaken belief should be based on the reasonable woman, rather than the average man. McGregor, Joan, *Force, Consent and the Reasonable Woman*, p. 246. The "reasonable" man standard has in fact been supplanted by the "reasonable person" concept. See Hubin, Donald & Haely, Karen, *Rape and the Reasonable Man*, Law and Philosophy J. Vol. 18, Nr. 2, March 1999.

⁵⁷² Brody, Acker & Logan, *Criminal Law*, Aspen Publication, (2000), p. 428.

A particular problem with a crime such as rape is the fact that the physical contact that exists in rape by its nature is present in regular sexual relations. The difficulty in inferring reasonableness is, again, that the social conventions on when consent exists as demonstrated by surrounding circumstances may not correspond with the manner in which the victim actually manifested non-consent. Certain feminist authors have criticised the use of *mens rea* as a defence in rape cases. According to MacKinnon, women are raped by men who know perfectly well the meaning of their acts but women are also violated on a daily basis by men who have no idea what their behaviour signifies to a woman, and consequently, these acts are described by the law as sex. Rape is then only an injury from women's point of view.⁵⁷³ According to this argument, from a legal point of view, the experience of the victim becomes less important than the beliefs of the perpetrator. Considering the social constructions of gender roles where women often are believed to be a more passive partner, it may result in an imbalance in a heightened level of unwanted sex for women. The regulation of *mens rea* can thus become a gendered concept to the detriment of the female victim.⁵⁷⁴

The few cases that have analysed rape as a violation of international human rights law have not discussed the matter of *mens rea*, but have rather examined the *actus reus* of rape, and more specifically, the issue of non-consent or force. Solely in international criminal law has the element been analysed in international law, albeit in a limited manner.

No crimes of strict liability exist within international criminal law, i.e. where *mens rea* does not have to be proven. *Mens rea* in international criminal law is, however, treated in a somewhat different fashion than in domestic laws. Since rape is included in the *chapeau* of all three international crimes, the *mens rea* refers both to the specific intent of e.g. genocide, but also that pertaining particularly to rape. Torture e.g. requires that the act was carried out with the specific purpose of obtaining information, to punish or discriminate the victim etc, which entails that in order for rape to constitute torture, it must also be conducted for any of these particular objectives.

⁵⁷³ MacKinnon, Catherine, *Toward a Feminist Theory of the State*, p. 180.

⁵⁷⁴ This was also noted in the *Park* case in Canada by Judge L'Heureux-Dubé, who discussed the defence in relation to the protection of fundamental human rights stating: "The current common law approach to the *mens rea* of sexual assault may perpetuate social stereotypes that have historically victimised women and undermined their equal right to bodily integrity and human dignity... This court must strive to ensure that the criminal law is responsive to women's realities rather than a vehicle for the perpetuation of historic repression and disadvantage". See *R. v. Park*, (1995) 2 SCR 836, paras. 38 and 51.

In the Rome Statute of the ICC, it is required that the elements of the crime are committed with intent and knowledge.⁵⁷⁵ This may be inferred from relevant facts and circumstances.⁵⁷⁶ Intent is defined as a) in relation to conduct, that person means to engage in the conduct, b) in relation to a consequence, that person means to cause that consequence or is aware that it will occur in the ordinary course of events.⁵⁷⁷ Knowledge entails “awareness that a circumstance exists or a consequence will occur in the ordinary course of events”.⁵⁷⁸ Additionally, the international crimes may also require a particular knowledge, e.g. that the act occurred in the context of a widespread or systematic attack concerning crimes against humanity.⁵⁷⁹ The accused must know “the broader context in which his act occurs”.⁵⁸⁰ The crime of genocide also has a particular *mens rea - dolus specialis* - in that it requires “intent to destroy, in whole or in part, a national, ethnical, racial or religious group”.⁵⁸¹ As for war crimes, the perpetrator must be “aware of the factual circumstances that established the existence of an armed conflict”.⁵⁸² Varying levels of intent and knowledge may also depend on the level of participation of the individual, e.g. if he is prosecuted for aiding and abetting the crime, for command responsibility or for joint criminal enterprises.⁵⁸³

⁵⁷⁵ Article 30 of the Rome Statute. The terms ‘know’ and ‘was aware of’ are interchangeable. Certain delegations argued that recklessness should be included as a form of intent. It is, however, left to the Court to determine the exact content of Article 30. See von Hebel, Herman & Kelt, Maria, *Some Comments on the Elements of Crimes for the Crimes of the ICC Statute*, p. 279.

⁵⁷⁶ General introduction, Elements of Crimes, paras. 2-3. It is also stated in para. 4: “With respect to mental elements associated with elements involving value judgement, such as those using the term ‘inhuman’ or ‘severe’, it is not necessary that the perpetrator personally completed a particular value judgment, unless otherwise indicated.”

⁵⁷⁷ Article 30 (2) Rome Statute.

⁵⁷⁸ Article 30 (3) Rome Statute.

⁵⁷⁹ Article 7 Rome Statute.

⁵⁸⁰ *Prosecutor v. Tadic*, Judgment of 7 May 1997, para. 656.

⁵⁸¹ See e.g. Article 6 of the Rome Statute. There is no requirement of success, i.e. that the group was in actuality destroyed. Hebel, Herman von & Kelt, Maria, *Some Comments on the Elements of Crimes for the Crimes of the ICC Statute*, p. 281.

⁵⁸² Article 8 Introduction, Elements of Crimes. However, there is not requirement that the perpetrator makes a legal evaluation as to the existence of an armed conflict or whether it is international or national.

⁵⁸³ See e.g. *The Prosecutor v. Jean-Paul Akayesu*, Judgment of 2 September 1998, paras. 488-491, *Prosecutor v. Furundzija*, Case No. IT-95-17/1-T, Judgment of 10 December 1998, para. 249, *Prosecutor v. Tadic*, Appeal Judgment of 15 July 1999, para. 229, *Prosecutor v. Kunarac, Kovac and Vukovic*, Judgment of 22 February 2001, para. 512.

The *ad hoc* tribunals, as opposed to the ICC, lack general provisions on the mental element of the crimes. The tribunals have thus determined the requisite level of *mens rea* regarding each crime.⁵⁸⁴ The *mens rea* in connection to rape is only discussed in a limited manner in the case law of the *ad hoc* tribunals. It is simply noted by both the ICTR and ICTY that it is understood to mean “the intention to effect this sexual penetration, and the knowledge that it occurs without the consent of the victim”.⁵⁸⁵ In the *Kunarac* judgment, *mens rea* is discussed to some extent in relation to the proposed mistaken belief in consent of the defence. The accused held that a woman detained in a camp had seduced him and he therefore believed the sexual encounter was consensual. The Chamber here appears to apply a “reasonable man” evaluation in concluding that the captivity of the victim must have led Kunarac to assume that she was not consenting.⁵⁸⁶ The knowledge that the sexual act occurred without consent could be inferred from the circumstances surrounding the events of an armed conflict, and the captivity of Muslim women. This exemplifies the fact that courts and tribunals often have construed the mental disposition based on secondary evidence.⁵⁸⁷ Similarly, in *Gacumbitsi*, the ICTR held that the accused must be aware, or have reason to be aware, of the coercive circumstances that undermined the possibilities of genuine consent.⁵⁸⁸ Proof of this level of knowledge was facilitated by Rule 94 of the Rules of Procedure and Evidence of the ICTR, which permitted the Tribunal to take judicial notice of facts of common knowledge from other proceedings. In the *Karamera* case, the genocide, widespread or systematic attack and armed conflict in 1994 against the Tutsi ethnic group were held to constitute facts of common knowledge.⁵⁸⁹ Considering that the tribunals have stated that the existence of genocide, crimes against humanity or an armed conflict in general constitute coercive

⁵⁸⁴ Badar, Elewa, Mohamed, *Drawing the Boundaries of Mens Rea in the Jurisprudence of the International Criminal Tribunal for the Former Yugoslavia*, Intl. Crim. Law Review 6, (2006), p. 314. This has led to a mixture of approaches by the judges, from requiring solely foreseeability of harm to requiring direct intent, indirect intent or recklessness, alternatively applying a subjective or objective test.

⁵⁸⁵ *The Prosecutor v. Jean de Dieu Kamuhunda*, Case No. ICTR-95-54A-T, ICTR, Judgment of 22 January 2004, para. 707, *Prosecutor v. Kunarac*, Judgment of 22 February 2001, para. 460.

⁵⁸⁶ *Prosecutor v. Kunarac*, Judgment of 22 February 2001, para. 646.

⁵⁸⁷ Van der Vyver, Johan, *The International Criminal Court and the Concept of Mens Rea in International Criminal Law*, p. 69.

⁵⁸⁸ *The Prosecutor v. Gacumbitsi*, Case No. ICTR-2001-64-A, ICTR, Appeal Judgment of 7 July 2006, para. 157.

⁵⁸⁹ *Prosecutor v. Karamera*, Case No. ICTR-98-44-AR73 (C), ICTR, Decision on Prosecutor’s Interlocutory Appeal of Decision on Judicial Notice, 16 June 2006, paras. 22-38.

circumstances entail that proof of coercion can be easily established in rape cases.⁵⁹⁰ The fact that the context and surrounding facts serve to prove both non-consent and *mens rea* has been of substantial importance in rape cases.

Another important aspect of the case law of the *ad hoc* tribunals is that a distinction between motive and intent is emphasised.⁵⁹¹ This entails that even if a perpetrator is partly driven by lust or other personal motives, it does not preclude a finding of intent to commit the crime in question, e.g. genocide in the form of rape. This was raised as a defence in the *Kunarac* case, where the accused argued that he committed the rape because of a sexual urge rather than the specific intent of torture. This was, however, disregarded by the ICTY, which clearly separated motive and intent as concepts, arguing that “all that matters in this context is (Vukovic’s) awareness of an attack against the Muslim civilian population of which his victim was a member”.⁵⁹² Similarly, the Appeals Chamber in the *Tadic* case concluded that the motives of the accused for taking part in an attack are irrelevant and that a crime against humanity may be committed for purely personal reasons.⁵⁹³ Instead, the perpetrator must know that there is an attack on the civilian population and that his acts are part of this, or take the risk that his act is part of the attack.⁵⁹⁴

These elements will be further discussed in the following chapters, particularly underscoring similar approaches or distinctions in the various branches of international law.

⁵⁹⁰ See e.g. *Prosecutor v. Kunarac, Kovac and Vukovic*, Appeal Judgment of 12 June 2002, para. 130, *The Prosecutor v. Gacumbitsi*, Appeal Judgment, 7 July 2006, para. 155, *The Prosecutor v. Jean-Paul Akayesu*, Judgment of 2 September 1998, para. 688.

⁵⁹¹ Visser Sellers, Patricia & Okuizumi, Kaoru, *Prosecuting, Prosecuting International Crimes: An Inside View: Intentional Prosecution of Sexual Assaults*, p. 61, *Prosecutor v. Kunarac, Kovac and Vukovic*, Appeal Judgment of 12 June 2002, para. 155.

⁵⁹² *Prosecutor v. Kunarac, Kovac and Vukovic*, Judgment of 22 February 2001, para. 816.

⁵⁹³ *Prosecutor v. Tadic*, Appeal Judgment of 15 July 1999, paras. 248, 252.

⁵⁹⁴ *Ibid*, para. 248.

5. Sexual Violence in Context

5.1 Introduction: Armed Conflict and Gender Hierarchies as Contextual Elements

As viewed in this thesis, the context, i.e. the surrounding circumstances of sexual violence, is important from several aspects. The context may influence the *definition* of rape, primarily evident in the discussion on the offence as a violation of IHL and international criminal law. The role which sexual violence has served in the conflicts subject to the jurisdiction of the ICTY and the ICTR has directly impacted the choice of elements of the crime. The context may further prove the *existence* of rape, i.e. serve as evidence as to the non-consent of the victim or force employed in the sexual act. An armed conflict can e.g. lead to a presumption of coercion. The context is also essential in elevating an incident of rape to an *international crime*, i.e. constitutes a jurisdictional factor. Rape in e.g. a widespread or systematic attack against civilians can, because of the circumstances, constitute a crime against humanity within the field of international criminal law. The context thus serves to separate “regular” incidents of rape from those deemed to be of concern to the international community.

According to MacKinnon, with similar arguments expressed in the jurisprudence of the two *ad hoc* tribunals, criminal laws on rape tend to fail owing to their *decontextualized* application.⁵⁹⁵ When definitions of rape focus solely on body parts and on the question of non-consent or force, without considering the context in which the sexual assault occurs, such definitions become unworkable in practice. Whether rape transpires in inherently coercive situations, such as an armed conflict, must therefore be taken into account. Accordingly, “coercion is largely social in the sense that the hierarchies and pressures it deploys are inherently contextual. In the context of international humanitarian law, to look to coercion to define rape is to look to the surrounding collective realities of group membership and political forces, alignments, stratifications, and clashes”.⁵⁹⁶ Rape in the circumstances in which international crimes occur are arguably predicated on force, coercion and violence. Unlike rape in peacetime, rape as a war crime is not merely rape that occurs during the course of war, but rape that *is* war.⁵⁹⁷

⁵⁹⁵ MacKinnon, Catherine, *Defining Rape Internationally: A Comment on Akayesu*, 44 Colum. J. Transnat’l. L. 940, (2006), p. 956.

⁵⁹⁶ *Ibid.*, p. 956.

⁵⁹⁷ Kalosieh, Adrienne, *Consent to Genocide? The ICTY’s Improper Use of the Consent Paradigm to Prosecute Genocidal Rape in Foca*, p. 132.

MacKinnon, however, ventures a step further than the tribunals and argues that criminal laws on rape, not only in the context of armed conflicts, are reviewed “against a false background presumption of consent in the context of a presumed equality of power that is not socially real”.⁵⁹⁸ As such, the power imbalance that exists between the sexes in times of peace also tends not to be reflected in domestic criminal laws on rape. Such factors must be borne in mind in order to provide a contextual approach. Context thus may constitute the construction of society, such as conflict situations, or power relations. Dobash and Dobash further suggest that “an understanding of the specific context(s) in which violence occurs is essential if we are to have some purchase on explaining the violence and on developing meaningful responses to victims and to perpetrators”.⁵⁹⁹ The UN Special Rapporteur on Violence against Women has further asserted that the *motives* for rape in wartime must be analysed in order to comprehend the scope and the gravity of this particular form of violence against women, especially considering its escalation.⁶⁰⁰ Moreover, the UN Office for the Coordination of Humanitarian Affairs has emphasised that understanding the motives is crucial in order to develop effective strategies for prevention and protection.⁶⁰¹

Thus the matter for consideration is what distinguishes the nature of rape within the contexts of armed conflict/widespread violence and peace, international human rights law and IHL/international criminal law. If the context is essential to correspond fully to a realistic understanding of why sexual violence occurs, and the purpose of such crimes within each context, how does

⁵⁹⁸ MacKinnon, Catherine, *Defining Rape Internationally; A Comment on Akayesu*, p. 955. See also Copelon, Rhonda, *Surfacing Gender: Reconceptualizing Crimes Against Women in Time of War*, pp. 212-213, who holds that “every rape is a grave violation of physical and mental integrity...Every rape is an expression of male domination and misogyny...”. Dobash & Dobash also argue the need for a contextual approach, stating that “violence directed at women occurs within a wider context composed of responses from social agencies and general beliefs and attitudes about the relationships between men and women, husbands and wives, and about the use of violence to achieve various aims”. Dobash, R.E & Dobash, R.P, *Cross-Border Encounters: Challenges and Opportunities*, in *Rethinking Violence against Women*, p. 9.

⁵⁹⁹ Dobash, R. E & Dobash, R. P, *Cross-Border Encounters: Challenges and Opportunities*, p. 10.

⁶⁰⁰ Preliminary Report Submitted by the Special Rapporteur on Violence against Women, its Causes and Consequences, Ms. Rhadika Coomaraswamy, in accordance with Commission on Human Rights Resolution 1994/95, UN Doc. E/CN.4/1995/42, 22 November 1994, para. 274.

⁶⁰¹ Use of Sexual Violence in Armed Conflict, Identifying Gaps in Research to Inform More Effective Interventions, UN OCHA Research Meeting, 26 June 2008, Discussion Paper 1, Sexual Violence in Armed Conflict: Understanding the Motivations.

one construct a definition? Is the nature of rape so contextually different, especially if one considers MacKinnon's argument that power imbalances exist at all times, that the crime must be defined in different ways? The following chapter will provide a general overview of certain characteristics of rape in times of armed conflict and how they may differ from circumstances prevailing in peacetime. Greater attention will be paid to sexual violence in armed conflict than in peacetime, owing to the emphasis placed upon its distinct nature in IHL and international criminal law, which is reflected in the emerging jurisprudence on the definition of rape in these areas.

5.2 Victims of Armed Conflicts

During contemporary armed conflicts most casualties are civilians, a group which is increasingly deliberately chosen as targets in both international and non-international conflicts.⁶⁰² Today's armed conflicts are characterised by low-intensity battles fought with small arms in both urban and rural areas. Conventional warfare carried out by large, formed units with clear command and control structures is less common. Current hostilities are predominantly of an internal nature where battlefields no longer are separated from civilian areas.⁶⁰³ This development has obvious consequences for the safety of civilians who are increasingly caught in crossfire, targeted for reprisals and raped. The smaller, less trained armed groups, tend to target and spread fear among civilians.⁶⁰⁴ Women, finding themselves in the proximity of the fighting, are particularly vulnerable to indiscriminate attacks in non-international conflicts.⁶⁰⁵ According

⁶⁰² Askin, Kelly, *Prosecuting Wartime Rape and Other Gender-Related Crimes Under International Law: Extraordinary Advances, Enduring Obstacles*, 21 Berkeley Journal of Intl. L 288, (2003), p. 9 & Final Report by Ms. Gay J McDougall, Special Rapporteur, Contemporary Forms of Slavery: Systematic Rape, Sexual Slavery and Slavery-Like Practices During Armed Conflict, UN Doc. E/CN.4/Sub.2/1998/13, 22 June 1998, para. 7, Report of the Sub-Commission on Prevention of Discrimination and Protection of Minorities, Minimum Humanitarian Standards, Analytical Report of the Secretary-General Submitted Pursuant to Commission on Human Rights Resolution 1997/21, UN Doc. E/CN.4/1998/87, 5 January 1998, para. 33, Report of the Secretary-General to the Security Council on the Protection of Civilians in Armed Conflict, UN Doc. S/2005/740, 28 November, 2005, para. 3, SC Res. 1820 on Women, Peace and Security, UN Doc. S/RES/1820, 19 June 2008.

⁶⁰³ Gardam, Judith & Jarvis, Michelle, *Women and Armed Conflict: The International Response to the Beijing Platform for Action*, 32 Colum. Hum. Rts. L. Rev. 1, (2000), p. 6.

⁶⁰⁴ Report of the Secretary-General to the Security Council on the Protection of Civilians in Armed Conflict, UN Doc. S/2005/740, para. 3.

⁶⁰⁵ Lindsey, Charlotte, *The Impact of Armed Conflict on Women*, in *Listening to the Silences: Women and War*, ed. Helen Durham and Tracey Gurd, Martinus Nijhoff Publishers, (2005), p. 24. See also UN Doc. E/CN.4/1998/87, para. 31.

to the UN Secretary-General, the impact on civilians in this new warfare goes “far beyond the notion of collateral damage” and includes targeted attacks, forced displacement and sexual violence.⁶⁰⁶

Sexual violence is widespread in both international and non-international armed conflicts and because the largest group of civilians consists of girls and women, these are most frequently exposed to violence.⁶⁰⁷ Because armed conflicts in recent years have predominantly taken the form of a struggle for supremacy between ethnic groups rather than countries, women increasingly face the prospect of rape as an object of military strategy.⁶⁰⁸ Sexual violence is acknowledged as a particularly effective tactic of war because it has lasting physical and psychological effects on the victim and may also destroy communities.⁶⁰⁹ The UN High Commissioner for Refugees has stated that: “[v]iolence, and particularly sexual and gender-based violence, is one of the defining characteristics of contemporary conflict”.⁶¹⁰ Though women typically

⁶⁰⁶ Report of the Secretary-General to the Security Council on the Protection of Civilians in Armed Conflict, UN Doc. S/2005/740, para. 3.

⁶⁰⁷ Working Paper by Francoise Hampson on the Criminalization, Investigation and Prosecution of acts of Serious Sexual Violence, Administration of Justice, Rule of Law and Democracy, UN Doc. E/CN.4/Sub.2/2004/12, 20 July 2004, p. 3, SC Resolution 1820, UN Doc. S/RES/1820, 19 June 2008, Report of the Secretary-General pursuant to Security Council Resolution 1820, UN Doc. S/2009/362, 15 July 2009, para. 6, Parker, Karen, *Human Rights of Women During Armed Conflict*, in *Women and International Human Rights Law*, vol. 3, Transnational Publishers, ed. Kelly Askin & Doreen Koenig, (2001), p. 313. See also The Declaration on the Protection of Women and Children in Emergency and Armed Conflict, General Assembly Resolution 3318, which expresses its “...deep concern over the sufferings of women and children belonging to the civilian population who in periods of emergency and armed conflict...are too often the victims of inhuman acts and consequently suffer serious harm”. Declaration on the Protection of Women and Children in Emergency and Armed Conflict, General Assembly Resolution 3318 (XXIX) of 14 December 1974, UN Doc. A/9631, Report of the Secretary-General to the Security Council on the Protection of Civilians in Armed Conflict, UN Doc. S/2005/740, para. 14.

⁶⁰⁸ In such conflicts, rape is often intended to humiliate whole communities and establish boundaries between groups. Coomaraswamy, Radhika, *Sexual Violence during Wartime, in Listening to the Silences: Women and War*, ed. Helen Durham and Tracey Gurd, Martinus Nijhoff Publishers, (2005), p. 55, Bunch, Charlotte, *The Progress of Nations Report, UNDP, (1997), The Intolerable Status Quo: Violence Against Women and Girls*, p. 43.

⁶⁰⁹ Resolution 1670 (2009), Sexual Violence against Women in Armed Conflict, 20 May 2009, Parliamentary Assembly, Council of Europe, para. 2.

⁶¹⁰ Cost of Violence against Women ‘Beyond Calculation’, warns UN Chief, UN News, New York, 8 March, 2009.

constitute only approximately two percent of army personnel, they nevertheless suffer a disproportionate degree of violence.⁶¹¹

Women and men are violated in similar ways in times of war, e.g. are killed, tortured and displaced, but there are also forms of violence that more commonly target women and carry a clear gender component.⁶¹² Such violations generally take on a sexual expression, be it rape, sexual abuse or other forms of torture with sexual overtones. Crimes such as forced impregnation are clearly restricted to women. In fact, according to the Beijing Platform for Action in 1995, “women and girls are particularly affected [by violence in armed conflicts] because of their status in society and their sex”.⁶¹³ Further, “...the destructive impact of armed conflict is different on women and men and...a gender-sensitive approach to the application of international human rights law and international humanitarian law is important”.⁶¹⁴ In fact, the CEDAW Committee in General Recommendation No. 19 states that gender-based violence that impairs “the right to equal protection according to humanitarian norms in time of international or internal armed conflict” is included in the concept of discrimination in CEDAW.⁶¹⁵

As symptomatic as the prevalence of sexual violence in armed conflicts, is the glaring lack of prosecution. According to the UN Secretary-General, the severe types of human rights abuses that occur in armed conflicts, such as murder, torture and rape, of which civilian women are frequently victims, are characterised by the fact that there tends to be virtual impunity.⁶¹⁶ The Secretary-General's Special Representative on Sexual Violence in Conflict asserts that sexual violence during conflicts often is treated as part of local cultural traditions

⁶¹¹ UNDP, Human Development Report, Oxford University Press, (1995), p. 45.

⁶¹² See e.g. Resolution 1670 (2009), Sexual Violence against Women in Armed Conflict, Parliamentary Assembly, Council of Europe, paras. 9 and 10 (3), which sees it as a form of gender-based persecution.

⁶¹³ Beijing Declaration and Platform for Action, Fourth World Conference on Women, UN Doc. A/CONF.177/20, 15 September 1995, para. 135.

⁶¹⁴ Further Actions and Initiatives to Implement the Beijing Declaration and Platform for Action, UN Doc. A/RES/S-23/3, 16 November 2000, para. 15.

⁶¹⁵ General Recommendation No. 19, Violence Against Women, in Report of the Committee on the Elimination of Discrimination Against Women, UN GAOR, 47th Sess., Supp. No. 38, UN Doc. A/47/38 (1992), Article 7 (c).

⁶¹⁶ UN Doc. E/CN.4/1998/87, para. 34. See also statements by Naéla Gabr, chair of the committee monitoring compliance with CEDAW: “Violence against women in the context of armed conflict is widespread and largely unpunished”, in “Men commit wide-scale sexual crimes with impunity in conflict zones, says UN”, UN News Center, 12 October 2009.

instead of as war crimes.⁶¹⁷ To a certain extent there may be difficulties of jurisdiction in relation to offences committed abroad, but the main reason for such inaction is a “general failure to take the crimes seriously”.⁶¹⁸ Though rape tends to be conducted by both parties to a conflict, the perpetrators are frequently members of state armed forces and the police, with members of the highest echelons of the state accused of condoning or even commissioning the violence.⁶¹⁹ The lack of legal enforcement mechanisms has been noted by the UN Secretary-General in acknowledging the “weaknesses in the laws and procedures of many countries as well as in the administration of justice essentially allowing perpetrators to escape punishment...”.⁶²⁰ The UN Secretary-General has emphasised that compliance with international humanitarian law, human rights law and international criminal law by all parties concerned provides the strongest means for ensuring the safety of civilians.⁶²¹ It is recognised that accountability is an indispensable component of peace-building, since conflicts are often rooted in a failure to repair previous harms.⁶²²

The UN Security Council has passed several resolutions calling for the eradication of sexual violence in armed conflicts and an end to the culture of impunity.⁶²³ The especially precarious position of women in armed conflicts has been acknowledged in UN Security Council Resolution 1325, which states:

⁶¹⁷ “Rape must never be minimized as part of cultural traditions, UN envoy [Margot Wallström] says”, UN News, 25 March 2010.

⁶¹⁸ UN Doc. E/CN.4/Sub.2/2004/12, 20 July 2004, p. 3, para. 3. In UN Resolution 1888 it is noted that “only limited numbers of perpetrators of sexual violence have been brought to justice, while recognizing that in conflict and in post conflict situations national justice systems may be significantly weakened”. See also Kelly Askin, *The Jurisprudence of International War Crimes Tribunals: Securing Gender Justice for Some Survivors*, p. 126. Askin argues that impunity stems from patriarchal stereotypes that regard gender abuses as private matters. Further, the stigma attached to victims, who are often treated as dishonoured, serves as a strong deterrent in reporting the crime.

⁶¹⁹ Report of the Secretary-General pursuant to Security Council Resolution 1820, UN Doc. S/2009/362, para. 14.

⁶²⁰ Ibid, para. 22. Included in his critique are laws that classify rape as an attack against modesty, or links it to substantive or evidentiary requirements of adultery or sodomy. It is also noted that military tribunals largely fail to prosecute offenders of sexual violence domestically. See para. 26.

⁶²¹ UN Doc. S/2005/740 of 28 November 2005, para. 12.

⁶²² SC Res. 1888 on Women, Peace and Security, UN Doc. S/RES/1888, 30 September 2009. See also Lee, Roy, *The International Criminal Court: The Making of the Rome Statute - Issues, Negotiations, and Results*, Springer, (1999), p. 1.

⁶²³ SC Res. 1325 on Women, Peace and Security, UN Doc. S/RES/1325, 31 October 2000, SC Res. 1820 on Women, Peace and Security, UN Doc. S/RES/1820, 19 June 2008, SC Res. 1888 on Women, Peace and Security, UN Doc. S/RES/1888, 30 September 2009.

“civilians, particularly women and children, account for the vast majority of those adversely affected by armed conflict, including as refugees and internally displaced persons, and are increasingly targeted by combatants and armed elements”.⁶²⁴ The UN Secretary-General has emphasised that women and children “suffer a disproportionate share of the abuses directed at the civilian population” since wars are for the most part waged by men.⁶²⁵ In Resolution 1820 of 2008, the UN Security Council further records that women and girls are particularly at risk of sexual violence in armed conflicts, “including as a tactic of war to humiliate, dominate, instil fear in, disperse and/or forcibly relocate civilian members of a community or ethnic group”, which can persist after the cessation of hostilities.⁶²⁶ The eradication of rape has been deemed the highest concern of the UN since the systematic use of sexual violence as a war tactic can “significantly exacerbate” situations of armed conflicts or civil disturbances and therefore impede the restoration of international peace and security.⁶²⁷ In Resolution 1888 of 2009, the UN Security Council further “urges States to undertake comprehensive legal and judicial reforms, as appropriate, in conformity with international law, without delay and with a view to bringing perpetrators of sexual violence in conflicts to justice and to ensuring that survivors have access to justice, are treated with dignity throughout the justice process...”⁶²⁸

⁶²⁴ SC Res. 1325 UN Doc. S/RES/1325. The resolution lacks clear monitoring mechanisms. See evaluation of the implementation process in Report of the Secretary-General, Women and Peace and Security, UN Doc. S/2009/465, 16 September 2009.

⁶²⁵ UN Doc. E/CN.4/1998/87, para. 31.

⁶²⁶ SC Resolution 1820, UN Doc. S/RES/1820. See also Report of the Secretary-General to the Security Council on the Protection of Civilians in Armed Conflict, UN Doc. S/2005/740, para. 5: “Sexual violence, particularly against women and girls, is frequently used as a deliberate method of warfare. This disturbing phenomenon has become even more horrifying in recent years, especially when rape is used as a weapon”. See evaluation of the implementation process in Report of the Secretary-General pursuant to Security Council resolution 1820, UN Doc. S/2009/362.

⁶²⁷ SC Resolution UN Docs. S/RES/1820 (2008), S/RES/1888 (2009). See, also, Report of the Secretary-General pursuant to Security Council resolution 1820, UN Doc. S/2009/362, para. 7: “Sexual violence can prolong conflict by creating a cycle of attack and counter-attack....It fuels insecurity and fear, which are among the main causes of displacement...”, and “Ending History’s Greatest Silence”, Speech by Inés Alberdi, Executive Director, UNIFEM, 8 July 2009, Council of Women World Leaders, UN Action Against Sexual Violence in Conflict Programme: “When women are attacked, the structures that ensure human security fracture, leaving space for those who would destroy the peace process. In this way, sexual violence can spark the flames of conflict that the UN Security Council and peacekeeping missions seek to extinguish”.

⁶²⁸ UN Doc. S/RES/1888 (2009).

5.3. The Presence of Sexual Violence in Conflicts

Rape has consistently been committed in armed conflicts throughout history, even in societies with a low incidence of the offence. Women in a conquered territory were often, as a rule of war, conferred upon the victor.⁶²⁹ Looting and rape were linked as concepts in times of war, albeit the former constituted a crime against property and the latter a violation of the person.⁶³⁰ The view that sexual violence was an unfortunate by-product of war has evolved into an awareness that rape in times of armed conflict generally is not “rape out of control. It is rape under control”.⁶³¹

Rape committed in the course of armed conflict is a consistent factor but varies in extent, form and motivation depending on the nature of the conflict.⁶³² Statistics are difficult to obtain since most victims do not report the crime and numbers are frequently based upon women seeking medical assistance following rape, e.g. for pregnancy or sexually transmitted diseases.⁶³³ In certain conflicts,

⁶²⁹ Seifert, Ruth, *War and Rape: A Preliminary Analysis*, p. 58, Askin, Kelly, *War Crimes against Women; Prosecution in International War Crimes Tribunals*, pp. 21 & 60, Bensouda, Fatou, *Gender and Sexual Violence Under the Rome Statute*, in *From Human Rights to International Criminal Law, Studies in Honour of an African Jurist, the Late Judge Laity Kama*, Brill, (2007), p. 402.

⁶³⁰ Lindsey, Charlotte, *The Impact of Armed Conflict on Women*, p. 45.

⁶³¹ MacKinnon, Catherine, *Rape, Genocide and Women's Human Rights*, *Harvard Women's Law Journal* 17 (1994), p. 11. See also Pilch, Frances, *The Crime of Rape in International Humanitarian Law*, 9 *USAFA J. Legal Stud.* 99, (1998), p. 101.

⁶³² The UN Special Rapporteur on Violence against Women has noted the varied forms of sexual violence committed in times of armed conflict: “Women are abused and raped by looters and civilians, sometimes people known to them, prior to military action in their own homes, or in public in their villages to serve as a deterrent for any resistance to the forthcoming military action, to suffocate dissent and to force collaboration. Upon the arrival of the military, the women are raped, sometimes killed and otherwise deported to detention camps. During deportation, women also may have to endure physical abuse. In the detention camps, they are once again raped and are sometimes required to serve as sexual slaves to the enemy soldiers, often having to endure other forms of sexual torture...”. Preliminary Report Submitted by the Special Rapporteur on Violence against Women, its Causes and Consequences, Ms. Rhadika Coomaraswamy, in Accordance with Commission on Human Rights Resolution 1994/95, UN Doc. E/CN.4/1995/42, 22 November 1994, para. 278. In certain conflicts along ethnic lines, sexual violence has not been prevalent, e.g. in Israel/Palestine and Sri Lanka. Sexual violence appears to have been very limited in the Israel/Palestine conflict. In Sri Lanka there were few reported instances of sexual assault from government forces against women belonging to the secessionist insurgency. Wood, Elizabeth Jean, *Sexual Violence During War: Explaining Variation, Presented at the Order, Conflict and Violence Conference at Yale University*, April 30 - May 1, (2004), p. 1.

⁶³³ Lindsey, Charlotte, *The Impact of Armed Conflict on Women*, p. 25.

individuals belonging to a particular group, e.g. based on ethnicity, are sought out while in other wars such attacks are less discriminate. Who is targeted as a victim varies; whether it is only women or also men. Age may also play a part as well as occupation. In the Rwanda and Yugoslavia conflicts, sexual violence was conducted as part of a clearly defined plan of so-called ethnic cleansing.⁶³⁴ In certain conflicts, such as in Yugoslavia, women were subjected to sexual slavery and raped repeatedly in camps or when installed in the apartments of combatants.⁶³⁵ In civil wars in South America, e.g. Argentina, El Salvador and Peru, women were primarily sexually assaulted while detained, as a means of torture to elicit information.⁶³⁶ In Sierra Leone, women and girls were kidnapped to become the “wives” of rebels and forced to provide sexual services.⁶³⁷

History contains abundant evidence of the use of sexual violence in armed conflicts.⁶³⁸ As will be discussed below, in the Second World War large-scale mass rapes were committed, not only by the German armed forces but also by other actors in the war. German troops raped an unknown number of women during the war and though evidence of this emerged during the Nuremberg trials, sexual violence was not prosecuted since there were other crimes considered to be of “more gravity”.⁶³⁹ The Nuremberg trial transcripts contain descriptions of mass rapes and sexual mutilations. Furthermore, as the Soviet Army advanced

⁶³⁴ Report on the Situation of Human Rights in Rwanda Submitted by Mr. R. Degni-Séqui, Special Rapporteur of the Commission on Human Rights, under Paragraph 20 of Commission Resolution E/CN.4/S-3/1 of 25 May 1994, UN Doc. E/CN.4/1996/68, 29 January 1996, Annex: Final report of the Commission of Experts Pursuant to Security Council Resolution 780 (1992), UN SCOR, 49th Session, UN Doc. S/1994/674, paras. 250-251, Human Rights Watch, Federal Republic of Yugoslavia - Kosovo: Rape as a Weapon of “Ethnic Cleansing”, 2000.

⁶³⁵ See e.g. *Prosecutor v. Delalic et al, (Celebici Camp)*, Judgment of 16 November 1998.

⁶³⁶ Wood, Elizabeth Jean, *Sexual Violence During War: Explaining Variation*, p. 1. In Haiti, wives and daughters of political dissidents were systematically raped. See Report of the Special Rapporteur on Violence against Women, its Causes and Consequences: Report on the Mission to Haiti, 56 UN ESCOR, UN Doc. E/CN.4/2000/68/Add.3, (2000), Mission to Haiti.

⁶³⁷ *Case No. SCSL-04-15-T against Sesay, Kallon, Gbao*, Judgment of 2 March 2009, Special Court for Sierra Leone.

⁶³⁸ Evidence of rape, however at times anecdotal, exists of Russian and Belgian troops during the First World War. See Gottschall, Jonathan, *Explaining Wartime Rape*, The Journal of Sex Research, Vol. 41, No. 2, May 2004, p. 130, De Than, Claire & Shorts, Edwin, *International Criminal Law and Human Rights*, p. 347.

⁶³⁹ Askin, Kelly, *War Crimes against Women: Prosecution in International War Crimes Tribunals*, p. 125.

westward, soldiers raped women of various ethnicities, albeit mostly German.⁶⁴⁰ Despite overwhelming historical evidence of mass rapes, accounts of rape were largely met by international silence and were dismissed as isolated incidents. The Nuremberg trials were in addition conducted by the victors of the conflict and centred on the acts of the Nazi regime, crimes of the victorious parties automatically excluded.

Japanese forces captured and used Korean and Chinese women as so-called “comfort women” in brothels to raise the morale of their soldiers. The Japanese forces that invaded Nanking in 1937 raped approximately 20,000 women solely in the first month of occupation. It became known as the “Rape of Nanking”.⁶⁴¹ The rapes were indiscriminate and the victims ranged from pre-pubescent girls to elderly women.⁶⁴² Various forms of sexual abuse of men also occurred, either rape by strangers or by forcing them to undergo sexual intercourse with family members.⁶⁴³ The subsequent outcry led to a system of comfort women being established to avoid similar rampages by providing organised and controlled brothels for the soldiers. In official documents from Japanese authorities, the justification for the “comfort stations” was “to prevent anti-Japanese sentiments from fermenting as a result of rapes and other unlawful acts by Japanese military personnel against local residents in the areas occupied by the then Japanese military, the need to prevent loss of troop strength by venereal and other diseases, and the need to prevent espionage”.⁶⁴⁴ It is estimated that as many as 200,000 women were recruited by force, most of them Korean girls between the

⁶⁴⁰ Askin, Kelly, *War Crimes against Women: Prosecution in International War Crimes Tribunals*, p. 60, Naimark, Norman, *The Russians in Germany: A History of the Soviet Zone of Occupation, 1945-1949*, Harvard University Press, (1995), p. 80. Historians analysing such sources as Soviet secret police records, German police records of complaints and wartime diaries, have concluded that thousands of women were raped, often in front of family members or neighbours, by the Soviet Army in Berlin during a two month period in 1945. Naimark, Norman, *The Russians in Germany: A History of the Soviet Zone of Occupation, 1945-1949*, p. 80. Naimark writes: “Even as they entered bunkers and cellars where Germans hid from the fierce fighting, Soviet soldiers brandished weapons and raped women in the presence of children and men. In some cases, soldiers divided up women according to their tastes. In others, women were gang-raped.”

⁶⁴¹ Seifert, Ruth, *War and Rape: A Preliminary Analysis*, p. 64.

⁶⁴² Chang, Iris, *The Rape of Nanking*, Penguin Books, (1997), p. 90. Vaginas were impaled with wooden rods, twigs and weeds. Ibid, p. 94.

⁶⁴³ Wood, Elizabeth Jean, *Sexual Violence During War: Explaining Variation*, p. 4, Chang, Iris, *The Rape of Nanking*, p. 95.

⁶⁴⁴ Note Verbale dated 26 March 1996 from the Permanent Mission of Japan to the United Nations Office at Geneva Addressed to the Centre for Human Rights, UN Doc. E/CN.4/1996/137, 27 March 1996, p. 14.

ages of 14 and 18 years and were located in various countries that contained Japanese military bases.⁶⁴⁵ Detailed regulations issued by the Japanese government have been found on how the stations were to be run, containing rules governing hygiene, hours of service, contraception and prohibitions of alcohol and weapons.⁶⁴⁶ Former UN Special Rapporteur on Violence against Women, Radhika Coomaraswamy, notes that the impunity enjoyed by the Japanese military in relation to sexual slavery during the Second World War represents one of the many examples of the failure of states to investigate and prosecute perpetrators of sexual violence.⁶⁴⁷

The precedent of a lack of prosecution for sexual offences naturally contributed to an atmosphere of impunity, fuelling the post-war impetus of employing such a war strategy. In fact, at the International Symposium on Sexual Violence in Conflict and Beyond, UNFPA concluded that while sexual violence in wartime is not a new phenomenon, there is a strong indication that such violence is becoming more common as a tactic.⁶⁴⁸ As mentioned, this is related to the fact that conflicts have taken on a more regional nature, targeting civilians, where systematic rape has become a prominent feature. UNFPA points to the fact that sexual violence not only occurs during armed attacks but that women are also particularly vulnerable during flight and in displacement camps. However, high levels of sexual violence can also continue after the end of a conflict, “due to a residual culture of violence” and collapsed legal systems that are incapable or unwilling to prosecute perpetrators.⁶⁴⁹ The UN Secretary-General has also noted that armed conflicts have become more complex and that

⁶⁴⁵ The comfort women stations were regulated by the military and established in China, the Philippines, Korea and the Dutch East Indies. UN Doc. E/CN.4/1995/42, para. 288. An estimation of the extent of comfort women is difficult due to the destruction of documents by the Japanese government. Addendum Report of the Special Rapporteur on Violence against Women, its Causes and Consequences, Ms. Radhika Coomaraswamy, in Accordance with Commission on Human Rights Resolution 1994/45, Report on the Mission to the Democratic People's Republic of Korea, the Republic of Korea and Japan on the Issue of Military Sexual Slavery in Wartime, UN Doc. E/CN.4/1996/53.Add.1, 4 January 1996, p. 6, & , Wood, Elizabeth Jean, *Sexual Violence During War: Explaining Variation*, p. 4. The women were forced to serve as many as 60-70 men per day. UN Doc. E/CN.4/1996/53.Add.1, 4 January 1996, p. 9.

⁶⁴⁶ UN Doc. E/CN.4/1996/53.Add.1, p. 6.

⁶⁴⁷ Integration of the Human Rights of Women and the Gender Perspective: Violence against Women Report of the Special Rapporteur on Violence against Women, its Causes and Consequences, submitted in accordance with Commission on Human Rights Resolution 2000/45, UN Doc. E/CN.4/2001/73, 23 January 2001, p. 5.

⁶⁴⁸ United Nations Population Fund Press Release, 21 June 2006, First International symposium on sexual violence in conflict and beyond Opens Today in Brussels.

⁶⁴⁹ Ibid.

“the pattern of sexual violence has evolved. Women are no longer in jeopardy only during periods of actual fighting; they are just as likely to be assaulted when there is calm, by armies, militias, rebels, criminal gangs or even police”.⁶⁵⁰

The organised use of sexual slavery in Yugoslavia is reminiscent of the comfort women system in China. According to the European Union, approximately 20,000 women were raped in Bosnia alone,⁶⁵¹ the majority in various forms of detention facilities such as local schools, factories or army apartments.⁶⁵² A large number of victims were Bosnian Muslims and Kosovo Albanians, and the perpetrators were in general Bosnian Serbs.⁶⁵³ The UN Commission of Experts in 1994 conducted a comprehensive investigation of the occurrences of sexual violence in the former Yugoslavia and identified various patterns in the sexual assault: 1) the attacks were conducted by individuals in conjunction with looting and intimidation of the target group, 2) in connection with fighting, often a public rape of selected women in front of the assembled village, 3) against both men and women held in detention centres for refugees, 4) in detention sites for the purpose of providing sex, 5) detention sites for the purpose of forced impregnation, where pregnant women at times were held past the point of having a legal abortion.⁶⁵⁴ The purpose of forced pregnancies was chiefly to dilute the Muslim population.⁶⁵⁵ The Commission noted that sexual violence and the form it took was chosen to emphasise shame and humiliation, in its being carried out in public or before family members.⁶⁵⁶

A similar practice was seen in the armed conflict in Rwanda. Certain reports indicate as many as between 250,000 and 500,000 victims of rape.⁶⁵⁷ Victims were chosen according to ethnicity and their vulnerability, or because of the

⁶⁵⁰ United Nations Secretary General’s Message on The International Day for the Elimination of Violence Against Women, 25 November 2008.

⁶⁵¹ The Warburton Mission II Report, EC Investigative Mission into the Treatment of Muslim Women in the Former Yugoslavia: Report to EC Foreign Ministers, Released Feb. 1993, para. 14.

⁶⁵² Annex IX of the Final Report of the United Nations Commission of Experts Established Pursuant to Security Council Resolution 780, UN Doc. S/1994/674/Add.2, 28 December, Rape and Sexual Assault, at II A (41).

⁶⁵³ Ibid, at I (D).

⁶⁵⁴ Ibid, at I (C).

⁶⁵⁵ Short, Jonathan, *Sexual Violence as Genocide: The Developing Law of the International Criminal Tribunals and the International Criminal Court*, 8 Mich. J. Race & L. 503, (2003), p. 512.

⁶⁵⁶ UN Doc. S/1994/674/Add.2 28 December, at I (C).

⁶⁵⁷ UN Doc. E/CN.4/1996/68, 29 January 1996, para. 16. See, also, Women, War and Peace, UNIFEM, 2002, vol. 1, p. 9 & Bunch, Charlotte, *The Progress of Nations Report, UNDP, 1997, The Intolerable Status Quo: Violence Against Women and Girls*, p. 43.

message that abuse would be transmitted to the group, e.g. young girls, virgins or prominent female community members. Men were also victims of rape, in being forced to perform grave sexual acts on family members or on other men in an attempt to stigmatise the group in inducing a sense of loss of manhood and stability. For similar reasons of humiliation, injuries were at times inflicted on victims with the use of objects.⁶⁵⁸ The judgments and witness testimonies of the two *ad hoc* tribunals are rife with indications of an official plan to sexually violate the opposing ethnic group. For example, in the *Semanza* case testimony describes Semanza commanding soldiers: “Are you sure you’re not killing Tutsi women and girls before sleeping with them... [y]ou should do that and even if they have some illness, you should do it with sticks”.⁶⁵⁹

The Sierra Leone conflict is particularly notorious for its rampant and brutal use of rape as a tactic of war. A survey by UNIFEM reported that 94 per cent of displaced households in Sierra Leone had experienced sexual assault, including rape.⁶⁶⁰ Another report detailed up to 64,000 war-related incidents of sexual violence against women.⁶⁶¹ There was no evidence to suggest that sexual violence was applied for the purposes of seeking out a particular ethnic group, but rather the internally displaced. In an organised manner, the rebels abducted victims from mosques, churches and refugee camps and forced them to live in rebel compounds. In the camps, victims have been systematically raped by the rebels, frequently by several individuals on a daily basis.⁶⁶² The rapes were reportedly particularly brutal and the victims young girls and older women, transgressing cultural taboos. Male family members were also forced to rape their own daughters in order to cause humiliation and profound disgrace.⁶⁶³ Cases included gang rapes, sexual assaults with objects such as firewood, umbrellas and sticks, and sexual slavery.⁶⁶⁴ Women were at times placed in

⁶⁵⁸ UN Doc. S/1994/674/Add.2, Rape and Sexual Assault, at I (C) & II (18).

⁶⁵⁹ *The Prosecutor v. Laurent Semanza*, Case No. ICTR-97-20-T, Judgment of 15 May 2003, para. 253.

⁶⁶⁰ Women, War and Peace, UNIFEM, 2002, Vol. 1, p. 9.

⁶⁶¹ Ellis, Mark, *Breaking the Silence: Rape as an International Crime*, 38 Case W.Res. J. Int’l L. 225, (2006), p. 226.

⁶⁶² Amnesty International, *Sierra Leone: Rape and Other Forms of Sexual Violence Must be Stopped*, AI Index, AFR 51/048/2000, (2000).

⁶⁶³ Human Rights Watch, “We’ll kill you if you cry”, *Sexual Violence in the Sierra Leone Conflict*, New York, Jan. 2003.

⁶⁶⁴ Integration of the Human Rights of Women and the Gender Perspective: Violence against Women Report of the Special Rapporteur on Violence against Women, its Causes and Consequences, *Violence Against Women Perpetrated and/or Condoned by the State During Armed Conflict (1997-2000)*, UN Doc. E/CN.4/2001/73, 23 January, 2001, para. 104.

detention for long periods of time or abducted to serve rebel camps as sex slaves.⁶⁶⁵

The conflict in Darfur has also been the subject of reports of an extensive use of sexual violence as a method of warfare. In response to the rapidly deteriorating situation in this area of Sudan, the UN Security Council adopted Resolution 1564 in 2004, acting under Chapter VII of the UN Charter to establish an International Commission of Inquiry. It investigated possible occurrences of violations of international humanitarian law and human rights law. In the report, published in 2005, the Commission found evidence of rape and sexual violence committed by government forces and militia throughout Darfur. Sexual violence was used to terrorise and displace rural communities, but it also occurred in urban areas.⁶⁶⁶ The Commission reported:

“Various sources reported widespread rape and other serious forms of violence committed against women and girls in all three states of Darfur. According to these sources, the rape of individual victims was often multiple, carried out by more than one man, and accompanied by other severe forms of violence, including beating and whipping. In some cases, women were reportedly raped in public, and in some incidents, the women were further berated and called ‘slaves’ or ‘Torabora’.”⁶⁶⁷

As was the case in Yugoslavia and Rwanda, camps were set up where women were raped by the Janjaweed and purposefully kept to ensure birth. As in other armed conflicts, certain rapes were conducted in front of family members or in

⁶⁶⁵ Wood, Elizabeth Jean, *Sexual Violence During War: Explaining Variation*, p. 9, UN Doc. E/CN.4/2001/73 para. 106, Report of the Secretary-General pursuant to Security Council resolution 1820, UN Doc. S/2009/362, para. 13. See further below on the Special Court for Sierra Leone.

⁶⁶⁶ Report of the International Commission of Inquiry on Darfur to the Secretary-General, Pursuant to Security Council resolution 1564 (2004) of 18 September 2004, UN Doc. S/2005/60, 1 February 2005, para. 334. In one incident, government forces and the Janjaweed attacked the region of Kenjew in Western Darfur, where the women were confined for three months and raped repeatedly. Certain girls consequently became pregnant. Torture was used as a means to prevent escape. See, further, the report to the UN Human Rights Council in 2007 by a group of experts, including the Special Rapporteurs on Violence against Women and Torture, giving account of the dire situation in Darfur. The report describes an extensive use of sexual violence, both by men in military uniforms and rebel groups: Final Report on the Situation of Human Rights in Darfur prepared by the Group of Experts Mandated by the Human Rights Council in its Resolution 4/8, UN Doc. A/HRC/6/19, 28 November 2007.

⁶⁶⁷ Report of the International Commission of Inquiry on Darfur, UN Doc. (S/2005/60), para. 333.

public.⁶⁶⁸ Most of these outrages went unreported because victims believed that the police would not take appropriate action. This was coupled with social stigma and a denial by local authorities as to the occurrence of rape.⁶⁶⁹ The Commission concluded that the degree of sexual violence suffered might amount to crimes against humanity, but it did not find conclusive evidence of genocide on the basis that the ethnic component of the conflict was arguably lacking.⁶⁷⁰ The facts were subsequently referred by the Security Council to the ICC with a view to prosecution, where several of the charges against the defendants were of sexual violence.

In recent years, mass rapes have been reported in all major internal conflicts, including Cambodia, Liberia, Peru, Somalia, East Timor, Uganda, Burundi and the Democratic Republic of the Congo.⁶⁷¹ Both historical and anthropological evidence thus demonstrates that sexual violence has been a practice of war that

⁶⁶⁸ Short, Jonathan, *Sexual Violence as Genocide: The Developing Law of the International Criminal Tribunals and the International Criminal Court*, pp. 509-512, See Amnesty International, Sudan, Darfur: Rape as a Weapon of War: Sexual Violence and Its Consequences, (19 July, 2004), AFR 54/076/2004, para. 3.1, finding: "In many cases the Janjawid have raped women in public, in the open air, in front of their husbands, relatives or the wider community. Rape is first and foremost a violation of the human rights of women and girls; in some cases in Darfur, it is also clearly used to humiliate the woman, her family and her community."

⁶⁶⁹ UN Doc. A/HRC/6/19, 28 November 2007, p. 43.

⁶⁷⁰ International Commission of Inquiry, UN Doc. S/2005/60, paras. 518 & 634.

⁶⁷¹ Ellis, Mark, *Breaking the Silence: Rape as an International Crime*, p. 226, Parker, Karen, *Human Rights of Women During Armed Conflict*, pp. 314-315, UN Doc. E/CN.4/2001/73, pp. 22-24. It is estimated that one in three female survivors personally suffered rape during the five-year conflict in Congo. Reports speak of approximately 350 rape cases being reported every month. Sexual violence against women is considered to be the rule rather than the exception. See United Nations Secretary General's Message on The International Day for the Elimination of Violence Against Women, 25 November 2008. In Report of the Secretary-General pursuant to Security Council resolution 1820, S/2009/362, 15 July 2009, para. 12, it is reported that at least 200,000 cases of sexual violence have been recorded since 1996. See, also, Bunch, Charlotte, *The Progress of Nations Report, UNDP, (1997), The Intolerable Status Quo: Violence Against Women and Girls*, p. 43 & Gardam, Judith & Jarvis, Michelle, *Women and Armed Conflict: The International Response to the Beijing Platform for Action*, p. 14. A report on the use of sexual violence in the DRC between 1996 and 2003 found that approximately 80 per cent of the victims of sexual violence had been raped by more than one attacker. See Women's Bodies as a Battleground: Sexual Violence against Women and Girls During the War in the Democratic Republic of Congo, International Alert, 2 June 2005, p. 33. In a survey of women in Monrovia after the civil conflict in Liberia, it was found that 49 per cent of those surveyed had experienced at least one form of physical or sexual violence, of which 15 per cent were raped or subjected to attempted rape. See UN Doc. E/CN.4/1998/54, 26 January 1998, p. 7. It is further estimated that 200,000 civilian women were raped during the armed conflicts in Bangladesh in 1971 by Pakistani soldiers. Seifert, Ruth, *War and Rape: a Preliminary Analysis*, p. 12.

has occurred in many different cultures and societies, and in all epochs.⁶⁷² Such benumbing figures reveal that despite increased international awareness, rape is still an inherent characteristic of warfare.⁶⁷³

5.4 Theories on the Existence of Sexual Violence in Armed Conflicts

It is generally accepted that all forms of violence against women increases during an armed conflict. This includes sexual slavery, rape and enforced pregnancy.⁶⁷⁴ Recent UN research demonstrates that the motives driving sexual violence in armed conflict are more complex than straightforward “opportunism” or the expression of “a method of warfare”. Rather, motivation is perpetuated through an intricate mixing of “individual and collective, premeditated and circumstantial reasons”.⁶⁷⁵ Various reasons have been advanced for the prevalence of sexual violence in times of armed conflict. These include the lack of effective control over armed forces, reduced inhibitions in the ordinary soldier, a sense of reward felt by the victors in seizing the spoils of war, or the desire to humiliate the

⁶⁷² Gottschall, Jonathan, *Explaining Wartime Rape*, p. 130.

⁶⁷³ It is important to bear in mind that the differences in prevalence seen in reported rapes in various conflicts may also be a reflection of differing qualities or forms of monitoring by organisations. The methodology may vary. For example, dissimilar definitions of rape make comparisons difficult since, depending on the country and culture, similar conduct may or may not fall within the boundaries of rape, e.g. the legal recognition of marital rape. Furthermore, in certain societies victims may be particularly reluctant to report rapes because of shame and social stigma. Male victims are often unwilling to report sexual violence because of the humiliation. Added to this, surveys or investigations are also particularly difficult to conduct during or directly following armed conflicts. See Wood, Elizabeth Jean, *Sexual Violence During War: Explaining Variation*, p. 11. Police and health services may not be functioning, leaving few outlets for complainants. Fear of reprisals may also be increased if rapes were carried out by a group or persons in power. However, given the presence of many international organisations in conflict areas, unperturbed by local definitions of rape, and able to perform their own surveys, there is a consistency that shows that there is indeed variation in the prevalence and form of sexual violence depending on the conflict, even though such investigations may not fully capture the extent of the violence. It is, however, important to note that sexual violence has not been employed in all conflicts and is therefore neither an inevitable nor universal phenomenon.

⁶⁷⁴ Further Actions and Initiatives to Implement the Beijing Declaration and Platform for Action, UN Doc. A/RES/S-23/3, 16 November, 2000, para. 19.

⁶⁷⁵ Use of Sexual Violence in Armed Conflict, Identifying Gaps in Research to Inform More Effective Interventions, UN OCHA Research Meeting - 26 June 2008, Discussion Paper 1, Sexual Violence in Armed Conflict: Understanding the Motivations, p. 1.

vanquished.⁶⁷⁶ Four main theories have been developed to further explain the phenomenon. They are:

The Gender Inequality Theory

The Psycho-Social and Economic Background Theory

The Strategic Rape Theory

The Biosocial Theory⁶⁷⁷

The *gender-inequality* theory has primarily been developed by feminist scholars who argue that unequal power relations and gender discrimination are exacerbated in the aggression and violence of war. As such, a pre-existing animosity towards women is a prerequisite for the ensuing violence and is mirrored in the sexual violence characteristic of armed conflicts. The patriarchal gender relations that exist in peacetime, where women have an inferior social status encouraged by the state machinery and its institutions, are replicated in times of war. However, because the state and its institutions frequently break down, violence is exacerbated to enforce the imbalance between the genders.⁶⁷⁸ Seifert is of the opinion that women are raped because men have a “culturally rooted contempt for women” in many cultures and “women are raped not because they are enemies, but because they are the objects of a fundamental hatred that characterizes the cultural unconscious and is actualized in times of crisis”.⁶⁷⁹ Catherine MacKinnon further states that it is essential to analyse rape within the reality of everyday violence against women, since rape in wartime is but one outlet of gender-based violence. She holds that “the rapes in the Serbian war of aggression against Bosnia-Herzegovina and Croatia are to everyday rape what the Holocaust was to everyday anti-semitism...As it does in this war, ethnic rape happens everyday”.⁶⁸⁰ However, as reported by the UN, the discrimination and abuse that women experience in peacetime is magnified in armed struggles,

⁶⁷⁶ Working Paper by Francoise Hampson on the Criminalization, Investigation and Prosecution of Acts of Serious Sexual Violence, Administration of Justice, Rule of Law and Democracy, UN Doc. E/CN.4/Sub.2/2004/12, 20 July 2004, p. 3.

⁶⁷⁷ Wood, Elizabeth Jean, *Sexual Violence During War: Explaining Variation*.

⁶⁷⁸ *Ibid*, p. 16.

⁶⁷⁹ Seifert, Ruth, *War and Rape: A Preliminary Analysis*, p. 65. Brownmiller e.g. argues that women are not raped because they belong to “the enemy camp, but because they are women and therefore enemies”. Brownmiller, Susan, *Against Our Will*, p. 69.

⁶⁸⁰ MacKinnon, Catherine, *Rape, Genocide and Women's Human Rights*, 17 Harv. Women's L. J. 5, (1994), p. 8. See further e.g Buss, Doris Elisabeth, *Going Global: Feminist Theory, International Law, and the Public/Private Divide*, in *Challenging the Public/Private Divide: Feminism, Law, and Public Policy*, ed. Susan Boyd, University of Toronto Press, (1997), p. 369 who argues that mass rape “represents one end of a continuum of violence”.

expanding in “number, frequency and severity”.⁶⁸¹ The 1995 Beijing Declaration and Platform for Action also links the sexual violence that women undergo in wartime with their sex and status in society in general. It specifies that civilians often outnumber military casualties, of which women are the great majority owing to the “gross and systematic violations of human rights” that women suffer at all times. It is further caused by their special role in most cultures as the head of household as well as the bearer and primary caretaker of children.⁶⁸²

Subsets of this theory are the notions that violence against women is a communication to the men of the group that they are unable to protect their women, and the destruction of the opponent’s culture is achieved through targeting women who assume the central role of the family.⁶⁸³ Facts are therefore interpreted through a gendered lens. However, men have also been sexually assaulted to a considerable extent in major conflicts and both genders of a specific group may be sought out as victims, though it is a fact that most of them are female.

The second theory traces the increased use of sexual violence to a particular nation’s *history* and psycho-social dynamics. Examples include first analysing the specific conditions of a country under e.g. colonial and post-colonial rule, or the effects of inter-state wars, and then to examine the resulting foundations laid for the present and prevailing situation.⁶⁸⁴ For example, in analysing the conflict in the DRC, Jennifer Leaning noted the reduced possibilities open for men to accomplish traditional tasks such as acquiring land and being able to afford a bride due to limited economic resources. This coupled with the fact that the military or rebel groups represented one of the few avenues of available finance, together with the increased skills and status of women, arguably resulted in feelings of futility and frustration among men.⁶⁸⁵ According to UN Special Rapporteur on Violence against Women, Yakin Ertürk, studies show that violence against women intensifies when “men experience displacement and dispossession related to economic crises, migration, war, foreign occupation or

⁶⁸¹ UN Doc. E/CN.4/Sub.2/1998/13, 22 June 1998, para. 9.

⁶⁸² Beijing Declaration and Platform for Action, paras. 132-137.

⁶⁸³ Seifert, Ruth, *War and Rape, Analytical Approaches*.

⁶⁸⁴ Use of Sexual Violence in Armed Conflict, Identifying Gaps in Research to Inform More Effective Interventions, UN OCHA Research Meeting, Discussion Paper 1, Sexual Violence in Armed Conflict: Understanding the Motivations, 26 June 2008, p. 2.

⁶⁸⁵ In Meeting Report, OCHA - Policy Development and Studies Branch, Use of Sexual Violence in Conflict: Identifying Research Priorities to Inform More Effective Interventions, 26 June 2008, UN, New York.

other situations where masculinities compete and power relations are altered in society”.⁶⁸⁶

The third theory on rape as a *strategy* is the most frequently occurring and arguably, the most influential, explanation for this particular form of violence. It proposes that rape is an especially effective tactic in armed conflicts in securing objectives such as the conquest of territory or in ethnic cleansing, since a) it creates fear among civilians, which restricts their freedom of movement, b) it may increase flight, which facilitates the capture of land, c) it demoralises the population and reduces their will to resist, d) it may inhibit the evolution of a particular group by decreasing the reproductive capacity of the community and thus “diluting” the blood stream.⁶⁸⁷

The fourth theory explains rape as a *bio-social* factor where sexual desire is proposed as the main motive of sexual violence, though it is regulated by socio-cultural factors. The main proponents of this theory are anthropologists Thornhill and Palmer who conclude that the fact that sexual violence occurs in various cultures, throughout history and essentially targets women, indicates that the main motive must be the sexual desire of the male fighter.⁶⁸⁸ The claim that rape is random or an arbitrary act in wartime perpetrated by soldiers in search of an outlet for sexual energy, is contested.⁶⁸⁹

Additionally, the general *breakdown of control* is often offered as a cause of the higher prevalence of sexual violence in armed conflicts than in peacetime. In a study conducted by Elizabeth Jean Wood, the main reason given for this increased violence is that the regulatory mechanisms of peacetime tend to break down in times of war. The breakdown of controlling sources leads to greater opportunities for such violence because the principal participants in wars generally are young men subjected to group mentality and far from the social controls of home. Sexual aggression is less regulated and may even be encouraged.⁶⁹⁰ The surrounding conflict may be interpreted as a social licence to

⁶⁸⁶ Discrimination against women weakens all of society, UN Rights Chief, UN News, New York, 6 March, 2009.

⁶⁸⁷ Use of Sexual Violence in Armed Conflict, Identifying Gaps in Research to Inform More Effective Interventions, UN OCHA Research Meeting, Discussion Paper 1, Sexual Violence in Armed Conflict: Understanding the Motivations, 26 June 2008, p. 3. This will be discussed further in Chapter 5.5.

⁶⁸⁸ Thornhill, Randy & Palmer, Craig, *A Natural History of Rape: Biological Bases of Sexual Coercion*.

⁶⁸⁹ Radhika Coomaraswamy, for example, dismisses this claim as unsubstantiated. UN Doc. E/CN.4/2001/73, 23 January 2001, para. 23.

⁶⁹⁰ Wood, Elizabeth Jean, *Sexual Violence During War: Explaining Variation*, p. 14.

rape, creating a sense of entitlement among young soldiers.⁶⁹¹ The normal constraints of antisocial behaviour are abandoned in wartime. It is argued that soldiers in many instances adopt specific ideas of manhood, equating masculinity with aggression.⁶⁹² The following chapter will further explore the use of rape as a tactic of war.

5.5 Rape as a Strategic Tactic of War

5.5.1 Rape as a Crime against the Community

The basic presumption found in the case law of the *ad hoc* tribunals and literature is that the function of rape committed during an armed conflict differs from that of peacetime.⁶⁹³ Though experts conclude that rape in general is not an aggressive manifestation of sexuality, but rather a sexual manifestation of aggression, the underlying motives and selection of victims may be different during an armed conflict.⁶⁹⁴ As of 2009, a third of the completed cases of the ICTY contained evidence of sexual violence as part of a widespread and/or systematic attack against civilians and in nine out of 13 completed cases of the ICTR, sexual violence was directed against civilians.⁶⁹⁵ The emphasis in case law has thus been that rape was used as a military tactic.

The objectives of war may reach beyond the defeat of a foreign army and occupation of territory and extend to destroying the enemy's community. Rape is an effective tactic of war. Apart from the individual victim, whole groups are demoralised and the social fabric that holds them together is torn asunder.⁶⁹⁶ An array of reports from NGOs and the UN, as well as the opinions of legal scholars, all agree that in attacking women, the sexual assault is primarily a means of demoralising the male opponents and thereby breaks down their

⁶⁹¹ Copelon, Rhonda, *Surfacing Gender: Reconceptualizing Crimes Against Women in Time of War*, p. 213.

⁶⁹² Ibid, p. 15. With the masculine aura of an armed conflict, rape further enhances the ideal of virility among soldiers. Seifert, Ruth, *War and Rape: a Preliminary Analysis*, p. 58. Higher numbers of rape may also be explained as a result of practical reasons, such as the fact that most civilians in war zones often are women, with their men perhaps taking part in the fighting. Ibid, p. 18.

⁶⁹³ See Chapter 9.

⁶⁹⁴ Seifert, Ruth, *War and Rape: a Preliminary Analysis*, p. 55.

⁶⁹⁵ Report of the Secretary-General pursuant to Security Council resolution 1820, UN Doc. S/2009/362, para. 10.

⁶⁹⁶ Rape is often perpetrated on discriminatory grounds, such as race, sex, religion. This was apparent in former Yugoslavia and Rwanda, but also in the DRC, Sudan and Myanmar. See Report of the Secretary-General pursuant to Security Council resolution 1820, UN Doc. S/2009/362, 15 July 2009, para. 15.

culture. In this sense, the rape of a woman becomes not a personal onslaught, but a crime against the whole community. Robert Hayden has compared instances of rape in several conflicts and concludes that frequently the purpose of mass rape in ethnic conflicts is to divide communalities and to ensure no possibility of future coexistence in heterogeneous populations.⁶⁹⁷ The UN Commission on Human Rights makes clear that rape in armed conflicts may “destroy families and communities”.⁶⁹⁸ The UN Special Rapporteur on Violence against Women holds that “sexual aggression is often considered and practiced as a means to humiliate the adversary” and “sexual rape is used by both parties as a symbolic act”.⁶⁹⁹ Several authors have noted the connection between territoriality and rape, in that the conquering of women’s bodies is similar to the occupation of land.⁷⁰⁰ Seifert is of the opinion that the raping of women symbolises cultural destruction: the “female body functions as a symbolic representation of the body politic...Violence inflicted on women is aimed at the physical and personal integrity of a group...the rape of the women in a community can be regarded as the symbolic rape of the body of this community”.⁷⁰¹ Many victims are raped in public places in the presence of family members, members of the community or

⁶⁹⁷ Hayden, Robert, *Rape and Rape Avoidance in Ethno-National Conflicts: Sexual Violence in Liminalized States*, p. 36.

⁶⁹⁸ Systematic Rape, Sexual Slavery and Slavery-Like Practices During Armed Conflicts, Report of the United Nations High Commissioner for Human Rights, UN Doc. E/CN.4/Sub.2/2005/33, 11 July 2005, para. 6.

⁶⁹⁹ Report of the Special Rapporteur on Violence against Women, its Causes and Consequences, Ms. Rhadika Coomaraswamy, submitted in accordance with Commission resolution 1997/44, UN Doc. E/CN.4/1998/54, 26 January 1998, paras. 12-13. See further e.g. Irene Khan, Secretary-General of Amnesty International who argues: “disparaging a woman’s sexuality and destroying her physical integrity have become means by which to terrorize, demean and ‘defeat’ entire communities, as well as to punish, intimidate and humiliate”, *Women’s Lives and Bodies - Unrecognized Casualties of War*, AI Index: ACT 77/095/2004, 8 December 2004. See, also, *Lives Blown Apart: Crimes against Women in Times of Conflict*, Amnesty International, 8 December 2004. Boon, Kristen, *Rape and Forced Pregnancy under the ICC Statute*, p. 632 argues: “The victims of sexual violence in war suffer as individuals and they suffer as members of a community”.

⁷⁰⁰ Hayden, Robert, *Rape and Rape Avoidance in Ethno-National Conflicts: Sexual Violence in Liminalized States*, *American Anthropologist* 102, (2000), p. 32.

⁷⁰¹ Seifert, Ruth, *War and Rape: A Preliminary Analysis*, p. 63. See, also, Das, Veena, *National Honour and Practical Kinship: Of Unwanted Women and Children*, in *Critical Events: An Anthropological Perspective on Contemporary India*, ed. Das, Veena, Oxford University Press, (1995), p. 56, who holds: “the woman’s body...became a sign through which they communicated with each other”.

an ethnic group.⁷⁰² The public nature of the crime is intended to instil terror in the population, and to strengthen the bond between combatants.⁷⁰³

It is often remarked that rape is a particularly effective war tactic for achieving various military ends. This is especially so in ethnic disputes, owing to its highly cultural and socially sensitive value, both to the person and the community. Of course, the significance of the message must be common to both groups - that is, the honour of the group is linked to the status of its women. This encompasses the attitude that exists in many cultures that a woman who has had sex is 'spoiled goods', even if involuntarily. Kelly Askin asserts that rape is a potent weapon of war primarily because "the destructive stereotypes and harmful cultural and religious attitudes associated with female chastity or notions of so-called 'purity' make sex crimes useful tools for destroying lives".⁷⁰⁴ As will be discussed in the chapter on cultural relativism, certain societies and cultures may be particularly vulnerable to this form of violence, where women embody the honour of the group and a violation of a woman is an insult to the family or group. The female body thus takes on the symbolic representation of the community.⁷⁰⁵ The UN Special Rapporteur on Violence against Women has also observed:

"Perhaps more than the honor of the victim, it is the perceived honor of the enemy that is targeted in the perpetration of sexual violence against women; it is seen and often experienced as a means of humiliating the opposition. Sexual violence against women is meant to demonstrate victory over the men of the other group who have failed to protect their women. It is a message of castration and emasculation of the enemy group. It is a battle among men fought over the bodies of women."⁷⁰⁶

A similar finding was made by the Inter-American Commission on Human Rights:

⁷⁰² Boon, Kristen, *Rape and Forced Pregnancy Under the ICC Statute*, p. 632, Ni Aolain, Fionnuala, *Rethinking the Concept of Harm and Legal Categorizations of Sexual Violence During War*, p. 336.

⁷⁰³ Coomaraswamy, Radhika, *Sexual Violence during Wartime*, p. 55. See, further, UN Doc. E/CN.4/1998/54/Add.1, (1998), Mission to Rwanda, Report of the Special Rapporteur on Violence against Women: Mission to Sierra Leone, 58 UN ESCOR, UN Doc. E/CN.4/2002/83/Add.2, (2002), Mission to Sierra Leone.

⁷⁰⁴ Askin, Kelly, *Prosecuting Wartime Rape and Other Gender-Related Crimes Under International Law: Extraordinary Advances, Enduring Obstacles*, p. 298. See, also, Bensouda, Fatou, *Gender and Sexual Violence Under the Rome Statute*, p. 402.

⁷⁰⁵ Wood, Elizabeth Jean, *Sexual Violence During War: Explaining Variation*, p. 19, Ruth Seifert, *War and Rape: A Preliminary Analysis*, p. 63.

⁷⁰⁶ UN Doc. E/CN.4/1998/54, para. 5.

“The sexual violence wounds the opposing faction in a special way because men are traditionally considered the protectors of the sexuality of women in their communities. Therefore, when the sexuality of women is abused and exploited, this aggression becomes an act of domination and power over men in the community...”⁷⁰⁷

Rape may be used as an instrument for controlling the reproductive abilities of a certain group, most commonly along ethnic lines. As was distinctly apparent in the conflicts in former Yugoslavia and Rwanda, a comprehensive plan existed to extinguish the opposing ethnic group and to further procreate a single ethnic group by sexually assaulting women with the aim of impregnation. Witness testimony in case law from the *ad hoc* tribunals of each conflict demonstrate an intention of ethnic cleansing displayed by perpetrators while sexually assaulting victims - for example, in exclaiming that the woman would bear a child of the other ethnic group.⁷⁰⁸ The judgment in the *Akayesu* case of the ICTR observed:

“in patriarchal societies, where membership of a group is determined by the identity of the father, an example of a measure intended to prevent births within a group is the case where, during rape, a woman of the said group is deliberately impregnated by a man of another group, with the intent to have her give birth to a child who will consequently not belong to its mother’s group”.⁷⁰⁹

The rape camps established in former Yugoslavia were an overt demonstration of this intention to impregnate. In the *Karadzic* and *Mladic* decision, the ICTY held that “the systematic rape of women is in some cases intended to transmit a new ethnic identity to the child, and could constitute genocide”.⁷¹⁰ Though it is difficult to verify the number of enforced pregnancies in the above mentioned conflicts, it estimated that between 1,000 and 2,000 women in former Yugoslavia became pregnant as a result of rape in 1993 and

⁷⁰⁷ Inter-American Commission on Human Rights, Rapporteurship on the Rights of Women, OAE/ser.L/V/II, Doc. 67, 18 October 2006, Violence and Discrimination against Women in the Armed Conflict in Colombia, para. 52.

⁷⁰⁸ See further below on the ICTY and ICTR in Chapter 9.

⁷⁰⁹ *The Prosecutor v. Jean-Paul Akayesu*, Case No. ICTR-96-4-T, Judgment of 2 September 1998, para. 507.

⁷¹⁰ *Prosecutor v. Karadzic and Mladic*, Review of the Indictment Pursuant to Rule 61 of the Rules of Procedure and Evidence, Case no. IT-95-5-R61 and IT-95-18-R61, 11 July 1996, paras. 94 and 95.

between 2,000 and 5,000 women in 1994 in Rwanda.⁷¹¹ Sterilisation was also inflicted in certain instances as well as slicing open the stomachs of pregnant women. In that context rape was used as an instrument for genocide in order to make an area ethnically homogenous. Certain sources indicate that also in the Darfur conflict women have been raped by the Janjaweed, targeting the black population with the purpose to produce ethnically mixed children.⁷¹² Because many cultures are patrilineal, the children born of rape are typically identified with the ethnic group of the father, e.g. in Rwanda, causing severe psychological trauma for the victimised woman, at times leading to matricide, suicide, or rejection by society.⁷¹³

As well as impregnation resulting in decreased procreation of a particular ethnic group, sexual violence has also been used as a “method of isolating and humiliating women and men of the same culture”.⁷¹⁴ In certain societies the rape victim is stigmatised rather than the assailant. This was evident in both Rwanda and Yugoslavia, where women at times were shunned by their own families after being raped, having had their honour tainted, resulting in little or no marriage prospects and more likely a life of exclusion.⁷¹⁵ Reports from Darfur also present

⁷¹¹ Halsell, Grace, *Women's Bodies a Battlefield in War for "Greater Serbia"*, Washington Report on Middle East Affairs, April/May 1993, pp. 8-9 & Human Rights Watch, *Shattered Lives: Sexual Violence During the Rwandan Genocide and Its Aftermath* (1996), p. 79.

⁷¹² Carpenter, Charli R, *Gender, Ethnicity, and Children's Human Rights, Theorizing Babies Born of Wartime Rape and Sexual Exploitation*, in *Born of War*, ed. Charli Carpenter, Kumarian Press, (2007), p. 1.

⁷¹³ Mukangendo, Marie Consolee, *Caring for Children Born of Rape in Rwanda*, in *Born of War: Protecting Children of Sexual Violence Survivors in Conflict Zones*, ed. Charli Carpenter, Kumarian Press, (2007), p. 42.

⁷¹⁴ Short, Jonathan, *Sexual Violence as Genocide: The Developing Law of the International Criminal Tribunals and the International Criminal Court*, p. 509. See, also, the UN Report of the Commission of Experts in Yugoslavia, where the particular effectiveness of rape as a weapon of war was described in the following manner: “Rape and other forms of sexual assault harm not only the body of the victim. The more significant harm is the feeling of total loss of control over the most intimate and personal decisions and bodily functions. This loss of control infringes on the victim’s human dignity and is what makes rape and sexual assault such an effective means of ethnic cleansing.” Annex IX, Rape and Sexual Assault, Commission of Experts Report, to XII UN Doc. S/1994/674/Add.2 (Vol.V), at I (D). The dual purposes of rape in these contexts was outlined by the ICTY in the *Mladic* case. Its functions was described in the following manner: “the systematic rape of women...is in some cases intended to transmit a new ethnic identity to the child. In other cases humiliation and terror serve to dismember the group”. *Prosecutor v. Karadzic and Mladic*, Review of the Indictment Pursuant to Rule 61 of the Rules of Procedure and Evidence, no. IT-95-5-R61 and IT-95-18-R61, July 11 1996, para. 94.

⁷¹⁵ Bennouna, Karima, *Do We Need New International Law to Protect Women in Armed Conflict?*, 38 Case W. Res. J. Int’l L. 363, (2007), p. 367.

female rape victims being disowned by families.⁷¹⁶ Being shunned by their husbands or being physically and mentally unable to engage in sex due to trauma, also leads to decreased procreation. Beyond the intention of shaming and impregnating women of the enemy group, the use of rape to intentionally spread HIV further confirms the deliberate tactic of group extermination. According to UNICEF, of the women who survived the Rwandan genocide, 70 per cent of rape victims were estimated to have contracted HIV.⁷¹⁷ Testimony of a victim of that conflict depicts the deliberate spreading of the disease:

“I was raped by two gendarmes...One of the gendarmes was seriously ill, you could see that he had AIDS, his face was covered with spots, his lips were red, almost burned, he had abscesses on his neck. Then he told me ‘take a good look at me and remember what I look like. I could kill you right now but I don’t feel like wasting my bullet. I want you to die slowly like me’.”⁷¹⁸

Many instances of legal doctrine as well as the jurisprudence from the *ad hoc* tribunals thus emphasise the harm to the “community” when analysing the unique nature of rape in armed conflicts, which separates the act from sexual violence in peacetime. For example: “Wartime rape...is a political crime against the concept, a means of destroying a nation through shame, pollution, and destruction of organized family and community life.”⁷¹⁹ Mark Ellis believes that women are particularly targeted because they are often the essential link to the cultural bond of the group and “their physical and psychological destruction quickly permeates the entire group”.⁷²⁰ Furthermore, “In this account, the violation of a woman’s body is secondary to the humiliation of the group. In this sense, international criminal law incorporates a problematic public/private distinction: it operates in the public realm of the collectivity, leaving the private sphere of the individual untouched.”⁷²¹

Although this perspective minimises the harm of the individual victim, it is likely that rape committed during armed conflict occurs precisely *because* the community views such offences as crimes against the group. As a result, rape becomes an agency of destruction of the fundamental elements of society and

⁷¹⁶ Sackellares, Stephanie, *From Bosnia to Sudan: Sexual Violence in Modern Conflict*, 20 Wis. Women’s L.J. 137, (2005), p. 140.

⁷¹⁷ United Nations, Radio, 15 April 2009, Rwandan Children Born of Rape.

⁷¹⁸ Mukangendo, Marie Consolee, *Caring for Children Born of Rape in Rwanda*, p. 45.

⁷¹⁹ Tetreault, Mary Ann, *Justice For All: Wartime Rape and Women’s Human Rights*, 3 Global Governance 197, 203, (1997), p. 203.

⁷²⁰ Ellis, Mark, *Breaking the Silence: Rape as an International Crime*, p. 226.

⁷²¹ Charlesworth, Hilary, *Feminist Methods in International Law*, p. 387.

culture.⁷²² This is reflected in the very nature of the international crimes. The ICTY stated in *Erdemovic* that the core crimes under international criminal law transcend the individual since the assaults in question are of such a nature that “...humanity comes under attack and is negated”.⁷²³ Further to this, Schabas holds that international crimes affect the whole of humanity and dictate prosecution “...because humanity as a whole is the victim. Moreover, humanity as a whole is entitled, indeed required, to prosecute them for essentially the same reasons as we now say that humanity as a whole is concerned by violations of human rights that were once considered to lie within the exclusive prerogatives of State sovereignty”.⁷²⁴ The principle of humanity is the cornerstone and foundation of both international human rights law and international criminal law, but whereas human rights law tends to focus on the individual victim, the harm is considered to be on a larger scale in international criminal law.

The emphasis on the intent to injure the community is, of course, not a coincidence. The definition of genocide, for example, contains an element of a motive to eradicate an ethnic or racial group, of which rape can be one of the component acts. Thus rape is not solely an act directed at harming women, but rather as a means of accomplishing ethnic cleansing. Jonathan Short notes regarding Yugoslavia: “...while rampant sexual violence was an *underlying* crime directed against women, the perpetrators intended these violations...to be a weapon of war”.⁷²⁵ The rape of the individual then becomes subsidiary to the suffering of the larger group. The other international crimes contain no such element, and though the jurisprudence of the *ad hoc* tribunals and the Rome Statute do not explicitly qualify rape as a violation against the community in their definitions of the offence, such considerations have been taken into account when discussing the harm of rape.

The view that the woman in this sense symbolically represents a whole community or ethnic group has been criticised for diminishing the trauma experienced by the individual victim, since international criminal law primarily engages sexual violence only when it is an aspect of the destruction of a

⁷²² Stephens, Beth, *Humanitarian Law and Gender Violence: An End to Centuries of Neglect?* 3 Hofstra L. & Poly. Symp. 87, (1999), p. 90.

⁷²³ *Prosecutor v. Erdemovic*, ICTY case IT-96-22-T, Judgment of 29 November 1996, para. 28.

⁷²⁴ Schabas, William, *An Introduction to the International Criminal Court*, Cambridge University Press, (2001), p. 228.

⁷²⁵ Short, Jonathan, *Sexual Violence as Genocide: The Developing Law of the International Criminal Tribunals and the International Criminal Court*, p. 504. Emphasis added.

community.⁷²⁶ This might perpetuate a view of women as cultural objects or as bodies on which war can be waged. It may mitigate the “hurt” and the trauma of rape for the person. It is interesting to note that the UN Special Rapporteur on Violence against Women has criticised municipal legal systems that define rape as a crime against the community rather than the person as being a form of gender-discrimination codified in domestic criminal law.⁷²⁷ Copelon argues on the merging of genocide and rape as a single crime that both crimes “are based on total contempt for and dehumanization of the victim...But to emphasize as unparalleled the horror of genocidal rape is factually dubious and risks rendering rape invisible once again.”⁷²⁸ It could be contended that the crime of rape loses its potency as a violation worthy of international condemnation.

In general, international criminal law perhaps diminishes the role of the individual victim in comparison with human rights law, since it primarily concerns violations conducted in the context of armed conflicts and large-scale atrocities where the focus is on the harm of groups. Though it could be argued that the purpose of rape in many armed conflicts is in actuality to injure the group to which the victim belongs, it might equally be asserted that the object of rape in peacetime is correspondingly indiscriminate, with the victim targeted because of her gender. This raises the question whether the harm suffered is a collective experience in armed conflicts more so than in other contexts and if this should be reflected in the definition of rape.

5.5.2 Distinguishing Rape from “Regular” Sexual Relations in Armed Conflicts

In the case law discussed in this thesis, as well as doctrine, the specificity of sexual violence within the context of armed conflicts is often emphasised, which has a bearing on the formulation of the definition of rape. The UN High Commissioner for Human Rights has stated: “Sexual violence during armed conflicts must be regarded as a particular kind of violence that is at the same time sexual, physical and psychological. It cannot be emphasized enough that those raped during armed conflicts are victims several times over.”⁷²⁹ The

⁷²⁶ Copelon, Rhonda, *Surfacing Gender: Reconceptualizing Crimes Against Women in Time of War*, p. 198, Dixon, Rosalind, *Rape as a Crime in International Humanitarian Law: Where to from Here?*, p. 703 ff, Charlesworth, Hilary, *Feminist Methods in International Law*, p. 387.

⁷²⁷ UN Doc. E/CN.4/Sub.2/1998/13, para. 96

⁷²⁸ Copelon, Rhonda, *Surfacing Gender: Reconceptualizing Crimes Against Women in Time of War*, p. 198.

⁷²⁹ Systematic Rape, Sexual Slavery and Slavery-Like Practices During Armed Conflicts, Report of the United Nations High Commissioner for Human Rights, UN Doc. E/CN.4/Sub.2/2005/33, 11 July 2005, para. 6. It is stressed that rape during armed

motivation for committing rape is commonly raised as a distinction. The UN Special Rapporteur on Violence against Women has argued that rape committed during hostilities differs from that in peacetime in that it is not perceived as a sexual act but rather one of aggression and while instances of rape occur for personal gratification, rape committed in the course of armed conflict tends to be of a distinct and deliberate nature.⁷³⁰ Boon asserts that this is why the provisions on rape in the Rome Statute of the ICC contain a high threshold for proving a particular *mens rea*, as compared with sexual crimes under domestic law. Accordingly, “the mandate of the ICC is to deter and prosecute the most serious international crimes, not random or private acts of violence that fall within the jurisdiction of domestic judicial systems”.⁷³¹

Schomburg and Peterson point to vast differences also in severity, the conclusion primarily based on the forms of sexual violence that occurred in Rwanda and Yugoslavia. They find that sexual violence occurring in such contexts were possessed of specific characteristics rarely seen in rape in peacetime, for instance rape intentionally occurring in public, before family or community members; women and girls repeatedly raped during extended periods of time, for example in rape camps; forceful impregnation; and in Rwanda the common use of sharp objects inserted into genitals and rape with the deliberate infection of HIV. According to Schomburg and Peterson, these acts are not “merely” undesired sex but rather “sexualized violence” which in addition to

conflicts is rarely an isolated incident and is particularly traumatic since it is often accompanied by other war-related traumas such as a loss of relatives, e.g. husbands and children as well as the destruction of property. Additionally, rape frequently goes unpunished because of a breakdown of the justice system and an unwillingness to prosecute on political grounds. Furthermore, national laws may be inadequate to deal with crimes of such magnitude. See, also, Bagaric, Mirko & Morss, John, *In Search of Coherent Jurisprudence for International Criminal Law: Correlating Universal Human Responsibilities with Universal Human Rights*, p. 171. In discussing the moral differentiation between similar acts occurring in wartime as opposed to peacetime, Bagaric and Morss pose the question of why the killing of a civilian by a soldier in principle should be viewed as more harmful than civilians committing murder in peacetime. According to these authors, the context of where the crime is committed is of the utmost importance to acknowledge “since wartime strips individuals of the normal constraints associated with communal living and introduces enormous power imbalances, additional fetters are necessary to curb anti-social and harmful conduct”. Additionally, there is typically no effective rule of law where the hostilities occur, causing a potential legal vacuum.

⁷³⁰ UN Doc. E/CN.4/1995/42, 22 November 1994, para. 277.

⁷³¹ Boon, Kristen, *Rape and Forced Pregnancy Under the ICC Statute*, p. 632.

infringing the sexual autonomy of the victim violates his/her physical well-being, as well as the collective to which the victim belongs.⁷³²

This presumption is challenged by certain authors who argue that the legal separation of rape in the two contexts is arbitrary. Christine Chinkin insists that "...the distinction between these offences emphasises the falsity from the perspective of the lives of women of such dichotomies as war and peace, protector and protected, security and insecurity, human rights law and international humanitarian law".⁷³³ One is thus torn between the acknowledgment that sexual violence often is distinctive in its motivation and form in armed conflicts, and the question of whether this should be relevant. Rhonda Copelon states that the failure to make distinctions between the two different forms of rape is to flatten reality; however: "...to rank the egregious demeans it".⁷³⁴ A discussion will follow on the characteristics of the international crimes, specifically whether they require a link to an armed conflict as well as the nature of the perpetrators' *mens rea*, which might distinguish the offence from "ordinary" acts of rape. These questions will only be briefly discussed here as they are also touched upon in the chapters on the jurisprudence emanating from the *ad hoc* tribunals.

5.5.3 The Contextual Approach to a Definition of Rape

Though most authors discuss provisions of international criminal law from the standpoint of armed conflict, it is, however, important to note that not all international crimes require a link to an armed conflict. Neither crimes against humanity nor genocide contain this nexus in their definitions in the Rome Statute

⁷³² Schomburg, Wolfgang & Peterson, Ines, *Genuine Consent to Sexual Violence Under International Criminal Law*, 101 Am. J. Int'l L. 121, January 2007, pp. 126-127. There is arguably also a higher degree of a risk of retaliation in connection with conflict-related rape trials since the perpetrator often is involved in the military or state machinery and has the means of undertaking such retribution. See Pieslack, Sylvia, *Comment: The International Criminal Court's Quest to Protect Rape Victims of Armed Conflict: Anonymity as the Solution*, Santa Clara Journal of Intl law. Vol. 2, 2003, p. 171.

⁷³³ Chinkin, Christine, *Women: The Forgotten Victims of Armed Conflict?*, p. 41. See also Copelon, Rhonda, *Surfacing Gender: Reconceptualizing Crimes Against Women in Time of War*, pp. 197 & 213. Copelon argues that while rape as genocide inflicts multiple, intersectional harms unlike those outside of armed conflicts, we have to be careful to accept at face value that rape in times of war is worse than those committed in peace. In fact, rape in everyday lives that does not have state sanction is no less brutal or dehumanising.

⁷³⁴ Copelon, Rhonda, *Surfacing Gender: Reconceptualizing Crimes Against Women in Time of War*, p. 214.

of the ICC.⁷³⁵ Offences that rise to the level of international crimes, however, more often than not occur in times of unrest and armed conflict, as is evident from the qualification of the crimes. Genocide concerns various acts committed with the “intent to destroy, in whole or in part, a national, ethnical, racial or religious group”.⁷³⁶ Crimes against humanity must be committed as part of “a widespread or systematic attack directed against any civilian population, with knowledge of the attack”.⁷³⁷ War crimes are thus the sole offences that explicitly demand such a link. War crimes, defined in the Rome Statute, are committed as “part of a plan or policy or as part of a large-scale commission of such crimes”, with the further qualification that such acts “took place in the context of and was associated with an international armed conflict”.⁷³⁸

The crimes in the provisions of the Rome Statute are further defined in the document entitled Elements of Crimes.⁷³⁹ Here the specific acts of the *chapeaus* are listed but also the contextual circumstances required. The contextual elements further serve to separate “regular” crimes from international crimes, for instance murder or rape. For example, genocide by causing serious bodily or mental harm, which includes rape, specifies: “the conduct took place in the context of a manifest pattern of similar conduct directed against that group or was conduct that could itself effect such destruction”.⁷⁴⁰ A single criminal act of, for example, rape may amount to genocide if it was committed in such a context.⁷⁴¹

⁷³⁵ However, a link of crimes against humanity to armed conflict exists in the ICTY Statute. See Statute of the International Tribunal for the Former Yugoslavia, adopted 25 May 1993 by UN Security Council Resolution S/RES/827, UN Doc. S/25704, Article 5.

⁷³⁶ Article 6 of the Rome Statute; Rome Statute of the International Criminal Court, UN Doc. A/CONF.183/9, 17 July 1998. The definitions of crimes referred to are primarily those of the Rome Statute since they to a large degree reflect the case law of the *ad hoc* tribunals and to a great extent are deemed to constitute customary international law.

⁷³⁷ Article 7 of the Rome Statute.

⁷³⁸ Article 8 and 8 (2) (b) (xxii)-1 (3) of the Rome Statute. The requirement of a plan or policy for war crimes was not explicit in the statutes of the ICTY and ICTR.

⁷³⁹ A distinction can be noted in the Rome Statute, as opposed to the statutes of the *ad hoc* tribunals. However, considering the fact that the Rome Statute is largely based upon the statutes and case law of the *ad hoc* tribunals and additionally was promulgated as a multilateral effort of 160 participating states, I will in this context solely refer to the provisions of the ICC.

⁷⁴⁰ Article 6 (b) (4) of Elements of Crimes; Elements of Crimes, Annex III, Preparatory Committee for the International Criminal Court, n. 17, UN Doc. PCNICC/1999/L.5/Rev.1/Add.2, (1999).

⁷⁴¹ Hebel, Herman von and Kelt, Maria, *Some Comments on the Elements of Crimes for the Crimes of the ICC Statute*, Yearbook of Intl. Humanitarian Law, vol. 3, (2000), p. 282. “Similar conduct” does not entail that the act must be a pattern of the same act, e.g. murder, but rather other acts in Article 6 may constitute such a pattern.

For rape to constitute a crime against humanity, it is required that “the perpetrator knew that the conduct was part of or intended the conduct to be part of a widespread or systematic attack directed against a civilian population”.⁷⁴² However, it is clarified that proof is not required that “the perpetrator had knowledge of all characteristics of the attack or the precise details of the plan or policy...In the case of an emerging widespread or systematic attack...this mental element is satisfied if the perpetrator intended to further such an attack”.⁷⁴³ The conduct of an individual perpetrator does not need to be widespread or systematic in itself if the act, both objectively and with intent, can be sufficiently linked to the collective attack.⁷⁴⁴ As for the *mens rea* element in connection to crimes against humanity, apart from the intent to commit the particular act, the accused must have been aware that his actions took place in the context of a widespread or systematic attack. However, the perpetrator need not have detailed knowledge of the overall attack.⁷⁴⁵ As such, the individual acts in a widespread attack may vary greatly in nature and gravity meanwhile still constituting a crime against humanity. In fact, the act may have occurred after the hostilities have concluded and still be considered part of the overall attack.⁷⁴⁶ An attack against a single victim is hence included, provided it forms part of the widespread or systematic attack.⁷⁴⁷ Single acts of rape can therefore qualify as international crimes depending on the context.

⁷⁴² Article 7 (1) (g)-1 (4) of the Elements of Crimes.

⁷⁴³ Article 7 (2) of the Elements of Crimes.

⁷⁴⁴ *Prosecutor v. Mrksic*, Review of the Indictment Pursuant to rule 61 of the Rules of Procedure and Evidence, No IT-95-13-R61, 3 April 1996. In the *Tadic* judgment the Tribunal affirmed that in order to reach the high threshold, it would not simply evaluate one particular act but “a course of conduct”. The offence itself does not need to constitute an attack but must rather form a part of an overall attack or “comprise a pattern of widespread and systematic crimes directed against a civilian population”. See Decision on the Defence Motion on the Form of the Indictment, *Prosecutor v. Tadic*, Case No. IT -94-1, T. Ch. II, 14 November 1995 and Article 5, ICTY Statute and *Prosecutor v. Tadic*, Case No. IT-94- 1-A, Appeal Judgment of 15 July 1999, para. 248.

⁷⁴⁵ *Prosecutor v. Tadic*, Judgment of 7 May 1997, para. 659.

⁷⁴⁶ *Prosecutor v. Tadic*, Appeal Judgment of 15 July 1999, para. 251.

⁷⁴⁷ In the case law of the ICTY, ICTR and SCSL, “widespread” refers to the large-scale nature of the attack, whereas “systematic” pertains to the organised nature of the acts of violence and the improbability of their random occurrence. Patterns of crimes are often an indication of such systematic violence. See Report of the Secretary-General pursuant to Security Council resolution 1820, UN Doc. S/2009/362, fn. 3.

As to war crimes, how does one determine how to distinguish regular interactions that occur between civilians during hostilities from war crimes? In the *Tadic* case, the ICTY declared that the events must be “closely related to the hostilities” in order to be considered war crimes. As such:

“It would be sufficient to prove that the crime was committed in the course of or as part of the hostilities in, or occupation of, an area controlled by one of the parties. It is not, however, necessary to show that armed conflict was occurring at the exact time and place of the proscribed acts alleged to have occurred...nor is it necessary that the crime alleged takes place during combat, that it be part of a policy or of a practice officially endorsed or tolerated by one of the parties to the conflict, or that the act be in actual furtherance of a policy associated with the conduct of war or in the actual interest of a party to the conflict; the obligations of individuals under international humanitarian law are independent and apply without prejudice to any questions of the responsibility of States under international law. The only question, to be determined in the circumstances of each individual case, is whether the offences were closely related to the armed conflict as a whole.”⁷⁴⁸

In the Rome Statute of the ICC, there is a requirement that the act occurred in “the context of and was associated with” an armed conflict.⁷⁴⁹ In the Elements of Crimes it is specified regarding the knowledge of an armed conflict, that “there

In the judgment of *Prosecutor v. Mrksic*, the Tribunal delineated the scope of the criminal elements, stating: “...as long as there is a link with the widespread or systematic attack against a civilian population, a single act could qualify as a crime against humanity. As such, an individual committing a crime against a single victim or a limited number of victims might be recognized as guilty of a crime against humanity if his acts were part of the specific context”. *Prosecutor v. Mrksic*, Review of the Indictment Pursuant to rule 61 of the Rules of Procedure and Evidence, No. IT-95-13-R61, ICTY, Decision on 3 April 1996, para. 30.

⁷⁴⁸ *Prosecutor v. Dusko Tadic aka "Dule"* (Opinion and Judgment), IT-94-1-T, para. 573. See also *The Prosecutor v. Kayishema and Ruzindana*, Case No. ICTR-95-1-T, Judgment of 21 May 1999, paras. 185-188: “[O]nly offences, which have a nexus with the armed conflict”, are covered. Also: “[T]he term ‘nexus’ should not be understood as something vague and indefinite. A direct connection between the alleged crimes . . . and the armed conflict should be established factually. No test, therefore, can be defined in abstracto. It is for the Trial Chamber, on a case-by-case basis, to adjudge on the facts submitted as to whether a nexus existed”.

The Prosecutor v. George Rutaganda, Case No. ICTR-96-3-T, Judgment of December 1999, paras. 104-105: The Chamber held that “there must be a nexus between the offence and the armed conflict” and “[b]y this it should be understood that the offence must be closely related to the hostilities or committed in conjunction with the armed conflict”. The Prosecutor has the burden of proving beyond a reasonable doubt that “on the basis of the facts, such a nexus exists between the crime committed and the armed conflict”.

⁷⁴⁹ “In the context of” entails that the acts are geographically and temporally connected to the relevant armed conflict. “Associated with” means that the acts are related to the armed conflict. See Hebel, Herman von and Kelt, Maria, *Some Comments on the Elements of Crimes for the Crimes of the ICC Statute*, p. 286.

is only a requirement for the awareness of the factual circumstances that established the existence of an armed conflict”.⁷⁵⁰

The *ad hoc* tribunals have taken into account several factors to determine a nexus to an armed conflict - for example, the status of the perpetrator and victim (whether soldier, combatant, non-combatant), the circumstances under which the crime occurred, whether committed in the context of a particular military campaign, if the crime coincided with the objective of such a campaign and whether the crime was committed as part of, or in the context of, the perpetrator’s official duty.⁷⁵¹ Particular care will be taken when the perpetrator is a non-combatant.⁷⁵²

The rules of warfare in international humanitarian law do not apply exclusively to the conduct of military personnel.⁷⁵³ It is important to remember that all wartime sexual assaults, whether committed by a civilian or military person, as a single, isolated incident, or as part of a widespread, systematic military strategy, are prohibited. Furthermore, regular relationships between individuals are influenced by the belligerency in armed conflicts such that no ‘normal’ relationships necessarily falling beyond the boundaries of humanitarian law can be said to exist. As such, even relationships between civilians can reach the level of violations of war.⁷⁵⁴ In cases of rape both by, and against, a civilian,

⁷⁵⁰ Article 8 Introduction, Elements of Crimes.

⁷⁵¹ See case law in footnote 747-748. See also discussion in Schomburg, Wolfgang & Peterson, Ines, *Genuine Consent to Sexual Violence Under International Criminal Law*, p. 131.

⁷⁵² *The Prosecutor v. George Rutaganda*, ICTR-96-3-A, Appeal Judgment of 26 May, 2003, para. 570.

⁷⁵³ *The Prosecutor v. Musema*, ICTR-96-13-I Judgment of 27 January 2000, paras. 274-275: It is “well-established that the post-World War II Trials unequivocally support the imposition of individual criminal liability for war crimes on civilians where they have a link or connection with a Party to the conflict. The principle of holding civilians liable for breaches of the laws of war is, moreover, favoured by a consideration of the humanitarian object and purpose of the Geneva Conventions and the Additional Protocols, which is to protect war victims from atrocities”. Thus, the accused, as a civilian “could fall in the class of individuals who may be held responsible for serious violations of international humanitarian law, in particular serious violations of Common Article 3 and Additional Protocol II”. *The Prosecutor v. Laurent Semanza*, Case No. ICTR-97-20-T, Judgment 15 May 2003, paras. 359-362: “Common Article 3 and Additional Protocol II . . . do not specify classes of potential perpetrators, rather they indicate who is bound by the obligations imposed thereby”. “[F]urther clarification in respect of the class of potential perpetrators is not necessary in view of the core purpose of Common Article 3 and Additional Protocol II: the protection of victims”. “[C]riminal responsibility for acts covered by Article 4 of the Statute does not depend on any particular classification of the alleged perpetrator”.

⁷⁵⁴ Schomburg, Wolfgang & Peterson, Ines, *Genuine Consent to Sexual Violence Under International Criminal Law*, p. 99.

a determination would need to be made on the hypothesis “but for” the war, the rape would not have occurred.⁷⁵⁵ In the Appeal Judgment of *Kunarac*, the ICTY argued that “[w]hat ultimately distinguishes a war crime from a purely domestic offence is that a war crime is shaped by or dependent upon the environment - the armed conflict - in which is committed.”⁷⁵⁶ Further: “The armed conflict need not have been causal to the commission of the crime, but the existence of an armed conflict must, at a minimum, have played a substantial part in the perpetrator’s ability to commit it, his decision to commit it, the manner in which it was committed or the purpose for which it was committed.”⁷⁵⁷

What then distinguishes a particular rape as an international crime from an opportunistic attack? Hostilities can last for long periods of time and may even contain interludes of relative peace. Escalated levels of violence may not necessarily cease in direct conclusion of the hostilities. High levels of sexual violence may continue, with no clear distinction between the armed conflict and so-called peace.⁷⁵⁸ Particularly during long-term conflicts, people engage in sexual relationships, also with members of the opposing side. Thus rape in wartime is not solely within the province of strategic plans executed as revenge against the enemy’s culture, but may also be committed for personal reasons. Rape is increasingly committed both systematically and opportunistically.⁷⁵⁹ Though the sexual assaults conducted in the above mentioned conflicts were largely part of an intentional plan, there were also single, isolated rapes.⁷⁶⁰ Thousands of women have been sexually assaulted during the conflict for non-military or non-ethnic purposes. Many times, sexual assaults were not the direct

⁷⁵⁵ Askin, Kelly, *War Crimes Against Women; Prosecution in International War Crimes Tribunals*, fn. 1034.

⁷⁵⁶ *Prosecutor v. Kunarac, Kovac and Vukovic*, Appeal Judgment of 12 June 2002, para. 58.

⁷⁵⁷ *Ibid.*

⁷⁵⁸ UN Doc. E/CN.4/1998/87, para. 23. Examples include forced prostitution around military bases that remain after a conflict and the instances of sexual abuse by UN peacekeepers in e.g. Mozambique and Bosnia. See e.g. UN Doc. A/51/306, 26 August 1996, Promotion and Protection of the Rights of Children, para. 98.

⁷⁵⁹ Askin, Kelly, *Prosecuting Wartime Rape and Other Gender-Related Crimes Under International Law: Extraordinary Advances, Enduring Obstacles*, p. 1, Condon, Elizabeth-Merry, *The Incoherent International Jurisprudence of Rape*, Eyes on the ICC, Vol. 3, No. 1, (2006), p. 23.

⁷⁶⁰ Mullins, Christopher, *We are Going to Rape You and Taste Tutsi Women*, Brit. J. Criminol. 49, (2009), p. 726. See witness testimony in *The Prosecutor v. Mikaeli Muhimana*, Case No. ICTR-95-1B-T, Judgment of 28 April 2005, para. 380, Askin, Kelly, *War Crimes against Women; Prosecution in International War Crimes Tribunals*, p. 288.

result of an official policy of ethnic cleansing but were committed because women were vulnerable as a result of the atmosphere of violence.⁷⁶¹

As noted by the UN Secretary-General: “When sexual violence is a feature of armed conflicts, there is often a corresponding increase in the incidence of rape and other forms of sexual violence among civilians.”⁷⁶² Many legal scholars agree that war increases the likelihood of rape, simply because of the breakdown of structure and the intensified brutality and inurement to human suffering.⁷⁶³ Such heightened levels of violence also amplify violence within the family, not solely by combatants in the conflict. An increase in “ordinary” violence against women has also been recorded.⁷⁶⁴ Arguably, other forms of crime, such as theft, are also more frequent in societies struck by war because punishment is less likely in such circumstances.⁷⁶⁵ This begs the question of whether the armed conflict in such circumstances can still be considered to be a coercive environment, negating genuine consent.

The causality of the act to the armed conflict was e.g. noted by the ICTR in the Appeal Judgment of *Rutaganda*, noting that a non-combatant which takes advantage of the lessened effectiveness of the police in conditions of disorder created by an armed conflict to murder a neighbour he has hated for years, would not generally constitute a war crime.⁷⁶⁶ In contrast, in the *Kunarac* case of the

⁷⁶¹ Askin, Kelly, *War Crimes Against Women; Prosecution in International War Crimes Tribunals*, fn. 995. For example, many of the rapes in Darfur have been committed opportunistically, not only by Janjaweed or security forces, but also locals, bandits and others. See Condon, Elizabeth-Merry, *The Incoherent International Jurisprudence of Rape*, p. 25.

⁷⁶² Report of the Secretary-General pursuant to Security Council resolution 1820, UN Doc. S/2009/362, para. 7. Reasons for this include the heightened level of violence, displacement, internally and across borders and general discrimination of women.

⁷⁶³ Copelon, Rhonda, *Surfacing Gender: Reconceptualizing Crimes Against Women in Time of War*, p. 213, Mullins, Christopher, *We are Going to Rape You and Taste Tutsi Women*, p. 726, Wood, Elizabeth Jean, *Sexual Violence During War: Explaining Variation*, p. 14, Condon, Elizabeth-Merry, *The Incoherent International Jurisprudence of Rape*, p. 23, Askin, Kelly, *War Crimes against Women; Prosecution in International War Crimes Tribunals*, p. 288. Anthropologists and sociologists are more likely to see the commonalities between rape committed during varying circumstances. Thornhill and Palmer argue that rape, whether outside or in times of armed conflict, are similar in that both forms of rape are, at least in part, motivated by sexual desire. The fact that rape is carried out in large numbers during war is simply a cause of the high vulnerability of females during war. See Thornhill & Palmer, *A Natural History of Rape*, p. 134.

⁷⁶⁴ Bennoune, Karima, *Do We Need New International Law to Protect Women in Armed Conflict?*, p. 367.

⁷⁶⁵ Thornhill & Palmer, *A Natural History of Rape*, p. 134.

⁷⁶⁶ *The Prosecutor v. George Rutaganda*, Appeal Judgment of 26 May 2003, para. 570.

ICTY, combatants who took advantage of their positions of military authority to rape individuals, whose displacement was an express goal of the military campaign in which they were part, constituted a sufficient nexus.⁷⁶⁷

As will be viewed below, the purpose of rape may be of importance in order to qualify it as a particular international crime, such as torture, which requires a purposive element. It is, however, an enduring problem in armed struggles to clarify such a purpose behind the offence, since conflicts tend to lead to lawlessness, which may in turn result in improvised instances of sexual violence for reasons of sexual gratification.⁷⁶⁸ The contextual elements of the international crimes could exclude many instances of rape that occur in the context of an armed conflict, but not by the participating forces to further the group's objectives.⁷⁶⁹ In the *Akayesu* case of the ICTR, a narrow understanding of the level of connection to the conflict was applied. The *ad hoc* tribunal required that the actions be carried out according to the objectives of the struggle and that "the crimes must not be committed by the perpetrator for purely personal motives" but rather "to support or fulfil the war effort".⁷⁷⁰ However, the case law of the ICTY demonstrates that e.g. war crimes can be committed by individuals both when acting under a direct order or for private gain or lust.⁷⁷¹ The same is true for crimes against humanity so long as the violation or injury sustained formed part of a systematic attack, that the accused was aware of that fact, and the motivation was not *purely* personal.⁷⁷² The fact that torture was committed partly

⁷⁶⁷ *Prosecutor v. Kunarac, Kovac and Vukovic*, Appeal Judgment of 12 June 2002. The problem of legally determining the nexus of "free-riders", i.e. individuals taking advantage of coercive circumstances for personal motives, is discussed in Burchard, Christoph, *Torture in the Jurisprudence of the Ad Hoc Tribunals*, p. 180.

⁷⁶⁸ As argued by Provost, proving the individual's motive beyond reasonable doubt in carrying out the acts as part of the war effort may be difficult from an evidentiary stance. He proposes that the *Tadic* and ICC approach should predominate and considers that sexual violence for such motives as pure cruelty should be a war crime if closely related to the conflict. Provost, Rene, *International Human Rights and Humanitarian Law*, pp. 101-102.

⁷⁶⁹ Condon, Elizabeth-Merry, *The Incoherent International Jurisprudence of Rape*, p. 23.

⁷⁷⁰ *Ibid*, paras. 636 & 640.

⁷⁷¹ *Prosecutor v. Tadic*, Case No. IT-94-1-T, Judgment of 7 May 1997, para. 634. See further below in chapter 9.

⁷⁷² *Ibid*, para. 659. "Thus if the perpetrator has knowledge, either actual or constructive, that these acts were occurring on a widespread or systematic basis and does not commit his act for purely personal motives completely unrelated to the attack on the civilian population, that is sufficient to hold him liable for crimes against humanity. Therefore the perpetrator must know that there is an attack on the civilian population, know that his act fits with the attack and the act must not be taken for purely personal reasons unrelated to the armed conflict."

for personal reasons does not exclude a finding of the requisite level of *mens rea*.⁷⁷³

Though the offence of rape is often not identical in the two separate settings of armed conflict and peace, rape in general takes many different forms, also outside of armed conflicts, depending on the circumstances and the identity of the perpetrator. However, the trauma endured by the victim is obviously not the relevant standpoint when determining which crimes reach the required level of concern in public international law. The initial sentiment that all instances of rape are equally egregious and should be granted equal recognition in the international arena give way to reality and the fact that one is dealing with different systems of law. To prosecute rape as one of the international crimes, one can evince from the jurisprudence of the *ad hoc* tribunals that, in actual practice, only rape committed by individuals integral to the conflict will be pursued, not isolated, opportunistic assaults by private individuals.⁷⁷⁴ It is still necessary to distinguish common crimes that should be dealt with by local jurisdiction, though committed during an armed conflict, e.g. theft or assault arising from a pub brawl.⁷⁷⁵ Generally, as viewed through the specific requirements of a plan or policy as an element of genocide, or a widespread attack regarding crimes against humanity, systematic rape in the context of international criminal law tends to stem from orders of a higher authority or a governmental entity rather than from, or committed by, a single unauthoritative individual.

It is interesting, however, to note that the definition and procedural rules on rape as promulgated by the *ad hoc* tribunals has been recognised by regional human rights courts as an appropriate source for analogy.⁷⁷⁶ The *ad hoc* tribunals have also recorded developments in case law concerning rape as a human rights violation and have largely based their definitions upon general principles drawn from domestic criminal law - that is, not definitions of rape particularly applied

⁷⁷³ *Prosecutor v. Kunarac, Kovac and Vukovic*, Case No. IT-96-23 & IT-96-23/1-A, Appeal Judgment of 12 June 2002, para. 155.

⁷⁷⁴ Considering the threshold of gravity required for prosecution, e.g. by the ICC, it is likely that only widespread occurrences of rape will be prosecuted, as well as the commanders in relation to such attacks.

⁷⁷⁵ Provost, Rene, *International Human Rights and Humanitarian Law*, p. 99.

⁷⁷⁶ See e.g. *M.C. v. Bulgaria*, 4 Judgment of December 2003, ECtHR and *Ana, Beatriz, and Celia González Pérez (Mexico)*, Case 11. 565, Report No. 53/01, April 4 2001, IACHR.

to war situations.⁷⁷⁷ Hence common points of reference obviously exist between rape committed in the two separate contexts, despite the differences in approach.

5.5.4 Armed Conflict as a Factor in Defining Rape

To what extent has, and should, the context of an armed conflict affect the definition of rape? The *mens rea* must necessarily be different since the international crimes require specific forms of contextual intent, depending on the crime. It is believed that the particular circumstances of sexual violence in Rwanda and Yugoslavia also informed the *actus reus*, i.e. extending the traditional focus on vaginal penetration. However, this is not informed by the context of international criminal law/IHL *per se*.

Particularly the determination of non-consent in sexual relations in the context of international crimes has caused debate. As will be discussed below, the context of armed conflict has by both *ad hoc* tribunals in their jurisprudence been viewed as constituting inherently coercive circumstances.⁷⁷⁸ The systematic use of force, in this view, causes an unequal power relationship between the perpetrator and victim. Certain circumstances are described as automatically vitiating consent, such as captivity. However, the tribunals and the ICC have taken different approaches, with certain chambers inclined to disregarding a non-consent based standard as being inappropriate in the setting of international crimes, with others concluding that solely non-consent takes into consideration the individual's autonomy, though the context of armed conflict automatically negates consent. It is similarly argued by many authors that the element is superfluous or not as relevant as in domestic criminal law.⁷⁷⁹ The UN Special Rapporteur on systematic rape, sexual slavery and slavery-like practices during armed conflict, has also emphasised that the definition of rape must of necessity be different in the two separate contexts: "The manifestly coercive circumstances that exist in all armed conflict situations establish a presumption of non-consent

⁷⁷⁷ See e.g. *The Prosecutor v. Jean-Paul Akayesu*, Judgment of 2 September 1998, *Prosecutor v. Furundzija*, Judgment of 10 December 1998, *Prosecutor v. Kunarac, Kovac and Vukovic*, Judgment 12 June 2002. Further discussed in chapter 9.

⁷⁷⁸ Ibid.

⁷⁷⁹ De Brouwer, Anne-Marie, *Supranational Criminal Prosecution of Sexual Violence: The ICC and the Practice of the ICTY and the ICTR*, Intersentia, (2005), p. 120, Schomburg, Wolfgang & Peterson, Ines, *Genuine to Sexual Violence Under International Criminal Law*, p. 128, MacKinnon, Catherine, *Defining Rape Internationally: A Comment on Akayesu*, 44 Colum. J. Transnat'l.L 940, (2006), p. 952, Final Report of the Special Rapporteur of the Working Group on Contemporary Forms of Slavery, on Systematic Rape, Sexual Slavery and Slavery-Like Practices During Armed Conflict, UN Doc. E/CN.4/Sub.2/1998/13, 22 June 1998, para. 25.

and negate the need for the prosecution to establish lack of consent as an element of the crime.”⁷⁸⁰

The circumstances of armed conflict arguably affect who is considered a *victim*, and therefore whether consent represents a necessary avenue of inquiry. It could be reasoned that there is a presumption that the consent of an individual victim is immaterial when an entire population is subjected to oppression, especially in the form of sexual assault.⁷⁸¹ In international criminal law, the crimes tend to be viewed as directed against a particular community or against the international community as a whole. For Schomburg, the role of non-consent must then be different in mass atrocities. Accordingly, if the protected interest and the harm pertain exclusively to the sphere of the actual victim, then consent may be relevant to the criminal liability of the perpetrator. However, criminal liability for acts that violate common values or the interests of more than one person cannot be excluded on the basis of a non-consent-based standard.⁷⁸² In such argument, non-consent is not a dividing line between legal or illegal sexual conduct because the implications of the crimes go beyond the “mere” victim in question. In Schomburg’s words, the international crimes primarily “protect *supraindividual* values. It is therefore difficult to imagine that any act falling into this category can be interpreted solely as an attack on individual autonomy, for which responsibility depends on the approval or nonapproval of one person”.⁷⁸³

Furthermore, in certain *ad hoc* tribunal cases, the ethnicity of the victim appears to have automatically informed the finding of non-consent.⁷⁸⁴ It must, however, be taken into account that relationships can arise between consenting adults during armed conflicts, including those between members on opposing sides.⁷⁸⁵ The question is particularly pertinent with regard to jurisprudence, demonstrating that single acts of rape can qualify as international crimes,

⁷⁸⁰ UN Doc. E/N.4/Sub.2/1998/13, 22 June 1998, para. 25.

⁷⁸¹ Fitzgerald, Kate, *Problems of Prosecution and Adjudication of Rape and other Sexual Assaults Under International Law*, 8 EJIL 1997 638, p. 641.

⁷⁸² Schomburg, Wolfgang & Peterson, Ines, *Genuine Consent to Sexual Violence Under International Criminal Law*, p. 125.

⁷⁸³ *Ibid*, p. 125.

⁷⁸⁴ *The Prosecutor v. Gacumbitsi*, Judgment of 17 June 2004, para. 688: “...coercion may be inherent in certain circumstances, such as armed conflict or the military presence of Interhamwe among refugee Tutsi women at the bureau communal”. *The Prosecutor v. Gacumbitsi*, Appeal Judgment of 7 July 2006, para. 155: “...the Trial Chamber is free to infer non-consent from the background circumstances, such as an ongoing genocide campaign...”. *Prosecutor v. Kunarac, Kovac and Vukovic*, Judgment of 22 February 2001, para. 585 ff.

⁷⁸⁵ Schomburg, Wolfgang & Peterson, Ines, *Genuine Consent to Sexual Violence Under International Criminal Law*, p. 126.

depending on circumstances. All sexual relations during violent upheaval cannot as a matter of course be imputed to be coercive, interpreting every liaison in an armed conflict in that perspective. Such relations may develop for various reasons, just as in peacetime.

Critics of the automatic designation of all armed conflicts as coercive include Robert Hayden. He insists that the definition of rape has been excessively imbued with notions of power and violence, rather than the main issue of non-consent. He claims that “the recent focus on violence in place of consent has distorted perceptions of many cases of gender relations in situations of ethno-national conflict by labelling almost *all* sexual relations between members of conflicting ethno-national communities as violent, despite what seem to be the strategic choices in the matter of the parties themselves”.⁷⁸⁶ This would deny agency and power to all women of certain communities that are victimised. According to Hayden, equating sexual relations with violence invalidates relationships against the background of mass sexual violence that in other contexts would be acceptable. In other words, the circumstance of an armed conflict and a definition of rape that presumes non-consent and focuses on force, serves to disempower women. In fact, in assuming all sexual relations to be forced without inquiring into the issue of consent deprives women the capacity of autonomy. It turns all women’s bodies collectively into property or territory.⁷⁸⁷

Social hierarchies exist at all times, be it based on gender, status, ethnicity or other power imbalances. The issue of power imbalances in sexual relationships is already considered in most domestic laws, e.g. pertaining to adults and children. According to feminist legal scholars, rape in armed conflict is but one expression of the inequality of the power between the genders also in peacetime. These hierarchies are more obviously expressed in times of armed conflict with distinctive categories of opposing parties. Women and children are frequently at the bottom of the hierarchy and particularly targeted in both contexts.⁷⁸⁸ However, because of the added component in armed conflicts of the collective as

⁷⁸⁶ Hayden, Robert, *Rape and Rape Avoidance in Ethno-National Conflicts: Sexual Violence in Liminalized States*, p. 28.

⁷⁸⁷ An example is the mass rapes in Punjab during the partition between Pakistan and India where approximately 40,000 women were abducted and raped. It has been concluded that many women were in fact not abducted but agreed to sexual relations and disapproved of the subsequent label of all instances of sexual relations as rape. Hayden, Robert, *Rape and Rape Avoidance in Ethno-National Conflicts: Sexual Violence in Liminalized States*, p. 36.

⁷⁸⁸ Chinkin, Christine, *Rape and Sexual Abuse of Women in International Law*, p. 341, 15 Years of the United Nations Special Rapporteur on Violence against Women, its Causes and Consequences, (1994-2009), p. 113.

the main target, rape is frequently performed with a specific intent of destruction, in the context of particularly brutal and coercive circumstances, which may inform the definition of rape. It is, nevertheless, important to not solely ascribe such coercive circumstances to wartime rape but to acknowledge the realities of power inequalities in all contexts. What we may find is that despite the different conditions, the same considerations will still need to be analysed when defining the crime. The question arises whether the main difference between rape committed in wartime as opposed to peace is mainly an *evidentiary* matter. For example, since coercion is considered inherent in armed conflict, there is no need to demonstrate additional coercion by the perpetrator. This will be further discussed in the chapter on international criminal law.

5.6 Common Forms of Rape in Peacetime

Similarly to understanding the context of sexual violence in armed conflict, it is relevant to briefly mention the most common forms of sexual violence outside of such contexts since it may inform or diverge from a domestic or international definition of rape. The nature of attacks is an important consideration in so far that the definition of rape has to bear in mind the nature of sexual violence corresponding to the protective interests in society.

Studies show that an overwhelming number of rape victims are women and rape thus constitutes a gender-based crime.⁷⁸⁹ It often takes place in private settings and intersects with domestic violence, stalking, forced marriage, trafficking and other forms of violence against women.⁷⁹⁰ According to a UN global survey, between 20 and 40 per cent of women have experienced sexual assault by men other than partners.⁷⁹¹ Statistics from the United Nations Interregional Crime & Justice Research Institute found that an average of 1.7 per cent of women reported rape victimisation and 0.5 per cent men, with the highest

⁷⁸⁹ BRÅ: Våldtäkt, En Kartläggning av Polisanmälda Våldtäkter, Rapport 2005:7, p. 12, Different Systems, Similar Outcomes? Tracking Attrition in Reported Rape Cases Across Europe, Lovett, Jo & Kelly, Liz, funded by the European Commission Daphne II Programme, CWASU, (2009), p. 104. The study compared rape charges and attrition rates of all Council of Europe states. Male victims ranged from 2-8 per cent of the charges. Solely three cases existed of female suspects in this study, albeit most countries had a gender-neutral definition of the law.

⁷⁹⁰ Different Systems, Similar Outcomes? Tracking Attrition in Reported Rape Cases Across Europe, p. 112.

⁷⁹¹ Violence against women: a statistical overview, challenges and gaps in data collection and methodology and approaches for overcoming them”, Expert group meeting, Organised by UN Division for the Advancement of Women, 11-14 April 2005, p. 6.

instances in industrialised countries such as the US, Iceland, Sweden and Northern Ireland.⁷⁹²

Although the numbers vary, studies illustrate that rape victims frequently know the rapist. A study by the United Nations Research Institute of 30 countries shows that offenders were known to the victim in approximately half the incidents and in over a third the assailant was known by name. Such known assailants were either an ex-partner (11 per cent), colleague or boss (17 per cent), current partner (8 per cent) or friend (16 per cent).⁷⁹³ In a major research study by the European Commission on attrition rates in rape cases of all European states, approximately 67 per cent of of suspects were known to the victim, most frequently a current or ex-partner.⁷⁹⁴ In a multi-country report by WHO on violence against women comparing ten countries representing diverse cultural, geographical and urban/rural settings, statistics on both sexual violence by partners and non-partners were recorded.⁷⁹⁵ The results on sexual violence by non-partners displayed varied results ranging from 1 per cent (Ethiopia and Bangladesh) to 10-12 per cent (Peru, Samoa and Tanzania).⁷⁹⁶ Forced intercourse by an intimate partner was distinctly higher, ranging from 4 per cent (Serbia and Montenegro) to 46 per cent (in Bangladesh and Ethiopia provinces).⁷⁹⁷

The most common location of assaults is the private sphere, most frequently the home of the victim or suspect.⁷⁹⁸ The overwhelming majority of victims report that the rapist does not use a weapon, numbers ranging from 1-8 per cent

⁷⁹² UN Interregional Crime & Justice Research Institute, *Criminal Victimization in International Perspective, Key Findings from the 2004-2005 ICVS and EU ICS*. It compared the level of crimes in 30 countries, conducted through surveys of the general population, albeit predominantly from European countries.

⁷⁹³ *Ibid*, p. 80.

⁷⁹⁴ *Different Systems, Similar Outcomes? Tracking Attrition in Reported Rape Cases Across Europe*, p. 106. According to Wertheimer, Alan, *Consent to Sexual Relations*, pp. 90-91, approximately 75-80 per cent of rape victims know the perpetrator.

⁷⁹⁵ WHO Multi-Country Study on Women's Health and Domestic Violence against Women, *Initial Results on Prevalence, Health Outcomes and Women's Responses*, (2005). The study compares Bangladesh, Brazil, Ethiopia, Japan, Peru, Namibia, Samoa, Serbia and Montenegro, Thailand and the United Republic of Tanzania based on interviews with 24,000 women.

⁷⁹⁶ *Ibid*, p. 43. Sexual violence was here understood as forceful sex or performing a sexual act that they did not want.

⁷⁹⁷ *Ibid*, p. 31.

⁷⁹⁸ *Different Systems, Similar Outcomes? Tracking Attrition in Reported Rape Cases Across Europe*, p. 106.

of the cases, with weapons used equally by strangers and partners.⁷⁹⁹ Two-thirds of victims report no physical injury apart from the penetration itself.⁸⁰⁰ Several additional surveys support the finding that while a substantial minority do incur serious physical injury, the large majority of victims do not.⁸⁰¹ The European Commission study shows that injury rates were highest among assaults by ex-partners (50 per cent) and current partners (40 per cent), as opposed to 24 per cent of rapes by strangers, which challenges the notion that stranger-rapes are more violent.⁸⁰² This disproves the common understanding that violence by partners are more difficult to verify.

As regards the victim's reaction to the assault, it is understood that the majority (72 per cent) take certain positive action such as resistance, warning or trying to scare the offender, whereas 18 per cent take no self-protective action.⁸⁰³ It has, however, been noted that victims of sexual violence frequently submit to such violations rather than physically resist, as a matter of self-preservation because of fear of further violence or as a result of shock leading to paralysis.⁸⁰⁴ Resistance by the victim may in fact increase the risk of being subjected to injuries.⁸⁰⁵ By requiring that the victim responds with physical violence to an attack, she risks escalating the level of violence and intensifying her own injuries merely to prove them.⁸⁰⁶ This leads us to understand that rape is a gender-based crime and is seldom an attack by a stranger, which is the most common assumption on rape. Rather, it most commonly occurs in the so-called private sphere, often by an acquaintance. In most cases no weapons are utilised but other

⁷⁹⁹ According to Criminal Victimization in International Perspective, Key Findings from the 2004-2005 ICVS and EU ICS, p. 80, weapons were rarely used (8 % of assault cases). In Different Systems, Similar Outcomes? Tracking Attrition in Reported Rape Cases Across Europe, p. 106, weapons were used in 1-7% of cases in all countries.

⁸⁰⁰ Wertheimer, Alan, *Consent to Sexual Relations*, pp. 90-91

⁸⁰¹ Temkin, Jennifer, *Rape and the Legal Process*, p. 167.

⁸⁰² Different Systems, Similar Outcomes? Tracking Attrition in Reported Rape Cases Across Europe, p. 106.

⁸⁰³ Wertheimer, Alan, *Consent to Sexual Relations*, pp. 90-91.

⁸⁰⁴ SOU 2001:14, p. 123 & *M.C. v. Bulgaria*.

⁸⁰⁵ Spohn, Cassia & Horney Julie, *Rape Law Reform, A Grassroots Revolution and its Impact*, p. 23, *M.C. v. Bulgaria*. Reports from e.g. the conflict in former Yugoslavia show that women who resist sexual violence run a higher risk of being killed by their attacker. Fitzgerald, Kate, *Problems of Prosecution and Adjudication of Rape and other Sexual Assaults under International Law*, p. 644.

⁸⁰⁶ This means that women who offer resistance in the required sense of the law, are more likely to suffer serious injuries. Rhode argues that in this sense, the law has promoted a kind of death-before-dishonour philosophy. See Rhode, Deborah, *Justice and Gender: Sex Discrimination and the Law*, p. 247.

forms of coercion. Such realities must be taken into account when constructing an appropriate definition of the crime. It may not only inform the definition of rape but also affect the evidence of such elements.

5.7 The Prohibition of Rape from Feminist Viewpoints

5.7.1 The Impact of Gender in Defining Rape

As mentioned, a further contextualisation of the definition of rape can be made through theories of feminist doctrine. Similar to the view on the manifestation of rape in armed conflicts, it points to the inherently coercive aspect of gender imbalance in society. Feminist legal scholars have in fact been instrumental in law reforms on sexual violence in many states, helping to dispel long-standing and widely held false notions on rape and eradicating the formalisation of stereotypical gender roles.⁸⁰⁷ The same is true for the development of international law on this matter.

Such scholars have since the 1970s advanced the idea that crimes such as rape are simply one expression of the suppression of women that pervades our patriarchal society. Rape is thus the ultimate symbol of male repression. The arguments are based on the perceived imbalance of power that exists between the genders, also reflected in sexual relations. Rape is held to be caused by the patriarchal structure of society where men are taught to dominate women. Rape is seen as a political act, rather than a sexual expression. The constant presence of sexual violence as a threat in the everyday life of all women is presumed by feminist scholars. Brownmiller, for example, submits that rape is central to the suppression of women and a constant consciousness in all women, asserting that rape “is nothing more than a conscious process of intimidation by which all men

⁸⁰⁷ See e.g. Brownmiller, Susan, *Against Our Will*, Fawcett (1975), Estrich, Susan, *Rape*, Dworkin, Andrea, *Pornography: Men Possessing Women*, Dutton, (1989), MacKinnon, Catherine, *Women's Lives, Men's Laws*, Harvard University Press, (2007), Rhode, Deborah, *Justice and Gender: Sex Discrimination and the Law*, West, Robin, *Jurisprudence and Gender*, in *Feminist Legal Theory, Readings in Law and Gender*, ed. Bartlett, Katharine & Kennedy, Rosanne, Westview Press, (1991), McGregor, Joan, *Is it Rape?: On Acquaintance Rape and Taking Women's Consent Seriously*. See a general overview in Torrey, Morrison, *Feminist Legal Scholarship on Rape: A Maturing Look at One Form of Violence Against Women*. It should be noted that in many countries, feminist scholarship and activism concerning rape has waned in the last decade, presumably as a consequence of legislative changes in many states and the focus on other issues, e.g. domestic violence. See Caringella, Susan, *Addressing Rape Reform in Law and Practice*, Columbia University Press, (2009), p. 2. Much of the literature on the matter is thus from the 1990s or even earlier.

keep all women in a state of fear”.⁸⁰⁸ As such, rape may well be an act of violence similar to other forms of physical assault, but “the meaning of this violence is unmistakably the demonstration of power over women”. This fear, as well as the actual experience of rape, is a form of social control of women.⁸⁰⁹ Thus social inequality is retained through women having to adjust their behaviour and social life to those that are considered ‘safe’. In that sense, fear further fuels the existing traditional gender roles.⁸¹⁰ This intimidation weakens women’s social achievement and empowers traditional gender roles that develop into social policy.⁸¹¹

In consequence, factors such as the gender roles constructed by society and the subordinate functions that women hold in most societies, economically and socially, mean that they are more vulnerable to violence, both in armed conflict and peace.⁸¹² Each individual subjected to sexual violence is targeted in the capacity of belonging to either gender, that is, for being either a man or a woman. The violation suffered is therefore inherently connected to the victim’s gender, whether male or female. However, the fact that it is chiefly women that are subjected to rape, sexual harassment and prostitution shows that gender inequality has a clear sexual dimension. Cahill argues that the fact that men can be raped, but often are not, “emphasizes the extent to which rape enforces a systematic (i.e. consistent, although not necessarily conscious), sexualized control of women”.⁸¹³ It is even suggested that the attack on female sexuality is so intrinsic to the act of rape that the crucial aspect of male rape is that the man is placed in the role of the sexually submissive - a “social woman”, i.e. is feminised.⁸¹⁴

In a sense, the part played by feminists is not to provide a neutral voice of reason. As MacKinnon argues, they “are not attempting to be objective, [but] are

⁸⁰⁸ Brownmiller, Susan, *Against Our Will*, p. 15. See, also, MacKinnon, Catherine, *Women’s Lives, Men’s Laws*, p. 130, Berglund, Kerstin, *Straffrätt och Kön*, p. 90.

⁸⁰⁹ Roberts, Cathy, *Women and Rape*, p. 38. According to certain studies, this fear is in fact greater than the actual occurrence of rape would warrant.

⁸¹⁰ Roberts, Dorothy, *Rape, Violence and Women’s Autonomy*, p. 378.

⁸¹¹ In fact, the social construction of the differences in male and female sexuality leads to a situation where the primary threat for men tends to be assault, whereas the inherent threat for women is one aimed at their sexual being and freedom. See Cahill, Anne, *Foucault, Rape, and the Construction of the Feminine Body*, p. 55.

⁸¹² Chinkin, Christine, *Women: The Forgotten Victims of Armed Conflict?*, in *The Changing Face of Conflict and the Efficacy of International Humanitarian law*, eds. Durham, Helen & McCormack, Timothy, Martinus Nijhoff, (1999), p. 42.

⁸¹³ Cahill, Anne, *Foucault, Rape, and the Construction of the Feminine Body*, p. 45.

⁸¹⁴ *Ibid*, p. 45.

attempting to represent the point of view of women”.⁸¹⁵ The primary interest of the critique regarding sexual violence has been on amending or introducing national laws pertaining to rape. The aim of such reforms has concerned the full range of activities in the justice system with intent to decrease levels of sexual violence, developing measures to increase reporting by victims and rates of prosecution and conviction.⁸¹⁶ Feminists have also largely used language as an instrument in analysing concepts and the views and values that they express, so that “rather than being neutral or naturally ordained, it reflects the world views and chosen meanings of those who have had the power to affect definitions and create terms”.⁸¹⁷

What are the arguments of feminist scholars on how gender roles influence a definition of rape? To a certain extent they have changed the face of the rapist, from rape being viewed solely as a stranger attack to acknowledging that sexual violence occurs in everyday situations.⁸¹⁸ They have also changed the face of the victim, emphasising that no category of women is exempt from rape. They have challenged the view in many cultures that the harm of rape is against the family and damages the purity of the victim and encouraged the recognition of rape as a violation of the person. Lynne Henderson believes that cultural conventions about heterosexuality to this day create myths and transforms most sexual acts that are experienced as rape into ‘sex’ and non-crimes.⁸¹⁹ Accordingly, cultural beliefs about what constitutes “normal” heterosexual practices have led to failure in reducing sexual abuse.

Similarly, historical sexual morals have been inherited that have led to presumptions of what women want, or are, as sexual beings. Men are cast as initiators of sexual encounters, with the female as a passive participant. There is

⁸¹⁵ Quénivet, N.R. Noëlle, *Sexual Offenses in Armed Conflict & International Law*, p. 15.

⁸¹⁶ Novotny, Patricia, *Rape Victims in the (Gender) Neutral Zone: The Assimilation or Resistance?*, p. 745.

⁸¹⁷ Finley, Lucinda, *Breaking Women’s Silence in Law: The Dilemma of the Gendered Nature of Legal Reasoning*, p. 887. According to Finley, the use of language reflects and reinforces the white male norm and has marginalised all other groups: “Because the men of law have had the societal power not to have to worry too much about the competing terms and understandings of ‘others’, they have been insulated from challenges to their language and have thus come to see it as natural, inevitable, complete, objective, and neutral.” See p. 892.

⁸¹⁸ Dworkin, Andrea, *Our Blood: Prophecies and Discourses on Sexual Politics*, Harper & Row, (1976), p. 45. “Rape is not committed by psychopaths or deviants from our social norms - rape is committed by *exemplars* of our social norms...Rape is no excess, no aberration, no accident, no mistake - it embodies sexuality as the culture defines it.”

⁸¹⁹ Henderson, Lynne, *Getting to Know: Honoring Women in Law and Fact*, p. 42.

also a presumption of moral guilt on the part of women.⁸²⁰ As will be further noted in the chapter on cultural relativism, culture heavily influences society's gender roles and its perspective on appropriate behaviour for men and women in sexual situations. This has often been reflected in the definition of rape in domestic laws. Because of cultural norms, men and women may become indoctrinated into assuming the roles of the persistent versus the passive in sex.⁸²¹ These sexual stereotypes, which come from historic power relations, to a certain extent persist and arise in legislation on rape.

Catherine MacKinnon is at the forefront of exploring rape in the context of gender roles. She proposes that women experience certain common aspects between what is legally defined as rape and what is considered to be normal sexual relations. The difficulty in distinguishing rape from sexual intercourse is that for women, there is little difference in an atmosphere of male dominance.⁸²² This springs from the idea that sexual intercourse *per se* is unequal. Sharon Deevey suggests that all heterosexual sex that occurs within the framework of a patriarchal society is an act of rape, since every man has power and privileges over women.⁸²³ The division of rape and sex in largely all legal systems therefore does not correspond with the experience of most women. MacKinnon observes that, according to a feminist view of rape, sexuality is "a social sphere of male power to which forced sex is paradigmatic", and that rape is not an aberration but rather part of a cultural interpretation of sexuality that centres on male domination.⁸²⁴ These arguments have been criticised for incapacitating women, i.e. indicating that women cannot choose freely and for implying that women are not reliable witnesses in rape proceedings.⁸²⁵ On a more general note, the feminist critique, similarly to the discussion above concerning inherently coercive circumstances in armed conflicts, simply propose that male dominance in society creates a coercive context. The feminist critique of the patriarchal society does not necessarily imply that all men oppress women, but rather that the structure of society *per se* results in pervasive violence against women.

In that sense, rape has often been viewed against a background of ordinary heterosexual relationships. How has this informed the definition of rape? Roberts believes that society has created an atmosphere where women are rebuked for

⁸²⁰ Henderson, Lynne, *Getting to Know: Honoring Women in Law and Fact*, p. 42.

⁸²¹ McGregor, Joan, *Is it Rape?*, p. 7.

⁸²² MacKinnon, Catherine, *Toward a Feminist Theory of the State*, p. 174.

⁸²³ Deevey, Sharon, *Such a Nice Girl, Lesbianism and the Women's Movement*, ed. Myron, Nancy, Bunch, Charlotte, Diana Press, (1975), p. 21.

⁸²⁴ *Ibid*, p. 147.

⁸²⁵ Schulhofer, Stephen, *Unwanted Sex: The Culture of Intimidation and the Failure of Law*, p. 83, Panichas, George, *Rape, Autonomy, and Consent*, 35 *Law & Soc'y Rev.* 231, (2001), p. 247.

being insufficiently careful, rather than constructing social conditions where women need not fear male sexual aggression.⁸²⁶ Male aggression is viewed as a natural response to female seduction and women should take precautions in such things as not dressing too provocatively, in not walking the streets alone, not drinking excessively, and never entering a man's home alone. In this respect, the conduct of the women still plays a major part in determining a finding of rape. While the focus lies on the actions of the female, the judgment of her behaviour is male. Weiner for example holds that since men and women are socialised to accept coercive sexuality as the norm in sexual behaviour, men consider aggressive behaviour as seduction, and what women consider rape is understood as "normal" behaviour by the legal system.⁸²⁷ A gap may thus exist between what is experienced as rape by the victim and that as defined by a legal system. Defining rape from a male perspective might expect that a non-consenting partner is overcome only by force, whereas a woman in a threatening situation might simply say 'no' and cry.⁸²⁸ The myth that the female victim can always prevent a rape by screaming or resisting still remains in many jurisdictions.⁸²⁹ This demonstrates an attitude of blaming the victim, or at least a shared burden, that seldom arises in the discussion of other crimes.

The idea that certain classes of women cannot be victims of rape is a prime example of the gender imbalance in definitions of rape in certain countries. For example, prior to 1990, Turkish law provided for a reduction in sentence of one-third if the victim was a prostitute.⁸³⁰ Such gender imbalance has been criticised by various UN organs and e.g. the European Court of Human Rights in its case law.⁸³¹ In *C.R. v. the United Kingdom*, the Court examined the prosecution of the applicant for the attempted rape of his wife, though marital rape at the time had not been explicitly recognised in the jurisprudence of British courts.⁸³² The domestic courts held that the common law had departed from the understanding of exempting marital rape, supported by the European Court, which stated that

⁸²⁶ Roberts, Dorothy, *Rape, Violence and Women's Autonomy*, p. 379.

⁸²⁷ Weiner, Robin D., *Note, Shifting the Communication Burden: A Meaningful Consent Standard in Rape*, 6 Harv. Women's L. J. 143, (1983), p. 147.

⁸²⁸ Byrnes, Craig, *Putting the Focus Where it Belongs: Mens Rea, Consent, Force, and the Crime of Rape*, 10 Yale J. L. & Feminism 277, (1998), p. 284.

⁸²⁹ Larsson, Sara, "*Fina Flickor*" *Kan Inte Våldtas*, p. 145.

⁸³⁰ Legislation in the Member States of the Council of Europe in the Field of Violence against Women, Council of Europe, vol. II, EG (2009) 3, p. 110.

⁸³¹ UN Doc. E/CN.4/1996/53, 5 February 1996, 15 Years of the United Nations Special Rapporteur on Violence against Women, its Causes and Consequences, (1994-2009), p. 37. European Court: *C.R. v. the United Kingdom*.

⁸³² *C.R. v. The United Kingdom*.

“the abandonment of the unacceptable idea of a husband being immune against prosecution for rape of his wife was in conformity not only with a civilised concept of marriage but also, and above all, with the fundamental objectives of the Convention, the very essences of which is respect for human dignity and human freedom”.⁸³³ The main notion of equality and non-exclusion of certain categories of individuals from bringing charges of rape can also be applied to other groups, e.g. men who in certain domestic definitions of rape are cast solely in the potential role as assailant by the *actus reus*. Additionally, many countries have and continue to prescribe rape as a violation of a woman’s honour.⁸³⁴

The reformers of laws on rape therefore face the test of drafting a definition that accounts for the violation of both women’s bodies and their dignity, and understands the contexts in which rape occurs. How can gender be borne in mind when constructing a definition of rape? Is a specific definition of rape preferable from the feminist viewpoint? Against a background of an imbalance of power, how does one identify which acts of sex should be criminalised when even “normal” sexual relations are unequal? As various scholars have made clear, rape is at the “end of a continuum of male/aggressive female/passive patterns, and an arbitrary line has been drawn to mark it off from the rest of such relationships”.⁸³⁵ Several of them advocate ensuring that inherent differences between the sexes be made “costless”.⁸³⁶ By placing offences of rape in a larger

⁸³³ *C.R. v. The United Kingdom*, para. 42.

⁸³⁴ Several South American countries, prior to recent legislative amendments, defined rape as a crime of honor and morality as opposed to a violation of bodily integrity. Rather than the word “victim” in the definition, sexual violence was an “attack on decency” on “decent women”. The Argentinian Penal Code used language such as “purity,” “chastity” and “decency” in its law on sexual violence. See, also, Brazil’s penal code, prior to amendment Feb. 2005, Ecuadorian Penal code, amended 1 June 2005. See discussion in e.g. The Annual Report, Inter-American Commission on Human Rights, 1997, Chapter IV: Conclusions.

⁸³⁵ Medea, Andra & Thompson, Kathleen, *Against Rape*, Farrar, Straus and Giroux, (1974), p. 11.

⁸³⁶ Littleton argues that we have to acknowledge the disadvantages that women face as a result of their biological characteristics, but also those that result from women’s social traits and make sure that all such sexual differences are made “costless”. In order to do this, she suggests that for every gendered activity undertaken, we should identify the female and male characteristics and equalise them so that the costs of having female traits will be no higher than the costs of comparable male characteristics. To remove the “cost” for women of being in a subordinated situation, nothing less than consent could be upheld as a standard, since the requirement of force only exacerbates men’s strong position. See Littleton, Christine, *Reconstructing Sexual Equality, in Feminist Legal Theory*, Westview press (1991) p. 6.

framework where women have traditionally been afforded a lower status, feminists seek to redefine rape in ways that empowers women. A proposal was, for example, once made in Sweden to define rape as a gendered crime, in order to “portray reality”.⁸³⁷

The impact of the feminist approach has been a “re-characterization of rape in the domestic laws of many states from a sexually motivated crime committed by superior force to a crime of power and dominance committed through sexual difference and vulnerability”.⁸³⁸ Feminists have challenged traditional understandings from the harm of rape to the elements of rape. Whereas certain authors propose a force-based standard as being more appropriate in the protection of women, others have reached the opposite conclusion.⁸³⁹ A non-consent-based standard may arguably lead to an excessive emphasis on the behaviour of the female victim. On the other hand, concentrating on force does not view the autonomy of the individual as the protective interest since other coercive acts may induce someone to unwanted sex. A non-consent based standard adopts the perspective of the victim, since it may consider forms of coercion experienced by the victim that would not be included in other standards. Certain feminists assert that a definition must entail the element of an affirmative

Schulhofer points out that a regulation of rape that requires an element of force is not objective nor does it make gender differences costless. Rather, it gives “primacy to male claims for sexual freedom and protection from criminal conviction without fair warning”. Schulhofer, Stephen, *Unwanted Sex: The Culture of Intimidation and the Failure of Law*, p. 52. Several legal scholars compare the right to sexual autonomy and bodily integrity to the right to control property, which is afforded comprehensive protection. As Schulhofer observes, when women demand comparable protection for their sexual integrity, they are criticised for demanding special privileges or “wallowing in victimhood”. Ibid, p.13.

⁸³⁷ SOU 1995:60, p. 279: Kvinnofrid, huvudbetänkande av kvinnoväldskommissionen. This was, however, rejected because of equality concerns. Berglund criticises such gendered definitions since it politicises the issue of rape. A power structure thus emphasises a conflict between the sexes. See Berglund, Kerstin, *Gender and Harm*, p. 23.

⁸³⁸ Cook, Rebecca, *State Responsibility for Violations of Women’s Rights*, 7 Harvard Human Rights J. 125 (1994), p. 138.

⁸³⁹ See discussions in e.g. McGregor, Joan, *Is it Rape?: On Acquaintance Rape and Taking Women’s Consent Seriously*, MacKinnon, Catherine, *Women’s Lives, Men’s Laws*, Brownmiller, Susan, *Against Our Will*, pp. 430–432, Estrich, Susan, *Real Rape*, Schulhofer, Stephen, *Unwanted Sex: The Culture of Intimidation and the Failure of Law*. Martha Chamallas argues: “...a decision as to what conduct constitutes consent in any particular context may mask value judgments implicit in the choice of definition. A determination of sexual consent may, for example, serve as a proxy for moral judgments about the behaviour of the parties or as a shorthand method for classifying certain forms of sexual behaviour as normal”. See Chamallas, Martha, *Consent, Equality, and the Legal Control of Sexual Conduct*, 61 S. Cal. L. Rev. 777, (1988), p. 795.

consent on the part of the participants.⁸⁴⁰ In general, at least, it is agreed that a resistance requirement is highly discriminatory and harmful.⁸⁴¹ Various understandings also exist as to the *mens rea* of the crime, certain authors favouring strict liability.⁸⁴² In this sense, feminist scholars have succeeded greatly in acknowledging the injuries of rape from a female perspective, widening the perception of rape from a property matter to that of focusing on the sexual autonomy of women. However, as noted by Quénivet, few feminist authors have ventured to suggest a definition of rape in their work, limiting the matter to critiques of the use of either ‘non-consent’ or ‘force’ as elements, whether in national or international law.⁸⁴³

The feminist view on the function of sexuality in relations between the genders has naturally not gone uncriticised. It is argued that such a fundamentalist and macro-oriented view of society creates static positions for men and women, presumptuously assuming that the circumstances are a constant reality and similar for all people and cultures.⁸⁴⁴ As indicated, criminal law focuses on the interests of the individual, and the concerns of a collective, in this case women as a group, are difficult to take into consideration unless such theories inform the harms of the particular woman in the case at hand.⁸⁴⁵ Constructing a definition bearing in mind gender roles may lead to non-neutral definitions, for example by not including male rape because it does not constitute the most common form of rape nor fits theories of gender subordination. A fear exists that regular sexual interactions will be qualified as subordination and each encounter imbued with a sense of inequality. It can also be considered condescending in that it casts women as the weaker gender with a passive relationship to sex.

Podhoretz suggests that feminist scholars have engaged in “a brazen campaign to redefine seduction as a form of rape, and more slyly to identify practically all

⁸⁴⁰ Remick, Lani Anne, *Read her Lips: An Argument for a Verbal Consent Standard*, p. 1111.

⁸⁴¹ McGregor, Joan, *Is it Rape?: On Acquaintance Rape and Taking Women’s Consent Seriously*, p. 29, Estrich, Susan, *Real Rape*, p. 43, Schulhofer, Stephen, *Unwanted Sex: The Culture of Intimidation and the Failure of Law*, p. 125, Burgess-Jackson, Keith, *A Most Detestable Crime: New Philosophical Essays on Rape*, p. 75, Torrey, Morrison, *Feminist Legal Scholarship on Rape: A Maturing Look at One Form of Violence Against Women*, p. 303.

⁸⁴² MacKinnon, Catherine, *Women’s Lives, Men’s Laws*. See also Estrich, Susan, *Real Rape*, p. 98.

⁸⁴³ Quénivet, N.R. Noëlle, *Sexual Offenses in Armed Conflict & International Law*, p. 2.

⁸⁴⁴ See e.g. Alvesson, Mats & Due Billing, Yvonne, *Understanding Gender and Organizations*, 2nd ed., Sage Publications, (2009), p. 65.

⁸⁴⁵ Berglund, Kerstin, *Straffrätt och Kön*, p. 234.

men as rapists”.⁸⁴⁶ He further maintains that non-violent verbal and psychological methods employed as a means to overcome a woman’s resistance, which feminists insist should be included in the definition of rape, in actual fact constitute seduction. The subjective stance is also apparent in the fact that the occurrence of male rape has generally been ignored in the legal literature and in the work of feminists, plausibly because of fear that it may detract from the cause of criticising the patriarchal structure of laws on rape. However, feminist theories are important contributions to the question of context as a factor in defining or proving an act of rape and has informed discussions on rape as a form of the human rights violation of discrimination on the basis of sex. The theories have also led to relevant discussions on what constitutes coercion and what are appropriate antecedents to forming genuine consent to sexual relations.

5.7.2 Feminist Critique of International Law

Though the interest shown in international law has been of more recent concern for feminist scholars, it has led to extensive work in analysing international humanitarian law and international human rights law from the perspective of women’s equality. Internationally this has rendered violence against women visible on the international arena, whether during armed conflicts or peace.⁸⁴⁷ Women’s rights, since the 1980s women’s movement, have largely been formulated within the international human rights framework and activists have worked from within that structure to expand and redefine their scope. As Yakin Ertürk argues, “the formulation of rights-based claims by women remains an important strategic and political tool as this language offers a recognized vocabulary for framing social wrongs”.⁸⁴⁸

In the 1980s, feminist scholars primarily focused on the *inclusion* of women’s rights in the field of international law. Their objective was to assimilate women’s

⁸⁴⁶ Podhoretz, Norman, *Rape in Feminist Eyes*, Commentary 93, (1992).

⁸⁴⁷ See e.g. *Reconceiving Reality: Women and International Law*, ed. Dorinda Dallmeyer, ASIL, (1993), Charlesworth, Hilary & Chinkin, Christine, *The Boundaries of International Law: A Feminist Analysis*, Manchester University Press, (2000), Buss, Doris Elisabeth, *Going Global: Feminist Theory, International Law, and the Public/Private Divide*, Cook, Rebecca, *State Responsibility for Violations of Women’s Rights*, Charlesworth, Hilary, *Feminist Methods in International Law*, Chinkin, Christine, *A Critique of the Public/Private Dimension*, EJIL 1999, Vol. 10, No. 2, Copelon, Rhonda, *International Human Rights Dimensions of Intimate Violence: Another Strand in the Dialectic of Feminist Lawmaking*, 11 Am. U. J. Gender Soc. Pol’y & L. 865, (2003), Engle, Karen, *International Human Rights and Feminisms: When Discourses Keep Meeting*, in *International Law: Modern Feminist Approaches*, ed. Doris Buss, Ambreena Manji, Hart Publishers, (2005), Fellmeth, A. X, *Feminism and International law: Theory, Methodology, and Substantive Reform*, 22 Human rights Quarterly 664, (2002), MacKinnon, Catherine, *Feminist Methods in International Law*, Parker, Karen, *Human Rights of Women During Armed Conflict*.

⁸⁴⁸ UN Doc. E/CN.4/2006/61, para. 57.

concerns with the existing bodies of law, for example in arguing that rape was indeed prohibited under IHL.⁸⁴⁹ In the period that followed, critics held that the inclusion of women's rights into international law was not sufficient since the construction of this field of law was considered to be essentially male. This gave way to a *structural* critique finding the regime itself fundamentally flawed. This was due to the exclusion of women from international positions, resulting in the creation of a body of international law that overlooked the concerns of women.⁸⁵⁰ The CEDAW Committee has observed: "[t]here are few opportunities for women and men, on equal terms, to represent Governments at the international level and to participate in the work of international organizations".⁸⁵¹ Within the structural critique, similar issues might be raised but from another viewpoint. For instance, Charlesworth has pointed out that rape in armed conflict is indeed acknowledged as a violation, but as a harm to the woman's honour or as genocide - that is, not fully recognising women as subjects.⁸⁵² Criticism has also concerned the fact that human rights activists have sought to include women's human rights within the already established parameters of international law in e.g. interpreting domestic violence as torture and rape as a war crime.⁸⁵³ While creative, where women's concerns diverge from 'male' interests, e.g. concerning reproduction, they risk being unrecognised as human rights.

According to the feminist legal method, the silences in international law are as important as the positive rules, and the gaps in relation to issues of concern to women are considered systematic.⁸⁵⁴ In the words of Steiner, Alston and Goodman, of the several blind spots in the early development of the human rights movement, none is as striking as the movement's failure to pay attention

⁸⁴⁹ Engle, Karen, *International Human Rights and Feminisms: When Discourses Keep Meeting*, p. 52.

⁸⁵⁰ Engle, Karen, *International Human Rights and Feminisms: When Discourses Keep Meeting*, p. 50, Chinkin, Christine, Wright, Shelley & Charlesworth, Hilary, *Feminist Approaches to International Law: Reflections from Another Century*, in *International Law: Modern Feminist Approaches*, ed. Doris Buss, Ambreena Manji, Hart Publ, (2005), p. 20.

⁸⁵¹ CEDAW General Recommendation No. 23, Political and Public Life, 16th Session, UN Doc. A/52/38,(1997), para. 38.

⁸⁵² Charlesworth, Hilary, *Feminist Methods in International Law*, p. 386.

⁸⁵³ Peach, Lucinda Joy, *Are Women Human?*, in *Negotiating Culture and Human Rights*, Columbia University Press, eds. Bell, Lynda, Nathan. Andrew, Peleg, Ilan, (2001), p. 159.

⁸⁵⁴ Charlesworth, Hilary, *Feminist Methods in International Law*, p. 381.

to violations of women's rights.⁸⁵⁵ The difficulties in gaining recognition for the responsibilities of states in ensuring women's human rights, and the relatively late response of the UN, has mainly been two-fold. Women's rights were not considered universal human rights, and were not considered to be internationally justiciable wrongs in that they mainly concerned the actions of private individuals. Examples include the lack of an explicit prohibition of sexual violence as an international human rights offence as well as the failure to categorise violence against women as a form of discrimination in CEDAW. This is perhaps a result of the fact that the unequal position between the genders is also reflected in international law. International human rights law e.g. concentrates on the protection of the individual from abuses of the state, whereas most forms of violence, and the oppression of women, occur at the hands of private actors.⁸⁵⁶ In that sense a dichotomy has been created between private and public harms, with only the latter being recognised by international law.⁸⁵⁷ It arguably demonstrates a reluctance to find a nexus between violence against women and international human rights law and a fear that such typically private behaviour will dilute international law.⁸⁵⁸

⁸⁵⁵ Steiner, Henry, Alston, Philip, Goodman, Ryan, *International Human Rights in Context, Law, Politics, Morals*, Oxford University Press, 3rd ed., (2008), p. 175. The history of the advancement of women's rights within the UN system is marked by different phases, depending on which rights have been in focus. At the time of creation of the UN, the emphasis primarily lay on strengthening civil and political rights of women, including citizenship and the right to vote in many Western states. The second phase, primarily in the 1960s and 1970s, focused on the concept of equality, both within the fields of civil and political rights and economic and social rights. This culminated in the adoption of the Convention on the Elimination of All Forms of Discrimination against Women. Remarkably, violence against women did not become a major international priority until the late 1980s, though it had been raised in national contexts earlier, and calls for reforming laws criminalising rape had already been raised in many states, e.g. in the US and various countries in Europe. Arguably, the combination of the issue being taboo in many societies and the private sphere being exempted from scrutiny in international law, required continual efforts by women's activists to highlight the universal nature of such violence. See e.g. *Integration of the Human Rights of Women and the Gender Perspective: Violence against Women Report of the Special Rapporteur on Violence against Women, its Causes and Consequences*, UN Doc. E/CN.4/2003/75, 6 January 2003, paras. 8-10.

⁸⁵⁶ Benninger-Budel, Carin, *Due Diligence and its Application to Protect Women from Violence*, Martinus Nijhoff, (2008), p. 1.

⁸⁵⁷ Engle, Karen, *International Human Rights and Feminisms: When Discourses Keep Meeting*, p. 53.

⁸⁵⁸ Copelon, Rhonda, *Gender Violence as Torture: The Contribution of CAT General Comment No. 2*, p. 238. These arguments have primarily focused on the private lives of women and issues such as domestic violence and FGM.

The ideas of feminist scholars have greatly influenced international law. For example, the UN Secretary-General has stated that patriarchy is entrenched in social and cultural norms, which has been institutionalised in law and political structures. Though it may take different forms, depending on the society and culture in question, it is reflected among other things in the pervasive nature of violence against women. One of the key means of maintaining this order lies in controlling women's sexuality.⁸⁵⁹ That women have endured a collective social history of deprivation of power and authority is understood as a fact, as is the universal oppression of women - though manifested in different ways depending on the culture.⁸⁶⁰ Violence against women, including sexual violence, has subsequently been interpreted as an expression of gender discrimination by the CEDAW Committee.⁸⁶¹ Every act of rape is thus seen as a manifestation of such discrimination and as a symbol of female subordination. Whereas the civil and political rights of women were the initial concern of the human rights movement, the UN Commission on Human Rights has noted that "the articulation of sexual rights constitutes the final frontier for the women's movement".⁸⁶²

The mass rapes committed in former Yugoslavia and in Rwanda opened a new era of feminist academics interpreting IHL and the burgeoning field of international criminal law.⁸⁶³ It is apparent that the feminist movement among legal experts initially aimed to merely make rape "visible", as a common occurrence in armed conflict and as an offence. The UN Secretary-General's Special Representative on Sexual Violence in Conflict has noted that sexual

⁸⁵⁹ In-depth study on all forms of violence against women. Report of the Secretary-General, UN Doc. A/61/122/Add.1, 6 July 2006, paras. 70-72.

⁸⁶⁰ Charlesworth, Hilary, *Alienating Oscar? Feminist Analysis of International Law*, in *Reconceiving Reality: Women and International Law*, ed. Dorinda Dallmeyer, ASIL, (1993), pp. 4-5.

⁸⁶¹ Declaration on the Elimination of Violence against Women, General Assembly, UN Doc. A/RES/48/104, 23 February 1994.

⁸⁶² UN Doc. E/CN.4/2003/75, para. 65.

⁸⁶³ See e.g. Gardam, Judith & Charlesworth, Hilary, *The Need for New Directions in the Protection of Women in Armed Conflict*, Chinkin, Christine, *Rape and Sexual Abuse of Women in International Law*, 5 Eur. J. Int'l L. 326, (1994), Copelon, Rhonda, *Surfacing Gender: Reconceptualizing Crimes Against Women in Time of War*, Askin, Kelly, *War Crimes Against Women; Prosecution in International War Crimes Tribunals*, Brill, (1997), Engle, Karen, *Feminism and its (Dis)Contents: Criminalizing Wartime Rape in Bosnia and Herzegovina*, AJIL 99, (2005), Gardam, Judith & Jarvis, Michelle, *Women and Armed Conflict: The International Response to the Beijing Platform for Action*, 32 Colum. Hum. Rts. L. Rev. 1, (2000), Oosterveld, Valerie, *The Making of a Gender-Sensitive International Criminal Court*, 1 International Law Forum du droit International 38, (1999), Viseur Sellers, Patricia, *The Prosecution of Sexual Violence in Conflict: The Importance of Human Rights as a Means of Interpretation*, OHCHR, Seifert, Ruth, *The Second Front - the Logic of Sexual Violence in Wars*.

violence during conflict has been invisible, as opposed to other forms of violence, precisely because it primarily targets women and girls.⁸⁶⁴ Similarly, “[m]atters of war and peace are measured in terms of bombs and bullets, rather than whether women can get to market without being robbed or raped”.⁸⁶⁵ Again, it was emphasised that rape impedes women’s political, economic and social participation.⁸⁶⁶ As strides were made, a shift occurred where the acknowledgement of sexual violence as a fact of war was insufficient. The aim was set on reclassifying rape as an independent and grave crime. In the words of Janet Halley: “making rape visible contextualised sexual assaults *in* war - while framing sexual violence as an independent predicate crime reclassified rape *as* war”.⁸⁶⁷ The realisation that war could be perpetrated through sexual violence as a military tactic became the greatest achievement of the movement. Just as the influential feminist movement of the 1970s analysed the rape definition in domestic laws, including the non-recognition of marital and date rape and uncovered a system based upon male presumption, so did international law similarly undergo a gendered reinterpretation. The systematic rape of both men and women in these conflicts has spurred international community to re-evaluate existing legislation and create new substantive laws to eradicate impunity. Some feminists have, however, objected to the extensive focus on rape in armed conflict and the attention given to rape as genocide, whereas other forms of rape committed in armed conflict or in peacetime, though equally grave, does not engender similar levels of interest.⁸⁶⁸

In conclusion, the feminist critique has legitimised evaluations of the origin and impact of laws in municipal legal systems and, within the international law framework, has disclosed limitations in the regime and remedial opportunities.⁸⁶⁹ It has been valuable in acknowledging that violence against women is a matter of international concern, demonstrating the discriminatory nature of rape as well as reforming domestic definitions of the offence to better recognise the sexual autonomy of the individual. The recognition of the gendered nature of sexual violence is of particular importance for the discussion on rape as a form of sex

⁸⁶⁴ “Rape must never be minimized as part of cultural traditions, UN envoy [Margot Wallström] says”, UN News, 25 March 2010.

⁸⁶⁵ “Ending History’s Greatest Silence”, Speech by Inés Alberdi, Executive Director, UNIFEM, 8 July 2009, Council of Women World Leaders, UN Action Against Sexual Violence in Conflict Programme.

⁸⁶⁶ *Ibid.*

⁸⁶⁷ Halley, Janet, *Rape in Berlin: Reconsidering the Criminalisation of Rape in the International Law of Armed Conflict*, p. 83.

⁸⁶⁸ *Ibid.*, p. 84.

⁸⁶⁹ Cook, Rebecca, *State Responsibility for Violations of Women’s Rights*, p. 131.

discrimination, as discussed. The feminist method thus provides a lens through which to evaluate the apparent neutrality of regulations.

5.8 Male Rape - The Excluded Victim?

As previously concluded, the main victims of sexual violence in both peacetime and during armed conflicts are women. This explains the extensive attention and research on the female victim and the underlying aspect of gender discrimination. Women are most at risk of such violence and additionally face gender-based obstacles when seeking remedies.⁸⁷⁰ However, it has become increasingly realised in recent armed conflicts that to a considerable extent men are also targeted. This fact must be taken into account when discussing the definition of rape. To a certain degree this conflicts with the presumption of feminist authors that sexual violence is a gender-based crime. Also acknowledging the occurrence of male rape would thus call for gender-neutrality of the definition and application of rape.

Most jurisdictions define rape as penile penetration of the vagina, casting women solely as victims and men as perpetrators.⁸⁷¹ Many states classify male rape as “forcible sodomy” or “homosexual rape”.⁸⁷² The separation of offences depending on the gender and age of the victim still exists in many jurisdictions. Rape of a woman by a man is often treated differently from a male to male rape. The rape of a girl often attracts a different sentence to that of a boy, despite involving similar behaviour.⁸⁷³ This may be a result of the culturally sensitive issues of homosexual acts, or reflect the historical gender imbalance and the large majority of male to female sexual assaults. Male rape was until recently generally perceived by the media and in literature as a phenomenon of prison life or a violent category of the homosexual subculture.⁸⁷⁴ The analysis by the United Nations Interregional Crime & Justice Research Institute in comparing levels of crime in a vast selection of countries did not even consider the experiences of the male rape victim until its survey in 2004-2005.⁸⁷⁵ It is believed that the pervasive taboo of male rape has caused it to remain a hidden phenomenon and thus little researched. Implied in the narrow focus on female rape in the literature could be

⁸⁷⁰ UN Doc. E/CN.4/Sub.2/1998/13, para. 18.

⁸⁷¹ UN Doc. E/CN.4/1995/42, para. 180.

⁸⁷² Sivakumaran, Sandesh, *Male/Male Rape and the “Taint” of Homosexuality*, 27 Hum. Rts. Q. 1274, (2005), p. 1286, Stephen Donaldson, *Article from the Encyclopedia of Homosexuality*, ed. Wayne R. Dynes, 1990, NY: Garland Publications, p. 1094.

⁸⁷³ Temkin, Jennifer, *Rape and the Legal Process*, p. 70.

⁸⁷⁴ Abdullah-Khan, Noreen, *Male Rape: The Emergence of a Social and Legal Issue*, p. 16.

⁸⁷⁵ UN Interregional Crime & Justice Research Institute, 2004-2005, p. 78.

a fear of detracting from the cause of acknowledging discrimination against women in the form of sexual violence.

The analysis of male rape is still also underrepresented in the literature on public international law. An increased understanding has, however, evolved that in order to capture the experiences of *all* victims of sexual violence, the definition of rape must be gender-neutral and not restricted to certain gender roles or body parts. As will be viewed, the definition of rape has e.g. consciously been constructed in a gender-neutral manner in international criminal law, both by the *ad hoc* tribunals and the Rome Statute of the ICC.⁸⁷⁶ The WHO has warned against a narrow interest in the female victim of sexual abuse and declared:

“While some legal and social networks, however rudimentary, may exist for women and girls who have been sexually attacked, there is rarely anything comparable for male victims. In some countries, the legally defined crime of rape may only apply to women. Like women, men may experience profound humiliation, and they may also experience a sense of confusion about their sexuality. In addition, in societies where men are discouraged from talking about their emotions, they may find it even more difficult than women to acknowledge what has happened to them...There may be an underlying incidence of sexual violence against adult males, adolescents and young boys, which continues or escalates during conflict...”⁸⁷⁷

The issue of gender remains an important matter in any discussion on rape, particularly with regard to the discriminatory aspects of sexual violence. A prevalent prejudice concerning male rape is that both rapist and victim are homosexuals. This stems from the belief that rape is always sexually motivated, also seen in connection with female rape.⁸⁷⁸ Male rape is in fact at times referred to as “homosexual rape”, which allows society to view it as a form of violence

⁸⁷⁶ Whereas many domestic definitions of rape in this manner are restricted to the female victim and male perpetrator, the prohibition of sexual violence in international humanitarian law has arguably not discriminated on the grounds of sex and such prohibitions should therefore apply equally to men. However, this is most likely due to the lack of a definition of the crime in IHL rather than to particularly progressive thinking in this field. See Cleiren, C. P. M. & Tjissen, M. E. M., *Rape and Other Forms of Sexual Assault in the Armed Conflict in the Former Yugoslavia. Legal, Procedural, and Evidentiary Issues*, in *The Prosecution of International Crimes*, ed. Roger Clark and Madeleine Sann, Transaction Publishers (1996), p. 260.

⁸⁷⁷ World Health Organization, *Reproductive Health During Conflict and Displacement, A Guide for Programme Managers*, (2000), p. 111.

⁸⁷⁸ Stener Carlson, Eric, *The Hidden Prevalence of Male Sexual Assault During War*, 46 *Brit. J. Criminology* 16, Jan. 2006, p. 18.

that only concerns a small part of the population and therefore does not attach the proper level of severity to the offence.⁸⁷⁹ The understanding that rape is rather an expression of control and power, evident in both peacetime and armed conflict, has therefore been of importance. Studies on male rapists have confirmed that in most cases the purpose of the assault is to humiliate and destroy the individual or group.⁸⁸⁰ The perpetrator may of course be a man or a woman.⁸⁸¹ For example, women more frequently participate in armed conflicts, and not solely as civilians.⁸⁸² Though the victims were female, a woman was convicted of rape by the Rwanda tribunal for ordering the commission of sexual violence.⁸⁸³ Female soldier Lynndie England was also convicted of “committing an indecent act” subsequent to sexual violence in the Abu Ghraib prison in Iraq.⁸⁸⁴

There is scant historical evidence of such crimes occurring in earlier international or national conflicts, though anecdotal verification exists of male rape in detention in e.g. Chile, El Salvador, Greece and Sri Lanka in the 1980s and 1990s, both from victims of sexual violence and doctors.⁸⁸⁵ Sivakumaran argues that evidence of male sexual assault in reports frequently has been treated

⁸⁷⁹ Stener Carlson, Eric, *The Hidden Prevalence of Male Sexual Assault During War*, p. 19. One of the most influential authors on sexual violence, Susan Estrich in fact acknowledged male rape, while at the same time affirming prejudices, stating: “The general invisibility of the problem of male rape, at least outside the prison context, may reflect the intensity of stigma attached to the crime and the homophobic reactions against its gay victims. In some respects the situation facing male rape victims today is not so different from that which faced female victims about two centuries ago.” Estrich, Susan, *Real Rape*, p. 108.

⁸⁸⁰ *Ibid*, p. 77.

⁸⁸¹ Though the point has been raised that, owing to the generally more advanced physical strength of men, they cannot be raped by women, one must consider other coercive acts and pressures than the use of force.

⁸⁸² Lindsey, Charlotte, *The Impact of Armed Conflict on Women*, p. 22. See, also, e.g. Report of the Special Rapporteur on Violence against Women, Mission to Columbia, UN Doc. E/CN.4/2002/83/add.3, 11 March 2002, paras. 51-53, on the use of female combatants in armed conflicts.

⁸⁸³ *The Prosecutor v. Pauline Nyiramasuhuko*, Case No. ICTR-97-21-T, ICTR, Judgment of 18 September 2001.

⁸⁸⁴ Conviction in Fort Hood Court, 26 September 2005.

⁸⁸⁵ Zawati, Hilmi, *Impunity or Immunity: Wartime Male Rape and Sexual Torture as a Crime Against Humanity, Torture*, Journal on Rehabilitation of Torture Victims and Prevention of Torture, Vol. 17, Issue 1, (2007), p. 35. Sivakumaran also found evidence of male rape in Argentina, Northern Ireland, Chechnya, and Turkey. See Sivakumaran, Sandesh, *Sexual Violence Against Men in Armed Conflict*, p. 258. Oosterhoff, Pauline, Zwanikken, Prisca & Ketting, Evert, *Sexual Torture of Men in Croatia and Other Conflict Situations: An Open Secret*, Reproductive Health Matters 2004:12 (23), p. 69.

as “mutilation” or “torture” rather than rape, which has reinforced the obscurity of male victims of rape.⁸⁸⁶ There appears to be much under-reporting of rape by male victims which is generally considered to be due to a heightened sense of shame and stigma. Victimisation may be seen as being incompatible with masculinity. This is perhaps why male rape has been applied as an effective weapon of war.⁸⁸⁷ Accordingly, there is a presumption that a man should be able to prevent such assaults from occurring and if attacked he should cope with the consequences in a “dignified” manner. Oosterhoff, Zwanikken and Ketting hold that institutions have failed to recognise male victims of rape. For instance, health care workers who unconsciously adopt stereotypical gender roles of men as aggressors. Males subjected to rape may also have difficulty in verbalising what happened, possibly from shame or fear of legal consequences.⁸⁸⁸ They might be dissuaded from reporting such abuse because of the risk of consent being assumed if unable to prove rape. For example, in approximately 70 countries, same-sex relations are criminalised.⁸⁸⁹

Documentation, however, exists of substantial numbers of assaults from more recent conflicts, including Rwanda and former Yugoslavia, though the exact data are difficult to verify.⁸⁹⁰ It is estimated that more than 4,000 Croatian men were sexually abused by Serb militants during the conflict.⁸⁹¹ Evidence collected by the Commission of Experts set up by the UN during the conflict demonstrate that while the vast majority of victims were women, male detainees in all-male or mixed detention camps were also sexually assaulted, often in public and accompanied by other forms of torture. Castration would at times be inflicted through torturous methods, such as forcing one prisoner to bite off another detainee’s testicles, as well as enforced circumcisions. Sexual assaults included

⁸⁸⁶ Sivakumaran, Sandesh, *Sexual Violence Against Men in Armed Conflict*, p. 255.

⁸⁸⁷ Ibid, p. 255.

⁸⁸⁸ Oosterhoff, Pauline, Zwanikken, Prisca & Ketting, Evert, *Sexual Torture of Men in Croatia and Other Conflict Situations: An Open Secret*, p. 68.

⁸⁸⁹ Ibid, p. 68, Sivakumaran, Sandesh, *Sexual Violence Against Men in Armed Conflict*, p. 255.

⁸⁹⁰ Reports of male rape have also come from conflicts in, among others, the DRC, Central African Republic, Liberia, Sierra Leone and the Sudan. As Sivakumaran concludes, the documented evidence of those abuses primarily comes from NGOs or intergovernmental organisations working in the field with few cases reaching national or international justice systems. See Sivakumaran, Sandesh, *Sexual Violence Against Men in Armed Conflict*, p. 258.

⁸⁹¹ Zawati, Hilmi, *Impunity or Immunity: Wartime Male Rape and Sexual Torture as a Crime Against Humanity*, p. 34.

the forcing of prisoners to rape female detainees and performing fellatio on guards or one another.⁸⁹²

Several cases heard by the ICTY reveal abuse of men, ranging from positioning naked men in poses simulating intercourse⁸⁹³ to forcing detainees to perform oral sex on other interns.⁸⁹⁴ In the *Simic* trial, the judgment noted: “Several Prosecution witnesses gave evidence that detainees were subjected to sexual assaults. One incident involved ramming a police truncheon in the anus of a detainee. Other incidents involved forcing male prisoners to perform oral sex on each other and on Stevan Todorovic, sometimes in front of other prisoners.”⁸⁹⁵ The *Cesic* trial also detailed how Cesic forced two detained Muslim brothers to perform fellatio on each other in front of other detainees.⁸⁹⁶ Cesic was subsequently convicted of the rape as a crime against humanity.⁸⁹⁷ In the *Celibici* case, which adjudicated sexual violence against women, the forced oral sex between two brothers was mentioned. The Trial Chamber noted that the act could have constituted rape if the indictment had included the correct plea. However, the Tribunal held that the fellatio constituted the offence of inhuman treatment.⁸⁹⁸ Apart from sexual abuse in detention, one of the most common ways of sexually assaulting men was to force them to appear naked in public, thereby causing humiliation and a sense of loss of manhood.⁸⁹⁹ Forced masturbation either on the victim or the perpetrator is also a common form of sexual assault.⁹⁰⁰ In the Special Court for Sierra Leone male rape was recognised in a case where a man was forced to rape a woman. Both participants were considered to be victims.⁹⁰¹ Have the *ad hoc* tribunals fully acknowledged the

⁸⁹² Rape and Sexual Assault, Final Report of the UN Commission of Experts Established Pursuant to Security Council Resolution 780 (1992), UN Doc. S/1994/674/Add.2 (Vol.V), 28 Dec. 1994, pp. 7-8. See also Viseur Sellers, Patricia, *Sexual Torture as a Crime under International Criminal and Humanitarian Law*, 11 N.Y. City L. Rev. 339, (2007-2008), p. 345. Sellers, as a former gender legal advisor of the ICTY found that males were often sexually tortured in related pairs, e.g. father/son, brother/brother.

⁸⁹³ *Prosecutor v. Stakic*, Case No. IT-97-24, ICTY, Judgment of 31 July 2003, para. 241.

⁸⁹⁴ *Prosecutor v. Stevan Todorovic*, Sentencing Judgment, Case No. IT-95-9/1-S, ICTY, Judgment 31 July 2001, paras. 39-40.

⁸⁹⁵ *Prosecutor v. Blagoje Simic, Miroslav Tadic and Siom Zaric*, Case No. IT-95-9-T, ICTY, Judgment 17 October 2003, para. 728.

⁸⁹⁶ *Prosecutor v. Cesic*, Sentencing Judgment, Case No. IT-95-10/1-S, ICTY, Judgment 11 March 2004, paras. 13-14.

⁸⁹⁷ *Ibid*, para. 33.

⁸⁹⁸ *Prosecutor v. Delalic et al. (Celebici Camp)*, Judgment of 16 November 1998, para. 1066.

⁸⁹⁹ OSCE, Human Rights in Kosovo: As Seen, As Told, Volume 1, October 1998 - June 1999, 5 November 1999, Chapter 7, p. 12.

⁹⁰⁰ Sivakumaran, Sandesh, *Sexual Violence Against Men in Armed Conflict*, p. 267.

⁹⁰¹ *Case No. SCSL-04-15-T against Sesay, Kallon, Gbao*, Judgment of 2 March 2009.

gravity of male rape in a similar manner as sexual violence against women? In the indictment of *Sikirica* at the ICTY for the murder and rape of detainees at the Keraterm camp, the charges referred to the act of “engaging in fellatio” but not rape, as if it were a separate crime.⁹⁰² In the Rwanda conflict men were subjected to sexual violence that involved mutilation of genitals, with the organs subsequently displayed in public.⁹⁰³ However, male sexual abuse is not mentioned in the case law of the ICTR.

Arguably, sexual violence in general occurs for some of the same reasons as it does against women in male-dominated societies struggling for equality, that is, an attempt to challenge the social status of the dominant group.⁹⁰⁴ Male rape can be used as a tactic of war to ensure destruction of the victim through mental and physical suffering. In a study by the UN Secretary-General on women and armed conflicts, it is stated with regard to the male victim that “the sexual abuse, torture and mutilation of male detainees or prisoners is often carried out to attack and destroy their sense of masculinity or manhood”.⁹⁰⁵ Based on the nature of the sexual violence in conflicts such as in Rwanda and former Yugoslavia, it is obvious that rape was used to communicate and exert dominance over the opposing group. The message conveyed was that men had failed in the protection of the women of their group, since the male gender role traditionally represents virility and strength and the man as the protector of the family. As Sivakumaran argues: “sexual violence against male members of the household and community would thus suggest not only empowerment and masculinity of the offender but disempowerment of the individual victim”.⁹⁰⁶

⁹⁰² *Prosecutor v. Sikirica and others (Keraterm)*, ICTY Indictment, IT-95-8, 21 July 1995, paras. 19–20.

⁹⁰³ De Brouwer, Anne-Marie, *Supranational Criminal Prosecution of Sexual Violence: The ICC and the Practice of the ICTY and the ICTR*, p. 13.

⁹⁰⁴ Sivakumaran, Sandesh, *Sexual Violence Against Men in Armed Conflict*. Outside the context of armed conflicts, the male victim frequently knows the perpetrator and has been subjected to an acquaintance rape, regardless of whether the individuals are heterosexual or homosexual. Abdullah-Khan, Noreen, *Male Rape: The Emergence of a Social and Legal Issue*, p. 193.

⁹⁰⁵ Women, Peace and Security: Study Submitted by the Secretary-General Pursuant to Security Council Resolution 1325, (2000), para. 59.

⁹⁰⁶ Sivakumaran, Sandesh, *Sexual Violence Against Men in Armed Conflict*, p. 268. Researching the rape of men in Croatia and Bosnia and Herzegovina during the Yugoslavia conflict, a medical centre describes: the “...goal of this torture was to destroy the identity of those men. Men’s culture has taught them that they are all-powerful, dominate, and they are in control. Most of the men we worked with have said they did not grow up with the possibility of being sexually abused. That is the reason that most of them don’t tell anyone they were sexually abused...”, referred to in Carlson, Eric Stener, *The Hidden Prevalence of Male Sexual Assault During War*. The lack of reporting of male victims in Croatia is also discussed in Oosterhoff, Pauline, Zwanikken, Prisca & Ketting, Evert, *Sexual Torture of Men in Croatia and Other Conflict Situations: An Open Secret*, p. 73.

Men may also be targeted to inhibit reproduction of a certain group, evident through the large number of forcible castrations carried out in armed conflicts as well as the violence commonly directed at the reproductive organs. In the Yugoslavia conflict, witness testimony at the ICTY e.g. relayed that the perpetrator jeered: “you’ll never make Muslim children again”, while injuring the victim’s testicles.⁹⁰⁷ The mental trauma of sexual abuse may result in psychological difficulties in relationships that may in turn lead to an inability to procreate.⁹⁰⁸ As for the mental suffering experienced by the victim, it cannot be generalised according to culture or gender. Suffice to say is that in the same manner that sexual violence may be particularly detrimental for women in certain cultures where extramarital sex is prohibited, male rape can be especially taboo owing to the cultural view of masculinity and the perceived immorality of homosexual acts. According to several authors, the stigma of rape can be exceptionally severe for men because of the fear of being branded a homosexual.⁹⁰⁹

Certain feminist experts have opposed an increased focus on male rape, since it may detract from the categorisation of the offence as a gender-based crime and a form of subordination of the female gender.⁹¹⁰ As such, the acknowledgment of male rape is seen as competition to the focus on the female victim. Whereas the feminist movement has been instrumental in challenging societal prejudices towards the female victim, and have thereby been influential in reforming rape definitions, such prejudices concerning male rape have not been equally addressed. Some authors even hold that male rape consists of men feminising other males by treating their victims as subordinate females, thereby still

⁹⁰⁷ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, ICJ, Application of the Republic of Bosnia and Herzegovina, 20 March 1993, paras. 44D(c), (h), 62.

⁹⁰⁸ Sivakumaran, Sandesh, *Sexual Violence Against Men in Armed Conflict*, p. 273. The physical and mental consequences of the assaults on victims range from castration, STDs, genital infections, physical impotence, swollen testicles and ruptures of the rectum. Psychosomatic problems include headache, loss of appetite and weight, sleeplessness, palpitations, shame, guilt, anger, suicidal thoughts and post-traumatic stress disorder. See Oosterhoff, Pauline, Zwanikken, Prisca & Ketting, Evert, *Sexual Torture of Men in Croatia and Other Conflict Situations: An Open Secret*, p. 71.

⁹⁰⁹ Kramer, Elizabeth, *When Men are Victims: Applying Rape Shield Laws to Male Same-Sex Rape*, 73 N.Y.U.L. Rev. 293, April 1998, pp. 296 & 311.

⁹¹⁰ See e.g. Leng, Roger, *The Fifteenth Report of the Criminal Law Revision Committee: Sexual Offences - The Scope of Rape*, Crim LR 416, (1985), Naffine, Ngaire, *Possession: Erotic Love in the Law of Rape*, The Modern Law Review, Vol. 57, No. 1 (Jan., 1994). See a review of the criticism in Rumney, Philip & Morgan-Taylor, Martin, *Recognizing the Male Victim: Gender Neutrality and the Law of Rape: Part One*, 26 Anglo-Am. L. Rev. 198, (1997).

maintaining the gender component.⁹¹¹ However, as Quénivet points out, cases such as *Tadic* depicting male sexual assault in the form of forcing a man to bite off another's testicles is hardly an imitation of heterosexual interactions or a feminising action.⁹¹²

Though male rape has now been acknowledged as occurring in a variety of contexts, not just in the prison environment as was the earlier focus, the fact that it occurs to a lesser extent is viewed as evidence of the gender component.⁹¹³ Gender-neutrality would arguably indicate that both genders are *equally* oppressed. Temkin contends: "Given man's greater physical strength and women's consequent vulnerability, the overriding objective which, it is submitted, the law of rape should seek to pursue is the protection of sexual choice - that is to say, the protection of women's right to choose, whether, when and with whom to have sexual intercourse."⁹¹⁴ Including male rape in the definition would diminish "the reality that sexual violence is predominantly committed by men against women" and the rape offence would move away from focusing on the sexual autonomy of women.⁹¹⁵ It could also prevent the analysis of the law from a gender perspective.

However, sexual autonomy should befit all, for the simple reason of being human and not be limited to certain categories of persons in society. Researching male rape does not detract from the plight of the female rape victim. Acknowledging the male rape victim would not compete with the feminist perspective on rape. Both forms of the offence contain a gender dimension and could benefit from the same type of analysis.⁹¹⁶ Are women disadvantaged by gender neutrality in the law? Critique of laws prohibiting rape primarily concern definitions that express gender-biases, or male interpretations of neutral terminology. This would not automatically be the case in gender-neutral definitions. In fact, in those states that have reformed their definitions to include male rape, it has been argued that it would actually benefit the female victim as well, since the inclusion of male victims could increase the level of gravity of the

⁹¹¹ MacKinnon, Catherine, *Reflections on Sex Equality under Law*, 100 *The Yale L. J.* 1281, (1991), p. 1307, Abdullah-Khan, Noreen, *Male Rape: The Emergence of a Social and Legal Issue*, p. 5, Stellings, Brande, *The Public Harm of Private Violence: Rape, Sex Discrimination and Citizenship*, 28 *Harv. C.R.-C.L.L. Rev.* 185 (1993), p. 196.

⁹¹² Quénivet, N.R Noëlle, *Sexual Offenses in Armed conflict & International Law*, p. 17.

⁹¹³ *Ibid*, p. 17.

⁹¹⁴ Temkin, Jennifer, *Towards a Modern Law of Rape*, 45 *Modern Law Review* 299, No. 4, (July 1982), pp. 400-401.

⁹¹⁵ Leng, Roger, *The Fifteenth Report of the Criminal Law Revision Committee: Sexual Offences - The Scope of Rape*, *Crim LR* 416, (1985), p. 417.

⁹¹⁶ Sivakumaran, Sandesh, *Sexual Violence Against Men in Armed Conflict*, p. 260.

crime and the treatment of the victim by the justice system.⁹¹⁷ Additionally, differentiation based on sex can lead to further gender stereotyping, i.e. assumptions on the behaviour of victim versus perpetrator and men and women.⁹¹⁸ Gender-neutrality and feminism should thus not be in opposition of one another. The importance of the gender-neutrality in the definition of rape has not been raised as an issue in the international human rights sphere. It has, however, been discussed as an important concern in international criminal law, as a result of both female and male rape victims e.g. in the conflicts subject to the jurisdiction of the *ad hoc* tribunals.

⁹¹⁷ Temkin, Jennifer, *Rape and the Legal Process*, p. 69.

⁹¹⁸ Rumney, Philip & Morgan-Taylor, Martin, *Recognizing the Male Victim: Gender Neutrality and the Law of Rape: Part One*, p. 216.

Part III: An International Human Rights Law Perspective

6. State Obligations to Prevent and Punish Rape

6.1. Introduction

This part of the thesis will examine the scope of obligations for states in international human rights law to enact criminal laws on rape, and ultimately, adopt certain elements of the crime. The question has primarily been approached in determining obligations to *prevent* human rights violations. The initial matter for analysis will thus be on duties to prevent rape, in particular between private actors. The perpetrator of rape may be a state actor, which is frequently the case in detention settings, or more commonly, a non-state actor.⁹¹⁹ Most forms of violence against women occur in the so-called “private realm” by a private individual.⁹²⁰ The role of the non-state actor in international human rights law is therefore provided ample space in the discussion, but more importantly, state obligations in relation to such actors. The focus is thus on the level of obligations on states to prevent acts of rape, whether perpetrated by a state or non-state actor, through domestic criminalisation of the offence. General rules on state responsibility explain situations where the acts of non-state actors are *imputed* to the state, i.e. when the state through its actions or omissions is considered responsible for such acts. International human rights law more explicitly delineates obligations to prevent acts of violence between private actors. The

⁹¹⁹ The use of the term non-state actor will in the following refer to a wide range of actors, from e.g. private individuals, companies and armed groups. Though at times treated as a coherent group, certain discussions apply more directly to certain non-state actors, e.g. non-state actors shouldering the role of the state may primarily refer to armed factions and companies. Non-state actors do not generally incur responsibility in international law, apart from international criminal law, except for the minimum standards in humanitarian law found e.g. in Common Article 3 of the Geneva Conventions. The possibilities of placing responsibilities directly on individuals is therefore rather limited, hence the importance of extending obligations on states for acts of non-state actors. As will be noted below, the reason for the reluctance to acknowledge the non-state actor as a subject of human rights law arises from the desire to maintain state sovereignty intact, dealing with non-state actors through domestic criminalisation.

⁹²⁰ Charlesworth, Hilary & Chinkin, Christine, *The Boundaries of International Law: A Feminist Analysis*, p. 148. Peach, Lucinda Joy, *Are Women Human?*, p. 158, Cook, Rebecca, *Accountability in International Law for Violations of Women's Rights by Non-State Actors*, in Dallmeyer, Dorinda, *Reconceiving Reality: Women and International Law*, (1993). Cook argues: “women’s exposure to discrimination and other denials of human rights will originate through acts of private persons and institutions”. See p. 94.

Draft Articles on State Responsibility will thus first be briefly touched upon before examining human rights obligations for states. The discussion on state responsibility/obligations will also point to a general development in expanding the obligations of states to prevent violence in the private sphere.

6.2 The Role of the State in International Human Rights Law

The character of the international legal system has traditionally been viewed as a system of sovereign nations whose actions are limited by rules freely accepted as legally binding.⁹²¹ The state-centred system has excluded non-state actors as subjects of international law and has chiefly consisted of bilateral obligations. A breach of an obligation would lead to a withdrawal of benefits from the offending state and occasionally to claims for compensation.⁹²² Human rights were previously considered to be an exclusively internal political matter, protected by the international principle of non-interference into the domestic affairs of other states. Ventures into regulating the private sphere have not only been criticised as delving into matters of states' internal affairs, but also as violating the privacy of the individual.⁹²³

Early authors in international law, such as Pufendorf, argued that a state could never be held responsible for the acts of its citizens because “no matter how much a state may threaten, there is always left to the will of citizens the natural liberty to [injure foreign states or nationals]”.⁹²⁴ According to this approach, the state can never be held responsible for conduct it cannot control. The focus on the ability to ‘control’ has been evident in international human rights law, where e.g. rape until recently was only recognised as torture in settings subject to obvious state control, e.g. in detention or prison. The approach to state ‘control’ has, however, expanded to view state passivity or acquiescence in relation to acts of non-state actors as forms of control. This is evident in the discussion on imputability of acts by non-state actors and requirements on states to act with due diligence.

The emphasis on the state is maintained in the current international legal system and a breach of international law must be linked to a state in order for it to be justiciable.⁹²⁵ Similarly, it is recognised that states maintain prime

⁹²¹ Shelton, Dinah, *Introduction: Law, Non-Law and the Problem of ‘Soft Law’*, p. 5.

⁹²² *Ibid.*, p. 6.

⁹²³ Clapham, Andrew, *Human Rights in the Private Sphere*, p. 218 ff.

⁹²⁴ Pufendorf, Samuel, *De Jure Naturae et Gentium Libri Octo*, CH Oldfather & WA Oldfather, 17 vol. University of Chicago Press, (1964).

⁹²⁵ Apart from international criminal law which concerns the responsibility of individuals. See the Draft Articles on State Responsibility.

responsibility in guaranteeing and implementing human rights standards. International human rights obligations therefore constitute restraints on the actions of states but also inherently contain a responsibility to actively enforce rights.⁹²⁶ The rationale is that violations of human rights performed by the state are a particularly serious form of abuse of power, since they are committed by the very authorities whose duty it is to protect the person.⁹²⁷ The international human rights framework was promulgated in the aftermath of the Second World War when the perceived main threat of abuse came from states. Conduct of persons not acting on the state's behalf, or which is not attributable to the state, has traditionally not been considered to be an act of the state.⁹²⁸ Since private actors are not parties to international human rights treaties they are not bound by such obligations, apart from certain human rights norms that form the basis of various international crimes. Though individuals have achieved a status as actors in international law, primarily through international criminal law, they are seen principally as the beneficiaries of rights. Abuse by a private individual is thus generally regarded as a domestic criminal offence rather than an international human rights violation, allowing the state to regulate the behaviour of its citizens.⁹²⁹

The traditional view on public international law has created a public/private dichotomy in which public crimes are solely acknowledged by international law,

⁹²⁶ Discussion on positive and negative obligations. The distinction between negative and positive rights was initially emphasised in the human rights movement. The former arguably entailed primarily a duty to abstain from a certain act or interference, e.g. to not torture an individual or intrude in his/her private life. Positive rights on the other hand would impose affirmative duties, which initially referred mainly to economic and social rights, e.g. the duty to provide food and medical care. However, such a delineation is outdated as the scope of rights has widened and the responsibilities of states increased. With this evolution comes the realisation that all rights have both negative and positive components as to duties, including due diligence obligations. See e.g. Steiner, Henry, Alston, Philip, Goodman, Ryan, *International Human Rights in Context, Law, Politics, Morals*, p. 186, Akandji-Kombe, Jean-Francois, *Positive Obligations Under the European Convention on Human Rights, A Guide to the Implementation of the European Convention on Human Rights*, p. 7. See, also, General Comment 3: Implementation at the National Level, General Comment 31: The Nature of the General Legal Obligations Imposed on States Parties to the Covenant, ICCPR, General Comment 3: The Nature of States Parties Obligations, CESCR.

⁹²⁷ OHCHR, *Human Rights in the Administration of Justice: a Manual on Human Rights for Judges, Prosecutors and Lawyers*, 2003, p. 775.

⁹²⁸ In contrast, non-state actors, as evident from the phrase, include societal groups that act independently of the government, such as private individuals, NGOs, insurgent or paramilitary groups, factions.

⁹²⁹ What with the due diligence regime described below, such private violence has, however, begun to be acknowledged through the obligations of states in international human rights law.

that is, violations perpetrated by or supported by the state.⁹³⁰ This has indirectly created an ideological barrier between contraventions deserving international attention based upon the identity of the perpetrator. In simple terms, crimes committed by individuals in a private capacity are breaches of national penal law, whereas transgressions of international human rights are committed by or on behalf of the government. The distinction has been particularly detrimental to the protection of women's human rights, as such violations mostly occur within the private realm - the perpetrators being non-state actors.⁹³¹ However, public international law has undergone a transformation in delving into the "private" arena, the area of law traditionally regulated by the state. New challenges to the rules on state responsibility have arisen in an age where privatisation and deregulation have become common.⁹³² States are increasingly being held responsible for the actions of non-state actors. As will be observed throughout this thesis, the role of the non-state actor has slowly shifted in international law to become more prominent, while at the same time state sovereignty has diminished to engender a wider scope of responsibility.

6.3 The Limits of State Obligations: Conduct Attributable to the State

6.3.1 Primary and Secondary Rules

The law of state responsibility developed first and foremost through customary international law, and to an extent through limited treaty law.⁹³³ The principles govern the circumstances under which a state can be held accountable for a

⁹³⁰ Charlesworth, Hilary & Chinkin, Christine, *The Boundaries of International Law: A Feminist Analysis*, p. 148.

⁹³¹ See e.g. Report of the Special Rapporteur on Violence against Women, its Causes and Consequences, Ms. Rhadika Coomaraswamy, Submitted in Accordance with Commission on Human Rights Resolution 2001/49, Cultural Practices in the Family that are Violent Towards Women, UN Doc. E/CN.4/2002/83, 31 January 2002. See also In-Depth Study on all Forms of Violence against Women, Report of the Secretary-General, UN Doc. A/61/122/Add.1, 6 July 2006, para. 256, Report of the Special Rapporteur on Violence against Women, its Causes and Consequences, Towards an Effective Implementation of International Norms to End Violence against Women, UN Doc. E/CN.4/2004/66, 26 December 2003, para. 41. Supported by statistics, see e.g. World Health Organization, Multi-Country Study on Women's Health and Domestic Violence against Women, Initial Results on Prevalence, Health Outcomes and Women's Responses, (2005), p. 46.

⁹³² Shelton, Dinah, *Regional Protection of Human Rights*, Oxford University Press, (2008), p. 311.

⁹³³ Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries, International Law Commission, 2001, p. 141 (Article 56), Dixon, Martin, *Textbook on International Law*, Oxford University Press, (2007), p. 243, Aust, Anthony, *Handbook of International Law*, Cambridge University Press, (2005), p. 407.

breach of an international obligation. Because states are abstract entities, the conduct inducing state responsibility is naturally carried into effect by persons, but such acts or omissions can be attributable to the state itself.⁹³⁴

The International Law Commission (ILC) as early as 1949 chose the topic of state responsibility for codification, but initially focused on the state responsibility for injuries to aliens.⁹³⁵ It later expanded its mandate to promulgate rules covering all instances of injuries to other states and their citizens, adopting the *Draft Articles on the Responsibility of States for Internationally Wrongful Acts* in 2001.⁹³⁶ As such, the ILC Draft Articles consist of general rules on state responsibility applicable to all areas of international law. The rules are therefore intentionally abstract, with the more specific content determined by the subject matter of obligations found in e.g. treaties.⁹³⁷ The document containing the articles is not a treaty but rather codifies existing case law and state practice and arguably provides evidence of customary international law.⁹³⁸

In the explanatory notes on the Draft Articles, James Crawford emphasises the difference between the law of treaties and that of responsibility. The specific content of substantive state obligations developed are deemed to be primary rules. The law of state responsibility through the Draft Articles on the other hand, sets out a general framework and can as such be considered as secondary.⁹³⁹ The rules are therefore separate from obligations set down in human rights treaties but in broad terms explain the doctrine of state duties. The rules consequently do not establish particular standards of conduct nor do they examine the content of obligations. Instead, as Crawford delineates: "...the

⁹³⁴ Although all acts are committed by an individual, the theory of state responsibility is a legal construction that assigns the risk for consequences stemming from acts deemed wrongful by international law to the artificial entity of the state. See Chinkin, Christine, *A Critique of the Public/Private Dimension*, p. 395.

⁹³⁵ Crawford, James, *The ILC's Articles on State Responsibility, Introduction, Text and Commentaries*, (2002), p. 1.

⁹³⁶ Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries, 2001.

⁹³⁷ Bodansky, Daniel & Crook, John, *Symposium: The ILC's State Responsibility Articles, Introduction and Overview*, AJIL, p. 779.

⁹³⁸ See, also, Fleck, Dieter & Wolfrum, Rüdiger, *Enforcement of International Humanitarian Law*, in *The Handbook of International Humanitarian Law*, ed. by Dieter Fleck, Oxford University Press, (2008), p. 678. The document also codifies and develops customary international law.

⁹³⁹ The term 'state responsibility' may cause confusion as its definition may be both narrow and broad in scope. The original understanding relates to the responsibility for injuries to aliens, whereas the Draft Articles focus on issues of attribution and remedies. A broader reading may also include the primary duties of states, but I will in the following refer to this principle as state obligations.

focus...[is]...on the framework or matrix of rules of responsibility, identifying whether there has been a breach by a State and what were its consequences”.⁹⁴⁰

The Draft Articles on State Responsibility as secondary rules apply to all areas within public international law, including human rights law.⁹⁴¹ The commentaries to the articles, in fact, frequently refer to the case law of the regional human rights courts to illustrate interpretations of the contents of the rules.⁹⁴² It should also be remembered that the human rights principles have greatly influenced the structure and content of the Draft Articles, including the issue of *erga omnes* obligations.⁹⁴³ As Dominic McGoldrick insists, the principles on state responsibility are found in, illustrated by, and amplified by human rights law.⁹⁴⁴ In fact, international human rights monitoring bodies in practice frequently apply the general rules of state responsibility but without expressly referring to them.⁹⁴⁵ The African Commission e.g. in 2005 found the Sudanese government to be complicit in the atrocities committed by the Janjaweed militia group in Darfur, which was held responsible for grave violations of human rights, including rape and sexual violence against women. The acts of the Janjaweed were imputed to the Sudanese government because of

⁹⁴⁰ Crawford, James, *The International Law Commission's Articles on State Responsibility: Introduction, Text and Commentaries*, p. 2.

⁹⁴¹ The only direct references to norms which may be of a human rights character in the Draft Articles are the concepts of peremptory norms and *erga omnes* obligations. In Article 48 (1) (b) the possibility is mentioned for a state to invoke state responsibility if the obligation breached is “owed to the international community as a whole”. States have in such cases not suffered an injury in the traditional sense, but bearing in mind the severity of the *erga omnes* obligations, it is considered to be in everyone’s interest.

⁹⁴² See e.g. Draft Articles, p. 56 on fair trial, p. 57 on incompatible legislation, p. 59 on continuing wrongful acts.

⁹⁴³ Craven, Matthew, *For the ‘Common Good’: Rights and Interests in the Law of State Responsibility*, in *Issues of State Responsibility Before Judicial Institutions*, ed. Malgosia Fitzmaurice, Dan Sarooshi, The Clifford Chance Lectures, vol. VII, Hart publ. (2004), p. 107.

⁹⁴⁴ McGoldrick, Dominic, *State Responsibility and the International Covenant on Civil and Political Rights*, p. 162 ff.

⁹⁴⁵ Lawson, Rick, *Out of Control: State Responsibility: Will the ILC’s Definition of the Act of the State Meet the Challenges of the 21st Century*, in *The Role of the Nation-State in the 21st Century: Human Rights, International Organisations and Foreign Policy*, eds. Monique Castermans-Holleman, Fried van Hoof and Jacqueline Smith, p. 115: “...while the Strasbourg bodies are obviously mindful of the Convention’s special character as a human rights treaty, they are willing to take into account any relevant rules of international law”.

its explicit support in e.g. providing them with supplies.⁹⁴⁶ The Draft Articles on State Responsibility and the obligations under human rights law therefore form part of a single whole and may in fact be increasingly converging. The level of responsibility may, however, be more extensive under human rights law.⁹⁴⁷

However, the consideration of imputability and, for example, the positive obligations of states will frequently overlap when evaluating whether or not a state has abided by its agreements. On determining the extent of a state's positive obligations, for example whether an omission in relation to the acts of a private actor is attributable to the state, it is directly linked to the question of the scope of the state's due diligence requirements to prevent and punish such acts. One must therefore bear in mind that the law of state responsibility solely considers the question of whether an actor's conduct is attributable to the state within that context. The issue of whether the conduct represents an international violation is treated separately, through substantive rights, which may be found e.g. in international human rights treaties. The ILC emphasises: "...it is one thing to define a rule and the content of the obligation it imposes, and another to determine whether that obligation has been violated and what should be the

⁹⁴⁶ Resolution on the Situation of Human Rights in the Darfur Region in Sudan, ACHPR/Res.93(XXXVIII)05, 38th Ordinary Session in Banjul, The Gambia, 5 December, 2005.

⁹⁴⁷ Mzikenge Chirwa, Danwood, *The Doctrine of State Responsibility as a Potential Means of Holding Private Actors Accountable for Human Rights*, 5 Melb. J. Int'l L. 1, (2004), p. 10. Theodor Meron, alongside many other legal scholars, argues that because provisions on responsibility for breaches in human rights law and humanitarian law are rarely self-contained regimes, general principles of state responsibility continue to be relevant and applicable: "While taking into account the relevant treaty provisions, the invocation, in appropriate cases, of the general principles of state responsibility enhances the efficacy of international human rights." Meron, Theodor, *Human Rights and Humanitarian Norms as Customary Law*, p. 138. As Meron argues: "unfortunately, the principles of state responsibility have often remained *terra incognita* for human rights lawyers...By coupling human rights with the corpus of law governing state responsibility, the latter is mobilized to serve the former and to advance its effectiveness". See Meron, Theodor, *State Responsibility for Violations of Human Rights*, 83 Am. Soc'y Int'l L. Proc. 372, 372 (1989), p. 372. See also Mzikenge Chirwa, Danwood, *The Doctrine of State Responsibility as a Potential Means of Holding Private Actors Accountable for Human Rights*, p. 9, Romany, Celina, *State Responsibility Goes private: A Feminist Critique of the Public/Private Distinction*, p. 96. Romany even holds that the doctrine of state responsibility is even "central to an expansive interpretations of human rights law". Likewise, Bodansky and Crook note that the increased specialisation and fragmentation of international law has created regimes with their own *lex specialis* interpretations of state responsibility, plausibly making the Draft Articles on State Responsibility redundant. However, the trend towards specialised regimes could also heighten the need for general rules to fill gaps and provide a unifying role. Bodansky, Daniel & Crook, John, *Symposium: The ILC's State Responsibility Articles, Introduction and Overview*, p. 774. Many human rights lawyers and scholars are unaware of the rules or view them with scepticism as to their functionality in the human rights field.

consequences”.⁹⁴⁸ Two parallel lines of inquiry must therefore be conducted in order to establish a breach of an international obligation.

6.3.2 Definition of an Internationally Wrongful Act

First, the articles conclude that an internationally wrongful act consists of either an action or omission attributable to the state, which in turn constitutes a breach of an international obligation.⁹⁴⁹ The acknowledgment that omissions may also rise to the level of a breach of norms has long been accepted in international practice. In fact, cases where the international responsibility of a state has been invoked on the basis of an omission are at least as numerous as those based upon positive acts, and no difference in principle exists between them.⁹⁵⁰ The relationship to primary rules is further noted in Article 12 which holds that “there is a breach of an international obligation by a State when an act of that State is not in conformity with what is required of it by that obligation, regardless of its origin or character”. This refers to all sources of international law - treaties, customary law and general principles. Breaches can arise from bilateral or multilateral obligations.⁹⁵¹ It can likewise “involve relatively minor infringements as well as the most serious breaches of obligations under peremptory norms”.⁹⁵² As such, the breach of an obligation - for instance, in a human rights treaty or customary law which can be attributed to the state - leads to a matter of state responsibility. The breach can only be identified by interpreting the nature of the obligation. With regard to the character of a wrongful act, the commentaries to the articles e.g. refer to case law of the Inter-American Court and European Court of Human Rights.⁹⁵³ The case law on state obligations has therefore further developed theories on state responsibility.

⁹⁴⁸ Yearbook of the International Law Commission, 1970, vol. II, UN Doc. A/CN.4/SER.A/1970/Add.1, p. 306, para. 66 (c). Judge Huber of the PCIJ has stated: “[r]esponsibility is the necessary corollary of a right. All rights of an international character involve international responsibility. If the obligation in question is not met, responsibility entails the duty to make reparation.” *Spanish Zone of Morocco Claim*, Report III, 1923, 2 RIAA 615, (1924), para. 615.

⁹⁴⁹ Article 2.

⁹⁵⁰ Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries, 2001, p. 35 (Article 2).

⁹⁵¹ *Ibid*, pp. 55-56 (Art. 12, commentary 3-6).

⁹⁵² *Ibid*, (Art. 12, commentary 6).

⁹⁵³ *Ibid*, pp. 60-61, (Art. 14, commentary 4 and 9).

6.3.3 Domestic Laws as Breaches of International Law

A failure in the implementation of international regulations may constitute a wrongful act, which is of relevance in the analysis of state obligations to adopt criminal laws prohibiting rape. In general, member states to a treaty are flexible in the determination of the most appropriate form with which to fulfil their international obligations. Unwillingness to create uniform regulations on implementation stems from a desire to maintain the sovereignty of the state and to leave the decision on the form of implementation to national authorities. However, regardless of whether a state's approach to international law is monistic or dualistic, i.e. either international law is automatically part of municipal law or the two regimes are viewed as separate legal orders, a state cannot invoke the legal procedures of its domestic laws as a justification for not complying with its international obligations. This is explicitly stated in Article 27 of the Vienna Convention on the Law of Treaties. Regardless of the model, most international rules need to be applied by state officials to become operational and national implementation is therefore of the utmost importance.⁹⁵⁴ The Inter-American Court has even stated: "In international law, a customary norm establishes that a State which has ratified a human rights treaty must introduce the necessary modifications to its domestic law to ensure the proper compliance with the obligations it has assumed. This law is universally accepted, and is supported by jurisprudence."⁹⁵⁵

Though international law asserts its own primacy over national law, it tends not to invalidate domestic regulations but instead leaves the methods of implementation in domestic hands. Failure to conform laws in accordance with international treaties that a state has ratified is generally not considered to be a direct breach of international law but such a contravention arises when the state concerned fails to observe its obligations in a specific case.⁹⁵⁶ International or regional tribunals or courts will therefore not directly hold national laws invalid but may find that the laws or how the law is applied is inconsistent with international law.⁹⁵⁷ The Inter-American Court on Human Rights e.g. stated in Advisory Opinion No. 14 that it only discussed "the legal effects of the law under international law. It is not appropriate for the Court to rule on its domestic

⁹⁵⁴ Cassese, Antonio, *International Law*, Oxford University Press, (2005), p. 217.

⁹⁵⁵ *Case of "The Last Temptation of Christ" v. Chile*, Judgment of 5 February 2001, IACtHR, para. 87. *Case of the "Five Pensioners" v. Peru*, Judgment of 28 February 2003, IACtHR, para. 164.

⁹⁵⁶ Brownlie, Ian, *Principles of Public International Law*, Oxford University Press, (2008), p. 35, *Interpretation of the Statute of the Memel Territory*, ICJ, Ser. A/B, no. 49, Judgment of 11 August 1932, p. 336.

⁹⁵⁷ Evans, Malcolm, *International Law*, Oxford University Press, (2006), p. 425.

legal effect within the State concerned. That determination is within the exclusive jurisdiction of the national courts and should be decided in accordance with their laws”⁹⁵⁸ As will be observed, the European Court in cases concerning complaints on the formulation of domestic legislation has analysed breaches in relation to the facts in a specific case.⁹⁵⁹ Likewise, the ICJ has stated that municipal laws “[a]re merely facts which express the will and constitute the activities of States, in the same manner as do legal decisions or administrative measures”.⁹⁶⁰ The Court may, however, analyse whether or not the state, in applying such law has acted in conformity with its obligations.

However, the mere passing of legislation may also rise to the level of a breach of international law. Accordingly, if a treaty creates an obligation to incorporate certain rules in domestic law, failure to do so constitutes an infringement and gives rise to international responsibility.⁹⁶¹ Schwarzenberger notes: “[i]t is a matter for argument whether the mere existence of such legislation or only action under it constitutes the breach of an international obligation. Sufficient relevant *dicta* of the World Court exist to permit the conclusion that the mere existence of such legislation may constitute a sufficiently proximate threat of illegality to establish a claimant’s legal interest in proceedings for at least a declaratory judgment”.⁹⁶² The Commentary to the Articles, however, holds that no general rule can be laid down that is applicable to all cases. Rather, “[c]ertain obligations may be breached by the mere passage of incompatible legislation....In other circumstances, the enactment of legislation may not in and of itself amount to a breach, especially if it is open to the State concerned to give effect to the legislation in a way which would not violate the international obligation in question”.⁹⁶³ The nature of the obligation in question therefore determines whether or not a breach has occurred with regard to the state’s legislation.

⁹⁵⁸ Advisory opinion, *International Responsibility for the Promulgation and Enforcement of Laws in Violation of the Convention*, OC-14/94, Ser. A, No. 14, IACtHR, para. 34.

⁹⁵⁹ *M.C. v. Bulgaria* and *X and Y v. The Netherlands*, ECtHR.

⁹⁶⁰ *Certain German Interests in Polish Upper Silesia*, Ser. A. No. 7, ICJ Judgment of 25 May 1926, p. 19.

⁹⁶¹ Brownlie, Ian, *Principles of Public International Law*, Oxford University Press, (2008), p. 451.

⁹⁶² Schwarzenberger, Georg, *International Law*, 3rd ed, Stevens, (1957), p. 614.

⁹⁶³ Art. 12, commentary 12. Related to the issue of state responsibility, the application of the principle of good faith may be of relevance. It entails the evaluation of whether or not a state has acted in good faith when undertaking an action to fulfil an obligation. However, what is determinative is the *effect* of the state action rather than the intent or motivation by the state and it therefore constitutes an objective application.

An increasing number of treaties, in addition to specifying a general list of obligations, explicitly impose a duty to enact implementing legislation of the provisions for member states, for instance the UN Convention against Torture, the Genocide Convention, the 1949 Geneva Conventions as well as the Rome Statute.⁹⁶⁴ This is particularly the case concerning treaties on international criminal law, which frequently require the introduction of national criminal jurisdiction for the crimes and the adoption of specific regulations and definitions of the crimes. If the treaty creates such an obligation to incorporate a rule in domestic law, failure to do so thus leads to responsibility for breaching the treaty.⁹⁶⁵ Furthermore, norms reaching the level of *ius cogens* require states to adopt the necessary implementing legislation.⁹⁶⁶ A consequence is that the state concerned may be held accountable in such cases when it fails to enact such legislation even though it may not have engaged in the conduct prohibited by a relevant international rule. The purpose is to emphasise the need to prevent and punish violations at the national level and thereby forestall infractions of the prohibited conduct.

The ICTY in its *Furundzija* case e.g. acknowledged regarding state responsibility that the failure to pass the required implementing legislation only has a potential effect - the wrongful fact occurs only when administrative or judicial measures are taken.⁹⁶⁷ However, the Tribunal held that with regards to the prohibition of torture:

“States are obliged not only to prohibit and punish torture, but also to forestall its occurrence: it is insufficient to merely intervene after the infliction of torture...[I]nternational law intends to bar not only breaches but also potential breaches against the prohibition against torture...It follows that international rules prohibit not only

See Goodwin-Gill, Guy, *State Responsibility and the ‘Good Faith’ Obligation in International Law*, in *Issues of State Responsibility Before Judicial Institutions*, ed. Malgosia Fitzmaurice, Dan Sarooshi, The Clifford Chance Lectures, vol. VII, Hart Publishers, (2004), p. 95, Fitzmaurice, Sir Gerald, *The Law and Procedures of the International Court of Justice, 1951-54: General Principles and Sources of International law*, 35 *British Year Book of International law*, (1959), p. 209.

⁹⁶⁴ Articles 4 & 5 of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, UN Doc. A/39/51 (1985), Article 5 of the Convention on the Prevention and Punishment of the Crime of Genocide, adopted by Res. 260 (III) A of the U.N General Assembly on 9 December 1948, Article 49 of 1949 Geneva Convention I, Article 129 of 1949 Geneva Convention III and Article 146 of 1949 Geneva Convention IV, Article 88 of the Rome Statute.

⁹⁶⁵ Brownlie, Ian, *Principles of Public International Law*, (2008), p. 451.

⁹⁶⁶ Cassese, Antonio, *International Law*, p. 219.

⁹⁶⁷ *Prosecutor v. Furundzija*, Judgment of 10 December 1998, para. 149.

torture but also...(ii) the maintenance in force or passage of laws which are contrary to the prohibition.”⁹⁶⁸

“Normally, the maintenance or passage of national legislation inconsistent with international rules generates State responsibility and consequently gives rise to a corresponding claim for cessation and reparation...only when such legislation is concretely applied....By contrast, in the case of torture, the mere fact of keeping in force or passing legislation contrary to the international prohibition of torture generates international state responsibility.”⁹⁶⁹

Since rape may constitute e.g. torture, genocide or a war crime, the prevention of which require the adoption of domestic criminal laws, this obligation is highly relevant to the topic at hand. Furthermore, duties to enact criminal laws have also been implied in the duty to prevent violence in the human rights regime.

6.3.4 Forms of Attribution

The Draft Articles identify for which actors the state can be held responsible. Whereas the rules discuss when the acts of non-state actors can be *imputed* to the state, i.e. constitute acts of the state, international human rights law further identify violations of omissions to prevent acts of non-state actors. Both aspects, are, however, of relevance to the topic.

The State is primarily responsible for all persons acting within legislative, judicial or executive organs of the state.⁹⁷⁰ In the commentary to the issue of attribution of conduct to the state, it is clearly specified that “the conduct of private persons is not as such attributable to the State”.⁹⁷¹ James Crawford explains the focus on the state in the following manner:

“In theory, the conduct of all human beings, corporations or collectivities linked to the State by nationality, habitual residence or incorporation might be attributed to the State, whether or not they have any connection to the government. In international law, such an approach is avoided, both with a view to limiting responsibility to conduct which engages the State as an organization, and also so as to recognize the autonomy of persons acting

⁹⁶⁸ *Prosecutor v. Furundžija*, Judgment of 10 December 1998, para. 148.

⁹⁶⁹ *Ibid*, para. 150.

⁹⁷⁰ Article 4 of Draft Articles.

⁹⁷¹ Chapter II Attribution of Conduct to the State, Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries, para. 3.

on their own account and not at the instigation of a public authority...As a corollary, the conduct of private persons is not as such attributable to the State.”⁹⁷²

The state is certainly not responsible for all acts or omissions that occur on its territory, but rather for those conducted by its internal apparatus. However, behaviour by persons who do not hold official state authority may in certain situations also be attributed to the state.⁹⁷³ According to Article 11, actions by non-state actors can be attributed to the state by retroactive approval by the government, through adoption of the conduct as its own. On the other hand, a mere statement of support for the private act is not sufficient for its attribution.⁹⁷⁴ The nexus between the state and the acts of the non-state actors must be strong, since the conduct of the private actor constitutes “an act of a state”. Furthermore, according to Article 8 the non-state actors must be “acting on the instructions of, or under the direction or control of, that State in carrying out the conduct”.⁹⁷⁵

The ICJ in the *Tehran Hostages Case* discussed international state responsibility for acts of violence by private individuals, focusing on the level of the relationship between the groups and the state. The Court held Iran responsible for the occupation of the American embassy and the hostage-taking of staff, even though the acts were committed by private individuals.⁹⁷⁶ The case is important in delineating the difference between conduct attributed to the state

⁹⁷² Crawford, James, *The International Law Commission's Articles on State Responsibility: Introduction, Text and Commentaries*, p. 91.

⁹⁷³ In the earlier version of the Draft Articles, the comments contained the statement that a state can incur international responsibility based upon acts by private individuals when such acts “serve as a catalyst for the wrongfulness of the state’s conduct”. See The International Draft Articles Commission on State Responsibility, Shabtai Rosenne ed, (1991), Art. 11, comment 4.

⁹⁷⁴ Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries, 2001, p. 53 (Art. 11, comment 6).

⁹⁷⁵ Other grounds for attribution to the state can be found in Article 10, which specifies conduct by revolutionary movements, and Article 9, which establishes attribution if the non-state actor is in fact exercising elements of governmental authority in the absence of the official authority. This specific form of attribution was raised in the *Nicaragua case* of the ICJ, where the Court established a high threshold of evidence of state involvement. The case concerned the participation of the United States in the military operations by the Contras in Nicaragua. The Court concluded that even if the US government had financed, organised and trained the Contras, this in itself was not sufficient to establish responsibility. For this, it was required that the authorities had such effective control of the paramilitary as instructing the Contras to commit particular tasks on behalf of the US government. *Case Concerning Military and Paramilitary Activities in and Against Nicaragua*, ICJ, 27 June 1986.

⁹⁷⁶ *Tehran Hostages Case*, ICJ Report, 1980.

through the rules on state responsibility and state obligations. Both issues were considered in several stages. The first question concerned attribution; whether the alleged incitement by Iranian officials taken together with their subsequent failure to protect the embassy was sufficient to attribute the action to Iran. The Court found that the basis was insufficient. The second point pertained to the issue of Iran's state obligations under the Vienna Convention on Diplomatic and Consular Relations – that is, primary rules. As such, the Court evaluated whether or not the state had met its positive obligations and taken sufficient steps to protect the embassy. It was therefore not a matter of attributing the acts of the hostage-takers to Iran, but that the omission on the part of the Iranian authorities constituted a failure in itself. The final question the Court considered was whether or not the praise given the militants by the Iranian authorities subsequent to the hostage manoeuvre as such was sufficient to establish an attribution of the continued occupation of the embassy. The fact that Ayatollah Khomeini had publicly approved the acts as state policy with other branches of authority conforming with those statements, was considered to be ample evidence of attribution. The Court affirmed that conduct by a private actor may also be attributable to the state if he is *de facto* acting on behalf of the state. The militants had therefore become agents of the state.⁹⁷⁷ Evident in the case was the separation of the issue of attribution to the state of the conduct of non-state actors, and positive obligations to take certain steps in relation to non-state actors according to various primary rules.

Crawford acknowledges that the different rules of attribution have a cumulative effect and that a state may be responsible for the effects of the conduct of private parties if it failed to take necessary measures to prevent those effects.⁹⁷⁸ The Commentary mentions the example of a state, though not being responsible for private individuals seizing an embassy, would be responsible if it failed to take all necessary steps to protect that embassy from forceful possession.⁹⁷⁹ This means that though the Articles do not establish a substantive due diligence standard, they touch upon the issue in situations where the state can be held responsible for the failure to act in response to acts by private individuals. The law on state responsibility thereby sets a foundation for the

⁹⁷⁷ *Tehran Hostages Case*, para. 58.

⁹⁷⁸ Crawford further quotes a case concerning injuries to aliens which spells out a limited form of state responsibility: "The responsibility of a State is only involved by the commission in its territory of a political crime against the persons of foreigners if the State has neglected to take all reasonable measures for the prevention of the crime and the pursuit, arrest and bringing to justice of the criminal." League of Nations, *Official Journal*, 5th Year, No. 4, (April 1924), p. 524.

⁹⁷⁹ Crawford, James, *The International Law Commission's Articles on State Responsibility: Introduction, Text and Commentaries*, p. 92.

existence of a due diligence principle, as developed primarily through the law of aliens. However, as Bodansky and Crook assert, the rules of attribution of acts of non-state actors in the Draft Articles on State Responsibility represent only the tip of the iceberg as regards when private acts can create state responsibility. More extensive responsibility to prevent certain types of private conduct can arise as a result of primary rules.⁹⁸⁰

As indicated, the issue of attribution tends to fuse with the obligations of the primary rules in cases of omissions on the state's part in human rights law. Attribution based upon omissions is in particular conceptually difficult to grasp with regard to human rights law, since positive obligations tend to dwell on the state's omissions in relation to acts by non-state actors.⁹⁸¹ Like a circular argument, the rules entail that in order for an omission to form the basis of responsibility, a duty to act must exist. The scope of that duty will be informed by the content of the primary rule. As for human rights law, the two aspects are evaluated in the following manner: where conduct contravenes human rights law and that violation is attributable to the state, e.g. by being conducted by a state official or a non-state actor in acquiescence with the state, the state has breached an obligation and responsibility ensues. However, when such conduct is not attributable, for example, because of being perpetrated by a non-state actor, the question of whether the state has still violated a human rights obligation turns on the question of the state's response to such transgressive conduct, i.e. an evaluation of due diligence. As John Cerone argues, however, the line drawn between complicity sufficient for attribution and a failure to exercise due diligence "...is highly fact-sensitive, and...these two modes of responsibility often blur into each other".⁹⁸²

6.3.5 Widening the Scope of Responsibility under International Law

The unease with which the rules have been viewed in the human rights context primarily concerns the limited role of non-state actors in the Articles, both as recipients of rights and the level to which states can be held responsible for their actions. The Draft Articles on State Responsibility have been criticised for the

⁹⁸⁰ Bodansky, Daniel & Crook, John, *Symposium: The ILC's State Responsibility Articles, Introduction and Overview*, p. 783.

⁹⁸¹ Cerone, John, *Human Dignity in the Line of Fire: the Application of International Human Rights Law During Armed Conflict, Occupation, and Peace Operations*, 39 Vand. J. Transnat'l L. 1447, (2006), p. 1464.

⁹⁸² Ibid, p. 1468.

narrow focus on states, since it does not reflect today's international system.⁹⁸³ Several authors assert that the ILC Draft Articles are inappropriate for analysing the practice of human rights bodies because human rights serve a distinct purpose.⁹⁸⁴ The law on state responsibility is deemed to be inapplicable and insufficient in that human rights treaties do not operate at an interstate level and the public/private dichotomy in that respect is arbitrary and unreasonable.⁹⁸⁵ The language of state responsibility as declared by the ILC is decidedly different in effect from the state duties promulgated by international human rights courts. For example, state responsibility for an internationally wrongful act may entitle another state to take countermeasures, whereas such possibilities do not exist in the human rights system.⁹⁸⁶ However, the principles of state responsibility have informed the notion of due diligence obligations in human rights law through its rules of attribution and can be used to evaluate state obligations.⁹⁸⁷ The Articles are relevant in that they provide the basis for, not only state responsibility for direct action, but also omissions, i.e. positive and negative forms of responsibility, the latter frequently referred to in the discussions on violence against women.

As a general objection to the state-centrist regime of international law, international human rights law concerns itself with the protection of the person from various forms of violations of human dignity and the distinction between

⁹⁸³ Matthew Craven e.g. argues that the Draft Articles are of limited importance for the human rights treaty regime. Craven, Matthew, *For the 'Common Good': Rights and Interests in the Law of State Responsibility*, p. 107. Andrew Clapham e.g. finds the rules inappropriate. Clapham, Andrew, *The Drittwirkung of the Convention*, in *The European System for the Protection of Human Rights*, p. 170. Edith Brown Weiss maintains that the Draft Articles could have included an article confirming that individuals and non-state entities are entitled to invoke the responsibility of a state if the obligation breached is owed them, through an international agreement or other primary rules of international law. Brown Weiss, Edith, *Invoking State Responsibility in the 21st Century*, 96 Am.J. Intl.L. 798, p. 816. Christine Chinkin also points out that in the same manner that substantive principles of responsibility stem from primary rules relating to the treatment of aliens in the early days of international law, so should principles of responsibility in international law derive substance from human rights. According to Chinkin, this would place the human rights regime more directly within the framework of international law and resist an unfortunate trend of autonomous development. Chinkin, Christine, *A Critique of the Public/Private Dimension*, p. 395.

⁹⁸⁴ Evans, Malcolm, *State Responsibility and the European Convention on Human Rights: Role and Realm*, p. 144.

⁹⁸⁵ Clapham, Andrew, *The Drittwirkung of the Convention*, p. 171.

⁹⁸⁶ Draft Articles on State Responsibility, p. 31.

⁹⁸⁷ Romany, Celina, *State Responsibility Goes Private: A Feminist Critique of the Public/Private Distinction*, p. 99.

private and public acts has increasingly been deemed as haphazard. Though the state remains the guarantor and protector of human rights and the main subject, its obligation to control acts in the private sphere is growing. This is specifically the case with regard to violence against women, since such violence frequently occurs in the private sphere, though such acts certainly may also be state-sponsored, e.g. during detention. This means that conduct between private individuals, typically found in cases of rape and other forms of violence towards women, does not generally fall under the general principles of state responsibility in international law, unless executed as a state-approved strategy. Instead such standards can be drawn from substantive primary rules as found in human rights treaties and jurisprudence. James Crawford further notes: “if international law is not responsive enough to problems in the private sector, the answer lies in the further development of the primary rules...or in exploring what may have been neglected aspects of existing obligations”.⁹⁸⁸ The law of state responsibility must therefore always be borne mind, but it is also necessary to enlarge the scope of obligations in this particular field of international law, in order to achieve the specific objectives of the human rights regime.

With the birth and strengthening of the international human rights system, a new age has been entered where the balance of power has shifted. The central point is now on the rights of the individual person and the state’s duty to perform as the protector and guarantor of such rights, which explains the development of the due diligence standard. An enlarged interest in both the duties of non-state actors, such as transnational corporations, terrorists and private individuals, as well as the obligations of states for the acts of such non-state actors, has steadily evolved.⁹⁸⁹ There is now general agreement that the justification for distinguishing between private and public abuse, which can constitute the same form of violation, is not legitimate and at times inconsistent. Andrew Clapham points out that in practice it is impossible to distinguish the private and public spheres in this age, and making such distinctions results in “[a] lacuna in the protection of human rights, and can in themselves be particularly dangerous ...dangerous because it could leave victims unprotected and dangerous because it reinforces a deceptive separation of the public and private spheres”.⁹⁹⁰ The hazard of course lies in the use of the public/private distinction as a device for

⁹⁸⁸ Crawford, James, *Revising the Draft Articles on State Responsibility*, 10 EJIL 2, (1999), p. 440.

⁹⁸⁹ See e.g. the Fundamental Standards of Humanity, Norms on the Responsibilities of Transnational Corporations and other Business Enterprises with Regard to Human Rights, UN Doc. E/CN.4/Sub.2/2003/12/Rev.2, 26 August 2003, discussed below and Clapham, Andrew, *Human Rights in the Private Sphere*.

⁹⁹⁰ Clapham, Andrew, *Human Rights in the Private Sphere*, pp. 94 & 124.

the state to deny responsibility for violations committed by private actors, for e.g. refusing to intervene in such matters as domestic violence, honour killings and marital rape.

As early as the 1980s, before the proliferation of the feminist critique of international law, Peter Cane summarised the discussion of the public/private distinction in the following manner: “scholars...stress the similarities between governmental and private activity and play down the public-private distinction; what matters for questions of legal liability is the nature of the activity not the identity of the person or body conducting it: and since activities are not by their nature either public or private, the distinction is irrelevant to the regulation and control of human activity”.⁹⁹¹ The private/public distinction is often criticised because there is no reliable or constant basis for the distinction.⁹⁹² It could be said that the line between the two spheres is constantly shifting, depending on political preferences with respect to levels of governmental intrusion. In fact, Christine Chinkin argues that since there is no objective basis on which to assign an actor to the category of ‘private’, the domestic courts hide behind this divide to avoid ruling on politically and culturally sensitive matters.⁹⁹³

It is generally recognised that international law is gradually moving away from a state-centric stance towards a moral, human rights approach.⁹⁹⁴ This trend was explicitly observed by the ICTY in the *Tadic* case.⁹⁹⁵ The duties on states have grown through the development of the due diligence regime and extensive obligations on creating a functioning legal system. It has also increased the obligations of the individual. Both developments are examples of an enhanced “human-being oriented” approach. Attempts to place direct duties upon individuals through the human rights framework have also been initiated. The Declaration on Human Social Responsibilities, which would identify duties owed by individuals to society, is such an example.⁹⁹⁶

⁹⁹¹Cane, Peter, *Public Law and Private Law: A Study of the Analysis and Use of a Legal Concept*, in Oxford Essays on Jurisprudence, Eekelaar and J. Bell (eds), Oxford University Press, (1987), p. 61.

⁹⁹²Chinkin, Christine, *A Critique of the Public/Private Dimension*, p. 389.

⁹⁹³ *Ibid*, p. 389.

⁹⁹⁴ Hammer, Leonard, *A Foucauldian Approach to International Law: Descriptive Thoughts for Normative Issues*, Ashgate, (2007), p. 115.

⁹⁹⁵ *Prosecutor v. Dusko Tadic aka "Dule"* (Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction), Case No. IT-94-1, 2 October 1995, para. 97.

⁹⁹⁶ Certain critics have raised the idea of a revolution in the traditional state-centred realm of human rights law to allow a horizontal application between non-state actors, thus turning all individuals into duty holders. Arguably, the individual deserves international protection from human rights violations regardless of the source, particularly bearing in mind the wealth of power now enjoyed by certain non-state actors. See e.g. Hessbruegge,

What reasons lie behind the shift in international law to a less state-centred approach? Andrew Clapham identifies three trends as underlying causes. First of all, society now has new centres of powers such as businesses, NGOs, political parties and trade unions. This means that "...the individual perceives authority, repression and alienation in a variety of new bodies", where in the past they were

Jan Arno, *The Historical Development of the Doctrines of Attribution and Due Diligence* in International Law, p. 26, Nowak, Manfred, *New Challenges to the International Law of Human Rights*, Nordic Journal of Human Rights, 01/2003, p. 2, Clapham, Andrew, *Human Rights in the Private Sphere*, p. 137, Buergenthal, Thomas, *The Normative and Institutional Evolution of International Human Rights*, Human Rights Quarterly, vol. 19, No. 4, Nov. 1997, p. 719, UN Doc. E/CN.4/2006/61, 20 January 2006, para. 74, Terrorism and Human Rights, Working Paper Submitted by Ms. Kalliopi K. Koufa in Accordance with Sub-Commission Resolution 1996/20, UN Doc. E/CN.4/Sub.2/1997/28, 26 June 1997, para. 16, Fundamental Standards of Humanity, Report of the Secretary-General Submitted Pursuant to Commission Resolution 1998/29, UN Doc. E/CN.4/1999/92, 18 December 1998, Knox, John, *Horizontal Human Rights Law*, 102 Am. J. Int'l L. 1, Jan. (2008), p. 3. Certain treaties mention duties of individuals: UDHR in Article 29, the 1948 American Declaration of the Rights and Duties of Man, the African Charter on Human and Peoples' Rights (Articles 27-29) and the African Charter on the Rights and Welfare of the Child (Articles 20 and 31). The question of whether or not such regulations create binding obligations is uncertain and has yet to be determined by a human rights court. States are exclusive parties to international documents on human rights and are therefore the only ones accountable for violations.

Initiatives to establish direct obligations for non-state actors are growing, but as of yet they are limited and, for instance, include the Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights. The Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights, UN E/CN.4/Sub.2/2003/12/Rev.2, 26 August, 2003 and The Montreux Document, UN Doc. A/63/467-S/2008/636, 6 October 2008 (regarding private military and security companies).

A trend towards considering non-state actors to be bound by international human rights law appears evident, particularly in situations of armed conflict and by insurgent and paramilitary groups. See e.g. SC Res. 1019 on Violations of International Humanitarian Law in the Former Yugoslavia, UN Doc. S/RES/1019, 9 November 1995, SC Res. 1034 on Violations of International Humanitarian Law in the Former Yugoslavia, UN Doc. S/RES/1034, 21 December, 1995, SC Res. 1464 on the Situation in Côte d'Ivoire, UN Doc. S/RES/1464, 4 February 2003, SC Res. 1468 on the Situation Concerning the Democratic Republic of the Congo, UN Doc. S/RES/1468, 20 March 2003. See also the views of the UN Secretary-General: UN Doc. E/CN.4/1998/87, para. 62. It is apparent that the majority of proponents to extend the culpability of non-state actors in limited circumstances, aside from the international criminal law regime, intend for the extension to be exclusive to such non-state actors as multinational corporations or armed rebel groups and factions, that in a sense shoulder the role of the state in an increased number of situations.

characteristics of the state.⁹⁹⁷ Secondly, the philosophical foundation of the division has changed. Whereas the definition of the private sphere was once centred on the household and family life, with women and children fundamentally inferior, the gender balance in politics has greatly advanced with women gaining more political power. Thirdly, a factor which is closely connected to the first point, supranational organisations have gained immense power, coupled with the ability of abusing it vis-à-vis the individual.⁹⁹⁸ However, this change in international law is generally welcomed by human rights scholars. Meron argues that for human rights law to ever gain significant effectiveness, it is important not to place violations by private actors outside the scope of the field. This is simply because the basis of human rights law is to protect human dignity and since essential human rights are frequently breached by private individuals, a certain extension of responsibility is necessary.⁹⁹⁹ However, certain scholars have warned that this can cause a diminution of public international law with consequent loss of its effectiveness.¹⁰⁰⁰ The following section will examine the importance of this development to widen the scope of responsibility for non-state actors in the field of women's international human rights.

6.3.6 Consequences of the Public/Private Divide for Women's Human Rights

Women's human rights, and violations particularly aimed at women, were until the last decade largely excluded from international law. This was mainly the

⁹⁹⁷ Clapham, Andrew, *Human Rights in the Private Sphere*, p. 137. Manfred Nowak also argues that the decreased role of the state in international law is a result of an increased privatisation, which has eroded the governmental power by taking over traditionally governmental functions. The traditional nation-state model is also giving way to other global actors such as transnational corporations or global networks of organised crimes. More abuses also take place in the context of internal armed conflicts, by civil groups such as armed rebels. Nowak, Manfred, *New Challenges to the International Law of Human Rights*, Nordic Journal of Human Rights, 01/2003, p. 2.

⁹⁹⁸ Clapham, Andrew, *Human Rights in the Private Sphere*, p. 137. See also Bourke-Martignoni, Joanna, *The History and Development of the Due Diligence Standard in International Law and Its Role in the Protection of Women against Violence*, in *Due Diligence and its Application to Protect Women from Violence*, ed. Carin Benninger-Budel, Martinus Nijhoff, (2008), p. 58, who argues that non-state actors such as "international organizations, the private sector and armed groups increasingly exercise control over territory and financial markets to an extent that often outstrips the power of states".

⁹⁹⁹ Meron, Theodor, *Human Rights and Humanitarian Norms as Customary Law*, p. 162.

¹⁰⁰⁰ Copelon, Rhonda, *International Human Rights Dimensions of Intimate Violence: Another Strand in the Dialectic of Feminist Lawmaking*, p. 867.

result of the state-oriented nature of public international law, creating a so-called public/private dichotomy. This distinction has been strongly criticised by feminist scholars who claim that, historically, men have dominated the public sphere in politics in most societies, and that violations against women are not acknowledged by international law as most forms of violence occur in the private sphere.¹⁰⁰¹ Rape during conflict has e.g. been viewed as private, local deviations rather than an international security issue.¹⁰⁰² Excluding violence against women from the international human rights agenda is thus a consequence of the failure to see the acts as political.

The public sphere has been considered to constitute business, economics, politics and law as opposed to the private sphere of the home, family and sexuality.¹⁰⁰³ Though the distinction appears to operate on a neutral basis, such scholars contend that the effect is gendered.¹⁰⁰⁴ The relevance of the public/private dichotomy has therefore chiefly surfaced with regard to women's rights and has been a central theme of much feminist writing.¹⁰⁰⁵ According to

¹⁰⁰¹ Charlesworth, Hilary & Chinkin, Christine, *The Boundaries of International Law: A Feminist Analysis*, p. 308, Benninger-Budel, Carin, *Due Diligence and its Application to Protect Women from Violence*, p. 11, Askin, Kelly, *Women and International Human Rights Law*, Cook, Rebecca, *Accountability in International Law for Violations of Women's Rights by Non-State Actors*, Romany, Celina, *State Responsibility Goes Private: A Feminist Critique of the Public/Private Distinction in International Human Rights Law*, in *Human Rights of Women*, ed. Rebecca Cook, University of Pennsylvania Press, (1994), Copelon, Rhonda, *Gender Violence as Torture: The Contribution of CAT General Comment No. 2*, 11 N.Y. City L. Rev. 229, (2007-2008), p. 234. The determination of what counts as public/private acts are deemed to be the result of a "conscious process of decision making". See Munro, Vanessa, *Dev'l in Disguise? Harm, Privacy and the Sexual Offences Act 2003*, p. 11.

¹⁰⁰² "Rape must never be minimized as part of cultural traditions, UN envoy [Margot Wallström] says", UN News, 25 March 2010.

¹⁰⁰³ Steiner, Henry, Alston, Philip, Goodman, Ryan, *International Human Rights in Context, Law, Politics, Morals*, p. 213, Charlesworth, Hilary, *What are "Women's International Human Rights?"*, in *International Human Rights Law*, in *Human Rights of Women*, ed. Rebecca Cook, University of Pennsylvania Press (1994), p. 68. Charlesworth equates the public sphere with "rationality, order and political authority" where political and legal activity take place, and the private sphere as the domestic and family life.

¹⁰⁰⁴ Charlesworth, Hilary, *What are "Women's International Human Rights?"*, p. 69. Violations of the rights of women in the private sphere that go unregulated by the state are considered to be part of the full subjugation of women in general. Cook, Rebecca, *Accountability in International Law for Violations of Women's Rights by Non-State Actors*, p. 94.

¹⁰⁰⁵ Ertürk, Yakin, *The Due Diligence Standard: What Does it Entail for Women's Rights?*, in *Due Diligence and its Application to Protect Women from Violence*, ed. Carin Benninger-Budel, Martinus Nijhoff, (2008), p. 32.

authors such as Hilary Charlesworth and Christine Chinkin, international human rights law has been formulated with the needs of men in mind.¹⁰⁰⁶ In their critical analysis they point to the very structure of the development of international law, where women have traditionally been excluded from positions of authority. This has arguably led to a development of a highly gender-biased international law where women's rights tend to be viewed as a special category rather than perceived as international human rights in general.¹⁰⁰⁷ Catherine MacKinnon asserts that "[w]hat is done to women is either too specific to be seen as human or too generic to human beings to be seen as specific to women. Atrocities committed against women are either too human to fit the notion of female or too female to fit the notion of human."¹⁰⁰⁸ By failing to address such matters as gender discrimination in the private sphere, international law merely provides a partial solution to a general problem of subordination.

In not including such protections in the body of international law, the international community has in effect proclaimed that those violations of rights that are of concern to women are not of international significance. A *structural* subordination has been the consequence. This has resulted in a moral distinction between human rights violations committed in and outside the home. Issues on sexual violence against women have been particularly sensitive because they are intrinsically bound to notions of culture and equality between the sexes. An example that clearly demonstrates the unequal effect of the private/public distinction is the prohibition on torture. In the UN Convention against Torture, torture is defined in terms of behaviour sponsored or condoned by the state. Though women certainly experience torture at the hands of public officials, the most common forms take place within the confines of the home, e.g. through domestic violence or marital rape, acts which may reach the severity level of torture. Identifying transgression both by organs of the state and non-state actors for which the state can be held responsible are therefore complementary objectives in the struggle for gender equality.

¹⁰⁰⁶ Charlesworth, Chinkin, Wright, *Feminist Approaches to International Law*, p. 613. They further write: "International jurisprudence assumes that international law norms directed at individuals within states are universally applicable and neutral. It is not recognised, however, that such principles may impinge differently on men and women; consequently, women's experiences of the operation of these laws tend to be silenced or discounted. See p. 621. See, also, Romany, Celina, *State Responsibility Goes Private: A Feminist Critique of the Public/Private Distinction*, p. 99.

¹⁰⁰⁷ According to Yakin Ertürk, since the private sphere has been out of bounds for state intervention, the privacy of the home has provided the ground for abuse of rights in such contexts. See Ertürk, Yakin, *The Due Diligence Standard: What Does it Entail for Women's Rights?* p. 32.

¹⁰⁰⁸ MacKinnon, Catherine, *Rape, Genocide and Women's Human Rights*, p. 184.

The fact that international human rights law until recently failed to reflect the specific needs of women have led to a feminist critique of rules on state responsibility in international law.¹⁰⁰⁹ However, the 1990s saw a rapid transformation of international law, the main characteristic being the decline of national sovereignty and the erosion of the reliance on domestic justice systems. Not only has the enforcement system expanded through the promulgation of international criminal law where private individuals can be held accountable for particularly severe infringements of international human rights and humanitarian law, but customary and treaty-based rules, including areas of women's rights, have also developed at an impressive pace.¹⁰¹⁰

Is the notion that women are relegated to the private sphere and thereby excluded by international law then still valid? Focusing on a "women's sphere", relegated to the private world of family and domestic duties, can be construed as being over-simplistic and even condescending. It portrays women as the weaker gender, permanently etched in the traditional role of home-maker. Though women in most parts of the world do not enjoy similar prospects to men of working and engaging in the public arena, and may still not occupy the most central political positions, they are nevertheless becoming more involved in causes traditionally considered to belong to the public domain. As Doris Buss reminds us, relegating violence against women solely to the private sphere is not as pertinent as it once was, though such violence in most cases still occurs privately. However, with the advent of the women's liberation movement and their increased political strength, women are now more often subjected to violations in the public sphere, either as political activists or on grounds such as ethnic affiliation or sexual orientation.¹⁰¹¹ As will be discussed further below, the development of the due diligence regime entails that many acts of private violence will now receive international attention, though by way of state obligations.

¹⁰⁰⁹ Rebecca Cook has e.g. recognised several ways where states contest responsibility for violations, particularly of women's rights. These include denying that international obligations are binding or that the practice constitutes a human rights violation at all, which is particularly pertinent when the behaviour constitutes a cultural tradition. Further, states invoke their legal sovereignty to condemn violations of women's human rights within their borders. This was mainly a problem before the recognition of women's rights as a part of the international human rights framework, when states could hide behind the veil of cultural relativism and marginalisation of women's rights, as well as the general concept of state sovereignty. Cook, Rebecca, *State Responsibility for Violations of Women's Rights*, p. 128.

¹⁰¹⁰ Charlesworth, Hilary & Chinkin, Christine, *The Boundaries of International Law: A Feminist Analysis*, p. 308.

¹⁰¹¹ Buss, Doris Elisabeth, *Going Global: Feminist Theory, International Law, and the Public/Private Divide*, p. 371.

That international law is more accommodating in holding states accountable for the actions of non-state actors is a fact sometimes ignored or minimised in importance in feminist literature. This might be because certain scholars desire to keep the discussion on the public/private distinction alive, and prevent the gender critique of international law to abate. Martti Koskenniemi argues that “their relative lack of interest in standard international law is perhaps a reflection of their frustration with what appears to them to be shallow theory and chauvinist practice”.¹⁰¹² Though the feminist critique of international law has been useful in propelling women’s human rights to a more prominent place, it must acknowledge the significant advances that have been made on international responsibility for violence against women. More recent documents relating to women’s human rights particularly encourage the removal of the public/private dichotomy. For example, the Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women (Convention of Belem do Para) states that “every woman has the right to be free from violence in both the public and private spheres”.¹⁰¹³ Similarly, the Protocol on the Rights of Women in Africa prohibits the “arbitrary restrictions on or deprivation of fundamental freedoms in private or public life”.¹⁰¹⁴ Other treaty bodies have interpreted state obligations pertaining to both spheres as implied in human rights treaties. Naturally, however, lacunas still exist concerning the protection of particularly women’s rights, which will be examined in this thesis.

6.4 The Due Diligence Standard - An Obligation to Prevent and Punish Human Rights Violations

The doctrine of due diligence has revolutionised the conventional view on international human rights law and issues of state obligations. The concept is originally an element of the theory of state responsibility in international law, but has been interpreted particularly through the human rights framework. Though human rights scholars generally attribute the due diligence standard to the early jurisprudence of the Inter-American Court of Human Rights, reference to it can be found as early as the 17th century in the writings of Hugo Grotius and

¹⁰¹² Koskenniemi, Martti, *Book Review: Reconceiving Reality: Women and International Law*, 89 Am. J. Int’l L. 227, (1995), p. 230.

¹⁰¹³ Article 1. See also the UN Declaration on the Elimination of Violence against Women.

¹⁰¹⁴ Article 1, Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa.

Pufendorf.¹⁰¹⁵ The doctrine was applied in several international arbitration cases in the 19th century in regulating the obligations of states to protect aliens from violence by private individuals.¹⁰¹⁶ The due diligence standard in its current form represents a fairly new development within the concept of state obligations, enlarging the scope under which acts a state can be held responsible. It has been central to the advancement of the responsibility of states for the acts of non-state actors.¹⁰¹⁷ This expansion of state obligations is a natural development alongside the shifting relationship between state machinery and citizen.¹⁰¹⁸

The concept of due diligence is often referred to in general terms and the specific content of the standard has only recently been clarified in case law with respect to substantive rights. It entails obligations on states to *prevent* acts of violence from occurring, whether committed by state- or private actors, as well as to *punish* perpetrators and *compensate* victims.¹⁰¹⁹ Whereas the general approach by states to the due diligence principle has primarily concerned responding to violence when it has occurred, a larger focus has now been given

¹⁰¹⁵ Hessbruegge, Jan Arno, *The Historical Development of the Doctrines of Attribution and Due Diligence in International Law*, p. 283, UN Doc. E/CN.4/2006/61, para. 19 & Bourke-Martignoni, Joanna, *The History and Development of the Due Diligence Standard in International Law and Its Role in the Protection of Women against Violence*, p. 48.

¹⁰¹⁶ UN Doc. E/CN.4/2006/61, para. 19. See e.g. *The Alabama Claims* (1871), published for the National Union of Conservative and Constitutional Assoc., The Central Press Company.

¹⁰¹⁷ Bourke-Martignoni, Joanna, *The History and Development of the Due Diligence Standard in International Law and Its Role in the Protection of Women against Violence*, p. 52.

¹⁰¹⁸ Discussing the history of the due diligence standard, Hessbruegge points out that the doctrines on state responsibility naturally must evolve according to the form of governance and relationship between the authority and private individuals. Accordingly: “the ancient and medieval collective was replaced by the absolute ruler, which then had to give way to the modern constitutional state. The law of state responsibility always adapted more or less swiftly to each momentous change in the nature of the state and its relations with its members”. See Hessbruegge, Jan Arno, *The Historical Development of the Doctrines of Attribution and Due Diligence in International Law*, p. 302.

¹⁰¹⁹ Declaration on the Elimination of Violence against Women, Art. 4 (c). Summarising the interpretation of the due diligence regime in jurisprudence, the UN OHCHR has defined the general duty to ensure effective protection of human rights as the following: 1) the duty to *prevent* human rights violations, 2) the duty to provide *domestic remedies*, 3) the duty to *investigate* alleged human rights violations, 4) to *prosecute* those suspected of having committed them and 5) to *punish* these individuals, as well as 6) providing *compensation* to victims. Roughly, the various levels of the due diligence requirements can thus be divided into measures to be taken by the state in order to *prevent* abuse and those that efficiently *respond* to the violation after the fact, through punishment and remedies. See Human Rights in the Administration of Justice: A Manual on Human Rights for Judges, Prosecutors and Lawyers, Office of the High Commissioner for Human Rights in Cooperation with the International Bar Association, 2003, p. 773.

to preventative actions.¹⁰²⁰ The state must take such reasonable measures of prevention that a well-administered government could be expected to exercise under similar circumstances.¹⁰²¹ The due diligence regime is thus focused on the *measures* and *means* taken rather than the result that must be reached.¹⁰²² The existence of a particular violation does therefore not automatically entail that the state has failed in its obligations, if it has taken sufficient measures to e.g. prevent the act. States may as a consequence be held accountable for failure to act in cases where the actual violence stems from private individuals, since passivity on the part of the state can amount to acquiescence. As viewed in relation to the ILC articles on state responsibility, both acts and omissions by the state can lead to a finding of a breach in human rights law.

The notions of positive obligations and due diligence at times overlap. The previously held view in international human rights was that rights and freedoms could be divided into positive and negative rights, e.g. finding that it was sufficient for the state to refrain from engaging in torture to meet its obligations. It is now understood that virtually all rights and freedoms require affirmative action on the part of the state, no less through the due diligence standard.¹⁰²³ This has principally evolved through the interpretation of obligations by regional human rights courts and UN treaty bodies. The language of positive obligations as used, e.g. by the regional human rights courts, has deliberately been employed to broaden the scope of obligations.¹⁰²⁴ Positive obligations is a broader concept than due diligence in human rights, and entails a general duty on the part of

¹⁰²⁰ Ertürk, Yakin, *The Due Diligence Standard: What Does it Entail for Women's Rights?*, p. 37. According to Ertürk, this is due the "narrow welfare/humanitarian approach" to violence against women, treating women as vulnerable victims, failing to recognise the underlying factors that systematically reproduce such violence. See p. 45.

¹⁰²¹ Shelton, Dinah, *State Responsibility for Covert and Indirect Forms of Violence*, in *Human Rights in the Twenty-First Century: A Global Challenge*, eds. Katherine Mahoney and Paul Mahoney, (1993), p. 272, UN Doc. E/CN.4/2006/61, which describes it in terms of prevention, protection, punishment and reparation.

¹⁰²² Holtmaat, Rikki, *Preventing Violence against Women: The Due Diligence Standard with Respect to the Obligation to Banish Gender Stereotypes on the Grounds of Article 5 (a) of the CEDAW Convention*, p. 88.

¹⁰²³ Brems, Eva, *Human Rights: Universality and Diversity*, Martinus Nijhoff, (2001), p. 446. Traditionally, civil and political rights were considered to imply negative obligations, as opposed to positive obligations for economic, social and cultural rights.

¹⁰²⁴ Evans, Malcolm, *State Responsibility and the European Convention on Human Rights: Role and Realm*, p. 140, Akandji-Kombe, Jean-Francois, *Positive Obligations Under the European Convention on Human Rights, A Guide to the Implementation of the European Convention on Human Rights*, Human Rights Handbooks, No. 7, Council of Europe, January 2007, p. 8.

states to undertake affirmative efforts.¹⁰²⁵ The due diligence regime is, however, for the most part connected to the notion of positive obligations in that it requires positive action in the form of e.g. education of personnel in the justice system and the performance of adequate investigations to achieve prevention of violations. It does, nevertheless, also entail a negative duty e.g. in not obstructing investigations of violations.

The matter is complicated by the fact that the regional human rights systems do not use the same concepts or language. The Inter-American Court and Commission use the term 'due diligence', referencing the well-established concept in public international law. This is, however, not employed by the European Court of Human Rights, which solely discusses positive or negative obligations of rights, albeit the due diligence logic underlies their decisions.¹⁰²⁶ Since the issue of criminalisation of certain acts primarily relates to prevention and protection as positive obligations, the focus will thus remain on due diligence in the form of such obligations by states.

The principle of due diligence has been generally accepted as a measurement of state responsibility for the acts of private individuals in the field of human rights law, confirmed by regional human rights courts and UN treaty bodies and UN special rapporteurs.¹⁰²⁷ It has been particularly important in order to establish state obligations for violence against women, for which the state can be held responsible if it systematically fails to protect women against violence from private actors.¹⁰²⁸ In such cases, the state functions as an accomplice to the human rights violation.¹⁰²⁹ Yakin Ertürk concludes that, based upon the practice and *opinio iuris* drawn from international human rights courts and committees, the obligation for states to prevent and punish acts of violence against women has reached the level of customary international law.¹⁰³⁰ States are therefore

¹⁰²⁵ Mowbray, Alastair, *The Development of Positive Obligations under the European Convention on Human Rights by the European Court of Human Rights*, Hart Publishing, (2004), p. 2.

¹⁰²⁶ Hofstötter, Bernhard, *European Court of Human Rights: Positive Obligations in E. and others v. United Kingdom*, p. 531.

¹⁰²⁷ UN Doc. E/CN.4//1995/42, 22 November 1994, para. 103. See the following chapter.

¹⁰²⁸ See Convention on the Elimination of All Forms of Discrimination against Women, Declaration on the Elimination of Violence against Women, the Beijing Declaration, UN Doc. E/CN.4/1995/42, Resolution adopted by the General Assembly, Crimes Prevention and Criminal Justice Measures to Eliminate Violence against Women, UN Doc. A/RES/52/86, 2 February 1998.

¹⁰²⁹ Romany, Celina, *State Responsibility Goes Private: A Feminist Critique of the Public/Private Distinction*, p. 99.

¹⁰³⁰ UN Doc. E/CN.4/2006/61, para. 29.

obliged, not just under treaty regimes, but through custom to ensure and protect the various rights and freedoms of the individual.

Due diligence obligations are sometimes considered to be “indirect state responsibility[ies]”, implying that non-state actors are held responsible by way of the state.¹⁰³¹ However, the state remains the main subject of the doctrine. It is the state’s behaviour that ultimately is seen as a violation of international obligations. The doctrine is considered separate from the law on state responsibility in the ILC Draft Articles, since due diligence obligations flow directly from treaties.¹⁰³² However, both sets of rules specify situations where private acts of violence serve as a catalyst for state responsibility. While the rules on responsibility for the actions of non-state actors attributed to the state, as found in the ILC study, are regulations on general international law that can be applied to human rights law, the doctrine of due diligence and its understanding of the positive obligations of states arises specifically from human rights law. The main difference is that the underlying principle of the ILC rules holds that the state can be held responsible if *complicit* in non-state conduct, whereas according to the due diligence principle, states are held responsible when failing to protect against the behaviour of the non-state actor.¹⁰³³ In a sense, the state in such situations is also considered to be complicit, but the ILC rules describe a wider category of conduct and the foundation of due diligence is centred firmly on protection. The Commentary to the ILC Articles confirms that standards such as due diligence “vary from one context to another for reasons which essentially relate to the object and purpose of the treaty provision or other rules giving rise to the primary obligation”.¹⁰³⁴ The due diligence standard therefore constitutes

¹⁰³¹ Doctrine at times refers to the due diligence standard as indirectly regulating non-state actors in international law, a form of *Drittwirkung*. However, it does not regulate behaviour between private individuals but concerns itself generally with the inaction/acquiescence of states. Steiner, Henry, *International Protection of Human Rights*, in *International Law*, ed. Malcolm Evans, Oxford 1st ed. (2003), p. 777, Hofstötter, Bernhard, *European Court of Human Rights: Positive Obligations in E. and others v. United Kingdom*, 2 Int’l J. Const. L. 525, (2004), p. 527. The due diligence theory is also often referred to as ‘state responsibility for the acts of private actors’, ‘positive obligations’ or ‘affirmative duties’ by human rights tribunals and bodies but due diligence is a wider term than positive obligations alone.

¹⁰³² ILC Draft Articles, p. 34 (commentary to Article 2, para. 3). See, however, authors who maintain that the state responsibility rules and the due diligence regime are similar questions, and the latter concept a matter of evincing state complicity. Romany, Celina, *State Responsibility Goes Private: A Feminist Critique of the Public/Private Distinction*, p. 99.

¹⁰³³ Hessbruegge, Jan Arno, *Human Rights Violations Arising from Conduct of Non-State Actors*, p. 65.

¹⁰³⁴ ILC Draft Articles, p. 34 (commentary to Article 2, para. 3).

one way of determining whether or not the primary obligation has been breached.

Why then should states be held responsible for the behaviour of persons within their jurisdiction? In the early development of international human rights law the state was viewed as the ultimate protector of its citizens. Simultaneously, the law was intended to curb the power of the state, the greatest perceived threat to the individual's rights and freedoms, by restricting its interference. Obliging the state to interfere with the actions of private individuals would therefore seem to be at odds with that precept. However, at times the freedom of one individual may be curtailed by the freedoms of others, necessitating such interference. Theo van Boven, as UN Special Rapporteur on Torture, argues that governments are "legally and morally" responsible if they fail to apply due diligence "...in responding adequately to or in structurally preventing human rights violations".¹⁰³⁵ The principle is also discussed by the UN Committee against Torture. In its General Comment No. 2 on state obligations it is affirmed that a failure by the state can be found where the state fails to act, since non-intervention "encourages and enhances the danger of privately inflicted harm".¹⁰³⁶ Further: "the State's indifference or inaction provides a form of encouragement and/or *de facto* permission".¹⁰³⁷ As such, private parties are *aided* in their actions by negligence on the part of the state to prevent and punish violence and where the state is seen as providing the opportunity for such violation to occur, without which it may not have happened. Inaction is therefore the precursor to violence, extending the traditional scope of obligations by acknowledging the causality of also omissions. An effective criminal justice system, in other words, strengthens preventive efforts. This was argued in the *Loayza Tamayo* case where the Inter-American Court stated: "the seeds of future violations are sown, in part, in the failure to come to terms with past cycles of violations...and anti-impunity measures are no longer seen as simply a question of national choice".¹⁰³⁸ Further, due diligence requirements strengthen the

¹⁰³⁵ UN Doc. E/CN.4/Sub.2/1993/8, para. 41, Study Concerning the Right to Restitution, Compensation and Rehabilitation for Victims of Gross Violations of Human Rights and Fundamental Freedoms, 2 July 1993.

¹⁰³⁶ General Comment No. 2, Implementation of Article 2 by States Parties, UNCAT, UN Doc. CAT/C/GC/2/CRP.1/Rev.4, 23 November 2007, para. 15.

¹⁰³⁷ *Ibid*, para. 18.

¹⁰³⁸ *Loayza Tamayo Case*, Reparations Judgment of 27 November, 1998, (series C), No. 42, IACtHR, para. 85.

effectiveness of rights guaranteed since, to the individual concerned, it makes little difference if the violence emanates from a state or private actor.¹⁰³⁹

In conclusion, though the rules on state responsibility provide for certain instances where non-state actors are provided a more prominent role, this is solely limited to situations where they *de facto* perform the functions of the state. The non-state actor is solely recognised as an actor when he or she can be linked to the state, either when the state exercises control over the group, or where the non-state actor fulfils the role of the state machinery. Similarly, in international human rights law, the non-state actor does not generally engender responsibility but the scope of state obligations in relation to the behaviour of private individual is increasingly becoming wider. The limited role of the non-state actor in international human rights law means that the development of the due diligence regime becomes even more important in eradicating private acts of sexual violence. The state can accordingly be held responsible for purely private acts if it fails to prevent or punish the act concerned.

6.4.1 The Scope of Due Diligence and the Nature of State Obligations

Though the concept of due diligence has become generally accepted within international human rights law, the exact content and scope of the principle is not clear, for example, when the duty has been met, since it has been determined on a case-by-case basis. It raises the question where there a suitable line should be drawn in the interference in the relations between two private actors in order to avoid restricting the freedoms of either person.

The Inter-American Court of Human Rights was the first to discuss the notion of due diligence in relation to human rights law and private acts of violence in the *Velasquez Rodriguez* case of 1988.¹⁰⁴⁰ The case concerned the phenomenon of mass disappearances of people in Honduras in the early 1980s. Mr. Velasquez disappeared and was most likely abducted and murdered because of his political affiliations. Though the identity of the perpetrators could not be positively established, it was probable that the kidnappings were undertaken either by the Honduran National Office of Investigation or its Armed Forces. It could not be concluded that they were carried out under the direct command of the state, but the state was still held responsible because its apparatus had failed to take steps to prevent the disappearances. Honduras was subsequently found to have violated the right to personal liberty, humane treatment and the right to life. The Inter-American Court expanded on the interpretation of the obligations of the

¹⁰³⁹ Hofstötter, Bernhard, *European Court of Human Rights: Positive Obligations in E. and others v. United Kingdom*, p. 527.

¹⁰⁴⁰ *Velasquez Rodriguez Case*, (series C), No. 4, Judgment of 29 July 1988, IACtHR.

state found under Article 1 of the American Convention, namely to *respect* the rights of the Convention and to *ensure* that all individuals have free and full exercise of the same. From that general duty, the Court delineated three distinct obligations of states, namely to: 1) abstain from violating the enumerated human rights, 2) prevent violations committed by state and non-state actors and 3) investigate and punish infringements committed both by state and non-state actors. The Inter-American Court stated:

“The state is obligated to investigate every situation involving a violation of the rights protected by the Convention. If the State apparatus acts in such a way that the violation goes unpunished and the victim’s full enjoyment of such rights is not restored as soon as possible, the State has failed to comply with its duty to ensure the free and full exercise of those rights to the persons within its jurisdiction. The same is true when the State allows private persons or groups to act freely and with impunity to the detriment of the rights recognized by the Convention.”¹⁰⁴¹

The obligation to prevent violations included the following duties:

It “implies the duty of the States Parties to organize the governmental apparatus and, in general, all the structures through which public power is exercised, so that they are capable of juridically ensuring the free and full enjoyment of human rights. As a consequence of this obligation, the States must prevent, investigate and punish any violation of the rights recognized by the Convention and, moreover, if possible attempt to restore the right violated and provide compensation as warranted for damages resulting from the violation”.¹⁰⁴²

On the issue of violations committed by non-state actors, the Court concluded:

“an illegal act which violates human rights and which is initially not directly imputable to a State (e.g., 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”.¹⁰⁴³

Instead, what is decisive in determining whether or not a violation of the Convention has been committed is if such conduct occurred “with the support or

¹⁰⁴¹ *Velasquez Rodriguez Case*, para. 176.

¹⁰⁴² *Ibid*, para. 165. Emphasis added.

¹⁰⁴³ *Ibid*, para. 172. Emphasis added.

the acquiescence of the government, or whether the State has allowed the act to take place without taking measures to prevent it or punish those responsible”.¹⁰⁴⁴

The Court’s reasoning in the *Velasquez Rodriguez* case was subsequently confirmed in the *Godínez Cruz* case, which also concerned the disappearance of a politically active person in Honduras.¹⁰⁴⁵ The Court stated that sufficient proof existed to conclude that responsibility for the disappearance of Mr. Godínez fell on persons acting under the cover of public authority. However, the Court proceeded to argue that even if that fact could not be proved “the circumstance that the State apparatus created a climate in which the crime of enforced disappearance was committed with impunity and that, after the disappearance of Saúl Godínez, the failure to act, which is clearly proven, is a failure on the part of Honduras...”.¹⁰⁴⁶ Evidence of a direct involvement in the disappearance was therefore not required and omissions, creating an implicit encouragement, were sufficient to constitute a breach. In like manner, the Inter-American Court in the *Case of the Mapiripan Massacre* emphasised:

“To establish that there has been an abridgment of the rights embodied in the Convention it is not necessary to establish, as would be the case in domestic criminal law, the guilt of its perpetrators or their intent, and it is also not necessary to individually identify the agents deemed responsible for said abridgments. It is enough to prove that there has been support or tolerance by public authorities in the infringement of the rights embodied in the Convention, or omissions that enabled these violations to take place.”¹⁰⁴⁷

That the scope of state responsibility may be wider in international human rights law than that specified in the general rules on state responsibility delineated by the ILC, is mentioned by the Inter-American Court in the same case.¹⁰⁴⁸ As for the motivation of the private individual, it is not relevant in

¹⁰⁴⁴ *Velasquez Rodriguez Case*, para. 173.

¹⁰⁴⁵ *Godínez Cruz Case*, (series C), No. 8, Judgment of 21 July 1989, IACtHR.

¹⁰⁴⁶ *Ibid*, para. 192.

¹⁰⁴⁷ *Case of the “Mapiripan Massacre,”* (series C), No. 134, Judgment of 15 September 2005, IACtHR, para. 110.

¹⁰⁴⁸ *Ibid*, para. 107 ff: “While the American Convention itself explicitly refers to the rules of general International Law for its interpretation and application, the obligations set forth in Articles 1(1) and 2 of the Convention are ultimately the basis for the establishment of the international responsibility of a State for abridgments to the Convention. Thus, said instrument constitutes *lex specialis* regarding State responsibility, in view of its special nature as an international human rights treaty *vis-à-vis* general International Law. Therefore, attribution of international responsibility to the State, as well as the scope and effects of the acknowledgment made in the instant case, must take place in light of the Convention itself.”

deducing accountability for the state, as seen in case law ranging from physical abuse to rape. In fact, the Inter-American Commission on Human Rights has stated that, in the context of violent attacks in Guatemala “the governments must prevent and suppress acts of violence, even forcefully, whether their motives are political or otherwise”.¹⁰⁴⁹

Since the language of Article 1 of the American Convention is similar to that of other human rights treaties, it is generally accepted that the jurisprudence of the Inter-American Court is authoritative influencing the overall interpretation and development of international human rights.¹⁰⁵⁰ The *Velasquez Rodriguez* case has subsequently been referred to in several cases from other regional human rights courts when considering the states’ obligation to prevent harm between private actors, as well as by UN treaty bodies.¹⁰⁵¹

6.4.2 Obligations in International Human Rights Treaties

A number of human rights conventions expressly impose a duty on states to protect non-state actors from violations of other private actors. CERD obliges state parties in Article 2 (d) “to prohibit and bring to an end, by all appropriate means, including legislation as required by circumstances, racial discrimination by any persons, group or organization”.¹⁰⁵² CEDAW also contains similar obligations, which will be discussed below. Most international human rights instruments, however, merely contain general language urging states to respect and ensure human rights. For example, the Universal Declaration of Human Rights calls upon “all people and nations” to respect human rights and provide for “progressive measures, national and international, to secure their universal

¹⁰⁴⁹ Report on the Situation of Human Rights in the Republic of Guatemala, OAS doc. OEA/Ser.L/V/II.53, doc. 21, rev.2, 13 October 1981, IACHR, chapter II, para. 10.

¹⁰⁵⁰ Meron, Theodor, *Human Rights and Humanitarian Norms as Customary Law*, p. 164.

¹⁰⁵¹ See e.g. *The Social and Economic Rights Action Center and the Center for Economic and Social Rights v. Nigeria*, African Commission on Human and Peoples' Rights, Comm. No. 155/96, 2001, where it stated regarding the state’s failure to control the acts of private companies that deposited toxic waste in the environment of the Ogoni people in Nigeria: “...governments have a duty to protect their citizens, not only through appropriate legislation and effective enforcement but also by protecting them from damaging acts that may be perpetrated by private parties...”. The practice before other tribunals also enhances this requirement as evidenced in the case of *Velasquez Rodriguez Case*, para. 59.

¹⁰⁵² International Convention on the Elimination of All Forms of Racial Discrimination, G.A. res. 2106 (XX), Annex, 20 UN GAOR Supp. (No. 14) at 47, UN Doc. A/6014 (1966), 660 U.N.T.S. 195, entered into force 4 January 1969. Emphasis added.

and effective recognition...”.¹⁰⁵³ The ICCPR in Article 2 (1) also requires states parties to “*respect* and to *ensure* to all individuals within its territory and subject to its jurisdiction” the rights recognised in the Covenant. The ICESCR also imposes a duty on state parties individually and collectively to take steps to achieve the realisation of the rights provided for in the Covenant.¹⁰⁵⁴ In general, it is understood that the state fulfils its obligation to ‘respect’ by not actively infringing the individual’s rights, while the term ‘ensuring’ indicates an affirmative obligation on the state to assure such rights.¹⁰⁵⁵ The obligations of states are thus couched in fairly broad terms in most human rights treaties.

The UN Human Rights Committee has stated more concretely with regard to the ICCPR that “the obligations under the Covenant are not confined to the respect of human rights, but that States parties have also undertaken to ensure the enjoyment of these rights to all individuals under their jurisdiction. This aspect calls for specific activities by the States parties to enable individuals to enjoy their rights”.¹⁰⁵⁶ The Committee further expanded on the legal obligations of Article 2 on state parties in its General Comment 31.¹⁰⁵⁷ The Committee asserts that the legal obligations are both negative and positive in nature, i.e. that states must refrain from violating the rights recognised in the Covenant, but also adopt “legislative, judicial, administrative, educative and other appropriate measures in order to fulfil their legal obligations”.¹⁰⁵⁸ Accordingly, states have not discharged their duties by merely abstaining from directly participating in a violation. Though Article 2 refers to the full catalogue of rights in the Covenant, it is envisaged that extending positive duties to address actions by non-state actors is implicit in primarily certain substantive articles. An example is Article 7, prompting states to take positive measures to ensure that private persons do not inflict torture, inhuman or degrading treatment on others within their territories. The Comment stresses that the obligations are solely binding on state parties and do not have direct horizontal effect. Nor can the Covenant act as a substitute for

¹⁰⁵³ Universal Declaration of Human Rights, (preamble).

¹⁰⁵⁴ Article 2 of International Covenant of Economic, Social and Cultural Rights (ICESCR), G.A. Res. 2200A(XXI), UN. Doc. (3 January 1976), Akandji-Kombe, Jean-Francois, *Positive Obligations Under the European Convention on Human Rights, A Guide to the Implementation of the European Convention on Human Rights*, p. 5.

¹⁰⁵⁵ On the ICCPR; General Comment 31: The Nature of the General Legal Obligations Imposed on States Parties to the Covenant: UN Doc. CCPR/C/21/Rev.1/Add.13, 26 May 2004. See also Lutz, Ellen, *International Obligations to Respect and Ensure Human Rights*, 19 Whittier Law Review 345, (1997-1998).

¹⁰⁵⁶ General Comment No. 3, para.1.

¹⁰⁵⁷ General Comment No. 31.

¹⁰⁵⁸ Ibid, para.7.

domestic criminal or civil law.¹⁰⁵⁹ However, the Committee concludes that the obligation to ensure the rights in the Covenant would lose its effect if it did not also cover behaviour between private parties. As such, a violation by the state party could arise in such situations as “permitting or failing to take appropriate measures or to exercise due diligence to prevent, punish, investigate or redress the harm caused by such acts by private persons or entities”.¹⁰⁶⁰

Furthermore, the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment also imposes a duty on states to take effective steps to prevent acts of torture or acts of cruel, inhuman or degrading treatment.¹⁰⁶¹ Such acts have to be committed by, or at the instigation of, or with the consent or acquiescence of a public official. Failure of the state to take action therefore amounts to acquiescence.¹⁰⁶²

The three regional human rights treaties contain similar language. For example, Article 1 of the American Convention on Human Rights provides that “States Parties undertake to *respect* rights and freedoms recognized herein and to *ensure* to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms”.¹⁰⁶³ On the duties to *respect* and *ensure* rights, the Inter-American Commission states:

“...these duties of the States, to respect and to guarantee, are the cornerstone of the international protection system since they comprise the States’ international commitment to limit the exercise of their power, and even of their sovereignty, vis-à-vis the fundamental rights and freedoms of the individual...The duty to guarantee...entails that the States must ensure the effectiveness of the fundamental rights by ensuring that the specific legal means of protection are adequate either for preventing violations or else for re-establishing said rights and for compensating victims or their families in cases of abuse or misuse of power. These obligations of the States are related to the duty to adopt such domestic legislative provisions as may be necessary to ensure exercise of the rights

¹⁰⁵⁹ General Comment No. 31, para. 8.

¹⁰⁶⁰ Ibid, para. 8.

¹⁰⁶¹ Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, UN Doc. A/39/51, (1985).

¹⁰⁶² This will be discussed further in Chapter 7.2.

¹⁰⁶³ American Convention on Human Rights, 22 November 1969, O.A.S.T.S. 36, OEA/Ser.L/V/II.83 doc. rev. 2. Emphasis added. It has been stated that for the purposes of determining if a violation of a substantive right in the Convention has occurred, it is not necessary to distinguish the term ‘omissions’ from ‘acts’, unlike the ILC Draft Articles, which point to the application of the due diligence standard. Ewing, Anthony P., *Establishing State Responsibility for Private Acts of Violence Against Women Under the American Convention on Human Rights*, 26 Colum. Hum. Rts.L. Rev. 751, 1994-1995, p. 761.

specified in the Convention (Article 2). As a corollary to these provisions, there is the duty to prevent violations and the duty to investigate any that occur since both are obligations involving the responsibility of the States".¹⁰⁶⁴

The African Charter on Human and Peoples' Rights obliges states to "recognize" the provisions in the Charter and to "adopt...measures to give effect to them", which has also been held by the African Commission to contain duties for member states to protect persons within its jurisdiction.¹⁰⁶⁵

The European Convention on Human Rights in Article 1 obliges states to "secure to everyone within their jurisdiction...rights and freedoms". Unlike the Inter-American Court, the European Court of Human Rights has not provided an independent interpretation of the term "secure", but has defined its boundaries in connection with other substantive provisions of the Convention, mainly concerning Articles 2, 3 and 8. The nature of state obligations therefore depends on the right in question and the specific facts of the case concerned. The Court has developed a particularly interesting body of case law on state obligations to take positive action to ensure respect for rights between private individuals, implicitly holding the state as a guarantor for individuals against wrongful private acts. The discussion on case law concerning due diligence of the ECtHR will primarily be found in subsequent chapters. However, a few cases deserve mention in highlighting the initial interpretation of the term "secure" rights. Early cases briefly touch upon the issue of positive obligations on states in relation to the rights in the European Convention. In the *Marckx* judgment of the ECtHR, the Court declared in general on the issue of state responsibility that "there is...no room to distinguish between acts and omissions".¹⁰⁶⁶ Furthermore, in *Young, James and Webster* the Court found that a state party can be held responsible for legislation that allows acts which in turn violate human rights. Accordingly: "Under Article 1 of the Convention, each contracting State 'shall secure to everyone within its jurisdiction the right and freedoms defined in...[the] Convention', thus, if a violation of one of those rights and freedoms is

¹⁰⁶⁴ *Chumbivilcas v. Peru*, Report no. 1/96, Case 10, 559, OAE/Ser.L/V/II.91 Do. 7, 1 March 1996, section 3.

¹⁰⁶⁵ Article 1 of the African Charter. See also *Commission Nationale des Droits de l'Homme et des Libertés v. Chad*, Comm. No. 74/92, paras. 19-23 (African Comm. Human & Peoples' Rights, 1995), *Mouvement Burkinabé des droits de L'Homme v. Burkina Faso*, Comm. 204/97, Decision of May 7 2001. Here the Commission emphasised: "...if a State Party fails to ensure respect of the rights contained in the African Charter, this constitutes a violation of the Charter. Even if the State or its agents were not the perpetrators of the violation". Ibid, para. 42.

¹⁰⁶⁶ *Marckx v. Belgium*, (Application No. 6833/74), ECtHR, Judgment of 13 June 1979, para.31.

the result of non-observance of that obligation in the enactment of domestic legislation, the responsibility of the State for that violation is engaged.”¹⁰⁶⁷

Substantial jurisprudence exists that recognises positive duties for states, also concerning acts between private individuals, with regard to several of the rights in the Convention.¹⁰⁶⁸ The Court in *Airey v. Ireland* discussed the topic of positive obligations of states regarding Article 8 of the ECHR, ensuring the right to privacy. The case concerned Mrs. Airey’s inability to receive a deed of separation from an abusive husband through a lack of financial resources to obtain legal representation. To secure such a decree, the party would have needed to take the case to the Irish High Court, which in theory also pertained to a lay person but in practice the party was exclusively represented by a lawyer. The Court declared:

“...the substance of her complaint is not that the State has acted but that it has failed to act. However, although the object of Article 8 is essentially that of protecting the individual against arbitrary interference by the public authorities, it does not merely compel the State to abstain from such interference: in addition to this primarily negative undertaking, there may be positive obligations inherent in an effective respect for private or family life”.¹⁰⁶⁹

In the case of *X and Y v. The Netherlands*, the Court held concerning Article 8 of the ECHR that “these obligations may involve the adoption of measures designed to secure respect for private life even in the sphere of the relations of individuals between themselves”.¹⁰⁷⁰ The Council of Europe has also explicitly supported the principle in relation to the eradication of violence against women, stating that an obligation exists “...to exercise due diligence to prevent,

¹⁰⁶⁷ *Case of Young, James and Webster v. The United Kingdom*, (Application No. 7601/76; 7806/77), ECtHR, Judgment of 13 August, 1981, para. 49.

¹⁰⁶⁸ See for e.g. case law of the ECtHR concerning Article 2: *Osman v. The United Kingdom*, (Application No. 87/1997/871/1083), Judgment of October 28 1998, Art. 3 *M.C. v. Bulgaria*, Art. 8; *X and Y v. The Netherlands*, (Application No. 8978/80), Judgment of 26 March 1985, *Case of 97 Members of the Gldani Congregation of Jehovah’s Witnesses and Others v. Georgia*, (Application No. 71156/01), Judgment of 3 May 2007. In the latter case the Court stated that Article 3 requires states to take measures designed to ensure that individuals within their jurisdiction are not subjected to torture or inhuman and degrading treatment or punishment, including such treatment administered by private individuals.

¹⁰⁶⁹ *Airey v. Ireland*, (Application No. 6289/73), ECtHR, Judgment of 9 October 1979, para. 32.

¹⁰⁷⁰ *Osman v. UK*, para. 23.

investigate and punish acts of violence, whether those acts are perpetrated by the state or private persons, and provide protection to victims”.¹⁰⁷¹

Several cases stress that human rights must not solely be implemented through domestic legislation but also operationalised and given practical effect. The fact that the obligations on states must not be overly intrusive has also been emphasised, i.e. that the measures required must be reasonable. In *Osman v. the United Kingdom*, the ECtHR constructed a standard for measuring positive state obligations and violations thereof, albeit in the context of the right to life.¹⁰⁷² The case concerned a teacher who over a long period of time stalked a student, eventually killing the student’s father. The question at hand concerned whether the police had failed in protecting the family, despite numerous reports to them on the disturbing behaviour of the perpetrator. The Court discussed the positive obligations of the Convention:

“The Court notes that the first sentence of Article 2 § 1 enjoins the State not only to refrain from the intentional and unlawful taking of life, but also to take appropriate steps to safeguard the lives of those within its jurisdiction...It is thus accepted by those appearing before the Court that Article 2 of the Convention may also imply in certain well-defined circumstances a positive obligation on the authorities to take preventive operational measures to protect an individual whose life is at risk from the criminal acts of others...such an obligation must be interpreted in a way which does not impose an impossible or disproportionate burden on the authorities.”¹⁰⁷³

¹⁰⁷¹ Council of Europe, Rec(2002)5 of the Committee of Ministers on the Protection of Women Against Violence, adopted on 30 April 2002, para. 4 II.

¹⁰⁷² *Osman v. United Kingdom*.

¹⁰⁷³ *Osman v. United Kingdom*, para. 115. Emphasis added. See, also, Case of *Mahmut Kaya v. Turkey*, (Application No. 22535/93), Judgment of 28 March 2000, ECtHR, where the Court further expanded on the notion of states’ obligations in accordance with Article 1 in conjunction with Articles 2 and 3. A Turkish doctor, suspected of providing assistance to wounded members of the PKK, was tortured and killed. Though it could not clearly be proved that the perpetrators were state actors, the state was held responsible since it knew or ought to have known that Dr. Kaya was at risk. The Court again declared that States must take measures designed to ensure that individuals within their jurisdictions are protected against torture or inhuman or degrading treatment: “...including such ill-treatment administered by private individuals...State responsibility may therefore be engaged where the framework of law fails to provide adequate protection...”. Further: “the failure to protect his life through specific measures and through the general failings in the *criminal law framework* placed him in danger not only of extra-judicial execution but also of ill-treatment from persons who were unaccountable for their actions”. Paras. 115-116. Emphasis added. Yet again, the Court held that the state must arrange its state apparatus so as to prevent violence between private individuals and that failure in its criminal law supports the existence of such violence.

The extent to which the acts of private individuals are attributed to the state must naturally be limited since such acts cannot as a matter of course be ascribed to the state. In the *Osman* case the limitations consisted of measuring whether the obligation was possible and proportionate to the aim. Furthermore, the Court rules that in order for a positive obligation to arise it “must be established that the authorities knew or ought to have known at the time of the existence of a real and immediate risk to the life of an identified individual or individuals from the criminal acts of a third party and that they failed to take measures within the scope of their powers...”¹⁰⁷⁴

Similar reasoning was advanced by the Inter-American Court of Human Rights. In the *Case of the Massacre of Pueblo Bello* of 2006, the Court stated:

“...a State cannot be held accountable for every human rights violation committed by private individuals under its jurisdiction. Indeed, the erga omnes nature of a State Party’s obligations to ensure the rights protected under the American Convention does not imply that it bears limitless responsibility for any act of private individuals, because its obligations to adopt prevention and protection measures for individuals in their relationships with each other are conditioned by the awareness of a situation of real and imminent danger for a specific individual or group of individuals and to the reasonable possibilities of preventing or avoiding that danger. In other words, even though an act, omission or deed of an individual has the legal consequence of violating the specific human rights of another individual, this is not automatically attributable to the State, because the specific circumstances of the case and the execution of these guaranteed obligations must be considered”¹⁰⁷⁵.

The necessity of demonstrating that the state had knowledge of a “real and immediate risk” in order to evaluate whether it adopted reasonable measures has for the most part been employed in relation to the right to life, both by the

¹⁰⁷⁴ *Osman v. United Kingdom*, para. 116. See also *Opuz v. Turkey*, (Application No. 33401/02), ECtHR, Judgment of 9 June 2009. In *Opuz v. Turkey* of the ECtHR, the adequate legislative framework on complaints of domestic violence existed, but the police and prosecuting authorities did not adequately protect Opuz and her mother from her husband, the latter who was consequently killed. Criminal complaints of domestic violence were dismissed and requests for protection by police authorities from the systematic violence ignored. It again affirmed that the state must not only refrain from taking lives but also take appropriate steps to safeguard the lives of those within its jurisdiction.

¹⁰⁷⁵ *Case of the Massacre of Pueblo Bello*, (series C), No. 140, Judgment of 31 January 2006, IACtHR, para. 123.

European and the Inter-American Human Rights Court.¹⁰⁷⁶ However, elements of this test have also been applied to other rights, e.g. the prohibition of torture and inhuman and degrading treatment. In *E. and others v. The United Kingdom*, regarding sexual abuse in a family under the surveillance of social services, the ECtHR found that the failure of the authorities to thoroughly investigate the situation constituted a violation of Article 3.¹⁰⁷⁷ The Court here evaluated whether “the local authority...was, or ought to have been, aware that the applicants were suffering or at risk of abuse and, if so, whether they took the steps reasonably available to them to protect them from that abuse.”¹⁰⁷⁸ The Court found that “the social services should have been aware that the situation in the family disclosed a history of past sexual and physical abuse from W.H. and that, notwithstanding the probation order, he was continuing to have close contact with the family, including the children.”¹⁰⁷⁹ Thus, if the state is aware of a threat of such violence in a particular case, or the awareness can be presumed due to the systemic nature of the violation, the state has obligations to prevent the act.¹⁰⁸⁰

6.4.3 Which Rights Engender Due Diligence Obligations?

Does the due diligence regime apply to all human rights or only to a limited few? As seen, though a few conventions contain express obligations for states to protect private individuals from non-state actors, most of the major human rights treaties contain general obligations to ensure rights. The development hereto of the due diligence regime and the notion of positive obligations has in a sense transpired gradually, right for right, through case law. The level of the standard of care by the state depends on the character and importance of the specific norm, the extent which has been expounded on by regional human rights courts

¹⁰⁷⁶ *Kilic v. Turkey*, (Application No. 22482/93), ECtHR, Judgment of 28 March 2000, paras. 62-63, *Osman v. United Kingdom*, ECtHR, paras. 115-116, *Renolde v. France*, (Application No. 5608/05), ECtHR, Judgment of 16 October 2008, para. 85, *Case of the Massacre of Pueblo Bello*, IACtHR, para. 124.

¹⁰⁷⁷ *E. and others v. The United Kingdom*, (Application No. 33218/96), Judgment of 26 November 2002. In the case, the live-in boyfriend of the mother to four children was charged with seriously indecent assault of three of the daughters. He was sentenced to two years suspended sentence, on the condition that he did not reside in their home. Despite several visits by the social services, where the boyfriend was found on the premises, no actions were taken and the abuse continued. The failure to further investigate the matter when he was found in the home was seen as a failure to protect the children. See also *Z. and Others v. The United Kingdom* (Application No. 29392/95), ECtHR, 2001, paras. 74-75.

¹⁰⁷⁸ *E and others v. The United Kingdom*, para. 92.

¹⁰⁷⁹ *Ibid*, para. 96.

¹⁰⁸⁰ See further discussion in Chapter 6.4.7.

and UN treaty bodies.¹⁰⁸¹ Since due diligence relates to the duty of states and to the failure to exercise due care, it contains a negligence analysis with reference to certain rights. Views differ as to the level of negligence - for example, whether it requires knowledge of the risk or solely foreseeability, i.e. that the state should have known that a violation would occur.¹⁰⁸²

Because the human rights bodies comment only on the case at hand, apart from the general comments of UN treaty bodies, any general conclusions as to which human rights contain due diligence obligations cannot be drawn. The combined case law of the regional human rights courts/commissions and other treaty bodies have found such obligations in relation to a wide variety of human rights. These include the right to security,¹⁰⁸³ non-discrimination,¹⁰⁸⁴ inhuman or degrading treatment, for instance pertaining to FGM or sexual violence,¹⁰⁸⁵ rights of minorities and indigenous peoples¹⁰⁸⁶ and the right to privacy and family life,¹⁰⁸⁷ to mention a few. As Hessbruegge argues, a review of the case law does not reveal a pattern indicating which human rights contain a duty to protect, but rather, any human right could potentially produce positive obligations with regard to acts of non-state actors, with the exception of a few.¹⁰⁸⁸ However, certain rights cannot, because of their nature, entail a duty on the state to regulate the relationship between non-state actors, since the harm caused is specifically caused by state action. This particularly concerns rights that aim to restrain the state's power in relation to its law-making functions or its legal system, e.g. the prohibition of retroactive laws, the due process rights of the accused and the

¹⁰⁸¹ Meron, Theodor, *Human Rights and Humanitarian Norms as Customary Law*, p. 164.

¹⁰⁸² Farrior, Stephanie, *State Responsibility for Human Rights Abuses by Non-State Actors*, 92 Am. Soc'y Int'l L. proc. 299, (1998), p. 302. See e.g. the discussion on prevention in relation to the right to life.

¹⁰⁸³ *William Eduardo Delgado Páez v. Colombia*, Comm. 195/85, UN Doc. CCPR/C/39/D/195/1985, (1990), paras. 5-6.

¹⁰⁸⁴ *Franz Nahlik v. Austria*, Comm. 608/1995, UN Doc. CCPR/C/57/608/1995, (1996), para. 8(2).

¹⁰⁸⁵ See below, *M.C. v. Bulgaria*. FGM: UN Doc. CCPR/C.79/Add.85 (1997): Sudan, para. 10; UN Doc. CCPR/C/79/Add.82 (1997): Senegal, para. 12.

¹⁰⁸⁶ *Hopu and Bessert v. France*, Comm. 549/1933, UN Human Rights Committee, View of 29 Dec. 1997, *The Mayagna (Sumo) Awas Tingni Community v. Nicaragua*, (series C), No. 79, IACtHR, Judgment of 31 August 2001, *The Social and Economic Rights Action Center and the Center for Economic and Social Rights v. Nigeria*, African Commission on Human and Peoples' Rights, Comm. 155/96, (2001).

¹⁰⁸⁷ Cases of the ECtHR: *X and Y v. The Netherlands*, *López Ostra v. Spain*, (Application No. 16798/90), Judgment of 9 December 1994, *Guerra v. Italy*, (Application No. 116/1996/735/932), Judgment of 19 February 1998.

¹⁰⁸⁸ Hessbruegge, Jan Arno, *Human Rights Violations Arising from Conduct of Non-State Actors*, p. 75.

right to recognition as a person before the law.¹⁰⁸⁹ The UN Human Rights Committee in General Comment No. 31 also recognised that not all human rights contain horizontal obligations:

“...the positive obligations on States Parties to ensure Covenant rights will only be fully discharged if individuals are protected by the State, not just against violations of Covenant rights by its agents, but also against acts committed by private persons or entities that would impair the enjoyment of the Covenant rights in so far as they are amenable to application between private persons or entities.”¹⁰⁹⁰

As such, the due diligence principle does not automatically apply to all human rights but it is the presumed standard. The degree to which such obligations are measured will also depend on the right in question.

Additional modes of interpretation exist to elucidate the extent of due diligence pertaining to various types of rights. Andrew Clapham suggests that, at least in the context of the European Convention, in order to determine the scope of state obligations in the private sphere, the rights should be analysed from the perspective of the dual aims of democracy and dignity. If the main aim of the right is to achieve democracy, there ought to be a public element in order to protect that right. However, if it primarily intends to protect human dignity, there would be no such need for a public element and therefore the right should always be protected.¹⁰⁹¹ This is true for the human rights within which the prohibition of sexual violence is essentially located; the prohibition of torture, inhuman or degrading treatment, the principle of non-discrimination as well as the right to privacy. Hessbruegge, on the other hand, has criticised this interpretative method as futile considering that the concept of dignity is all-embracing. Every human right has dignity as its underlying value, and therefore it becomes an

¹⁰⁸⁹ Hessbruegge, Jan Arno, *Human Rights Violations Arising from Conduct of Non-State Actors*, p. 71.

¹⁰⁹⁰ General Comment No. 31 on Article 2 of the Covenant. Emphasis added.

¹⁰⁹¹ Clapham, Andrew, *The Drittwirkung of the Convention*, p. 204.

inappropriate tool of analysis.¹⁰⁹² It appears unwise to restrict the possibilities of an overall application of positive obligations by states through categorisation, apart from accepting that certain rights are “amenable” to such an approach.

As viewed, in order to fulfil the duty of due diligence, the state must create an elaborate arrangement of effective legislation and government policy, all in accordance with the context in the specific country. It is evident that what is required of a state to meet its due diligence obligations will depend on particular domestic characteristics, problems and capabilities. States will have considerable discretion in deciding on strategies and appropriate measures.¹⁰⁹³ Whether a state has acted with the required level of due diligence within a particular context can therefore only be determined case by case.¹⁰⁹⁴ For instance, the European system of human rights allows for national varieties in implementation through the margin of appreciation regime, in order to accommodate strategies that are suitable to the particular domestic context. In general, human rights treaties allow for such domestic varieties, though not explicitly referred to as a “margin of appreciation.”

Certain critics warn that an extension of state responsibility into the private sphere will cause a diminished status of international human rights because it will descend from its most important and original elevation of protecting individuals from abuse by the state machinery.¹⁰⁹⁵ Hessbruegge warns that the scope of state responsibility to protect persons within their jurisdiction from non-

¹⁰⁹² Hessbruegge, Jan Arno, *Human Rights Violations Arising from Conduct of Non-State Actors*, p. 81. He further argues that some of the most pervasive denials of human dignity occur in the areas where there is no legitimate claim for the state to interfere. Instead, he proposes the division of rights into two categories - existential rights that protect the human being's existence and social good rights that protect the human being as a member of society. The so-called social rights would only give rise to obligations in the non-state sphere under limited circumstances determined, among other factors, by the nature of the social good. Such rights include primarily socio-economic rights but would also include e.g. the right to privacy, since it is a good that society can generate. Neither tool is overly convincing. Dignity is the foundation of all human rights and Hessbruegge's suggestion causes a division of two generations of rights.

¹⁰⁹³ Steiner, Henry, *International Protection of Human Rights*, p. 777. See also Ertürk, Yakin, *The Due Diligence Standard: What Does it Entail for Women's Rights?*, p. 46, who argues that what is required to meet the due diligence standard will vary according to the “domestic context, internal dynamics, nature of the actors concerned, international conjuncture...”.

¹⁰⁹⁴ Bourke-Martignoni, Joanna, *The History and Development of the Due Diligence Standard in International Law and Its Role in the Protection of Women against Violence*, p. 57, Abi-Mershed, Elizabeth, *Due Diligence and the Fight against Gender-Based Violence in the Inter-American System*, in *Due Diligence and its Application to Protect Women from Violence*, Martinus Nijhoff, (2008), p. 137.

¹⁰⁹⁵ Clapham, Andrew, *The Drittwirkung of the Convention*, p. 203.

state actors must be delineated with care. If not, any interaction between non-state actors could be framed as a human rights issue and the due diligence regime could develop into a “blueprint for the perfect society” and become meaningless.¹⁰⁹⁶ Evans asserts: “we are increasingly being asked to examine all aspects of our public and private lives from the human rights perspective and it is the state that is being held to account for the failures of us all”.¹⁰⁹⁷ It seems there are fears that the sphere of positive obligations for states could expand to such an extent as to render the doctrine unworkable. International human rights law may then lose its prominence. However, the due diligence regime still contains severe restrictions on its application. It pertains to a certain category of rights and it still concerns the culpability of the state, albeit an enlarged scope of obligations. A certain amount of gravity is also required. Furthermore, with regard to the fear that all violations between private individuals that fall within any of the human rights provisions will be brought before human rights tribunals or that the state will be bestowed with responsibility, the regional courts and treaty bodies first of all require an exhaustion of domestic remedies. This ensures that states are provided with options to address a particular situation, which in most cases occurs, so that instances are exceptional where the state is held to be internationally responsible.

In sum, the classic division between the public and private sphere is becoming increasingly obsolete owing to the expansion of the duties of states. With this expansion in international human rights law, state obligations no longer entail limitations solely on its authority, but also impose obligations to prevent and sanction violations of human rights committed by non-state actors. States must therefore protect individuals from the harmful acts of others.

It is generally agreed that the development of the due diligence regime within human rights law is a natural progression, with a view to achieving the aim of protecting human dignity. As Meron proclaims, the alternative of limiting the reach of human rights to public life and affairs, would greatly limit their effectiveness and render it unacceptable.¹⁰⁹⁸ The expansion of the duties of states under international law to a certain extent depends on the philosophies of duty-based theories of rights and the appreciation of the dignity of man.¹⁰⁹⁹ These

¹⁰⁹⁶ Hessbruegge, Jan Arno, *Human Rights Violations Arising from Conduct of Non-State Actors*, p. 66.

¹⁰⁹⁷ Evans, Malcolm, *State Responsibility and the European Convention on Human Rights: Role and Realm*, in *Issues of State Responsibility Before Judicial Institutions*, eds. Malgosia Fitzmaurice, Dan Sarooshi, The Clifford Chance Lectures, vol. VII, Hart Publishing, (2004), p. 159.

¹⁰⁹⁸ *Ibid*, pp. 466 & 470.

¹⁰⁹⁹ See e.g. Dworkin, Ronald, *Taking Rights Seriously*, Harvard University Press, (1977), p. 172.

theories are not revolutionary, as they are the basis of the human rights framework in themselves. However, a stronger focus on the innate dignity of the individual has led to important criticism of the private/public distinction, as the identity of the violator becomes of less consequence than the nature of the act itself and its impact on the dignity of the victim. With this movement towards personal dignity, it is the destructive nature of the act that becomes relevant. As mentioned, personal dignity is fundamental to all major human rights treaties and declarations. Personal self-fulfilment becomes in itself an analytical method of ascertaining whether or not certain violations constitute breaches of human rights.

6.4.4 The Due Diligence Standard as a Tool in Preventing Violence against Women

It is understood that the due diligence doctrine is most valuable to groups that are more readily discriminated against, such as women, LGBT persons and children, since such groups face violations mainly in the private sector. As Clapham argues, the disadvantage of these groups does not primarily arise from actual governmental interference in their lives, but from omissions of interference by the state.¹¹⁰⁰ The due diligence principle has thus been deemed particularly important for the advancement of women's human rights because it is often in the private sphere that women are restricted in the enjoyment of their rights.¹¹⁰¹ As for violence against women, the doctrine obliges states to eliminate, reduce and mitigate such conduct.¹¹⁰² Catherine MacKinnon argues that the fact that abuse of women is not 'official' is irrelevant, because "...the legitimization and the legalization of the abuse is. It is done with official impunity and legalized disregard".¹¹⁰³ This emphasises that the structure of the state may create a climate prone to a heightened level of private violence against women and that the traditional separation of state acts from private acts has not sufficiently acknowledged the *culpa* of the state. Acts by private individuals such as rape, even when not performed by state officials, therefore generate an international responsibility on the part of the state, not for the act of rape itself but for not acting with due diligence to either prevent or provide remedies to the victim.

Most relevant for the topic of sexual violence, CEDAW puts positive obligations on state parties by requiring them to take "all appropriate measures,

¹¹⁰⁰ Clapham, Andrew, *The Drittwirkung of the Convention*, p. 201.

¹¹⁰¹ Benninger-Budel, Carin, *Due Diligence and its Application to Protect Women from Violence*, p. 1.

¹¹⁰² Cook, Rebecca, *State Responsibility for Violations of Women's Rights*, p. 151.

¹¹⁰³ MacKinnon, Catherine, *On Torture: A Feminist Perspective on Human Rights*, in *Human Rights in the Twenty-First Century: A Global Challenge*, p. 29.

including legislation, to ensure the full development and advancement of women, for the purpose of guaranteeing them the exercise and enjoyment of human rights and fundamental freedoms on a basis of equality with men”.¹¹⁰⁴ Article 5 also encourages state intervention through the modification of “the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices...”. The UN Declaration on the Elimination of Violence against Women in addition obliges states to “exercise due diligence to prevent, punish, 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”.¹¹⁰⁵ Furthermore, states must in accordance with Article 4 “develop penal, civil, labour and administrative sanctions in domestic legislation to punish and redress the wrongs caused to women who are subjected to violence.” Though the Declaration is not legally binding, the possibility exists that it may generate such a level of state practice and *opinio iuris* as to evolve into customary international law.¹¹⁰⁶ Charlesworth and Chinkin find evidence of the growing *opinio iuris* in various restatements of the language of this Declaration.¹¹⁰⁷

In General Recommendation No. 19 issued by the CEDAW Committee it is further emphasised that under general international law and specific human rights treaties, states may be responsible for private acts if they fail to act with due diligence to prevent transgressions of rights, to investigate and punish violence and for a failure to provide compensation.¹¹⁰⁸ Failure by the state to protect women against violence can be viewed as “state complicity and conspiracy with private actors of violence”.¹¹⁰⁹ The General Recommendation is frequently employed by the Committee in its views and concluding observations, interpreting the scope of obligations in the Convention, and has also been

¹¹⁰⁴ Article 3 of the UN Convention on the Elimination of all Forms of Discrimination against Women.

¹¹⁰⁵ Ibid, Article 4 (c).

¹¹⁰⁶ Charlesworth, Hilary & Chinkin, Christine, *The Boundaries of International Law: A Feminist Analysis*, p. 73.

¹¹⁰⁷ Ibid, p. 75. This is evident in e.g. the General Recommendation No. 19, the Vienna Conference on Human rights, which emphasised: “the importance of working towards the elimination of violence against women in public and private life”, World Conference on Human Rights, Vienna Declaration and Programme of Action, 25 June 1993, UN Doc. A/CONF. 157/23, as well as the Cairo Programme of Action and the Beijing Platform for Action.

¹¹⁰⁸ General Recommendation No. 19, Violence Against Women, in Report of the Committee on the Elimination of Discrimination Against Women, UN GAOR, 47th Sess., Supp. No. 38, UN Doc. A/47/38, (1992).

¹¹⁰⁹ UN Doc. E/CN.4/2004/66, para. 57.

referred to by e.g. the ECtHR.¹¹¹⁰ It expounds upon the general duty in the Convention to “take all appropriate measures to eliminate discrimination against women” and obliges states to take specific steps, in the language of a due diligence standard:

“i) Effective legal measures, including penal sanction, civil remedies and compensatory provisions to protect women against all kinds of violence, including inter alia...sexual assault,

ii) Preventative measures, including public information and education programmes to change attitudes concerning the roles and status of men and women,

iii) Protective measures, including refuges, counselling, rehabilitation...for women who are the victims of violence or who are at risk of violence.”¹¹¹¹

The Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women also provides that states must “apply due diligence to prevent, investigate and impose penalties for violence against women”.¹¹¹² Its Article 7 specifically calls on states to take appropriate measures to amend or repeal existing laws and regulations that maintain the persistence and tolerance of violence against women. The Inter-American Commission has emphasised the due diligence obligations of states in relation to violence against women in several reports, stating:

“...violence against women is a manifestation of the historically unequal power relations between men and women. Violence based on gender originates in and perpetuates those negative power imbalances....The lack of due diligence to clarify and punish such crimes, and to prevent their repetition reflects that they are not perceived as a serious problem. The impunity in which such crimes are then left sends the message that such violence is tolerated, thereby fuelling its perpetuation”.¹¹¹³

Furthermore, the Protocol on the Rights of Women in Africa of 2003 requires states to enact and enforce laws to prohibit violence against women whether it occurs in a public or private context and to adopt such “legislative,

¹¹¹⁰ *Opuz v. Turkey*, ECtHR, para. 74.

¹¹¹¹ General Recommendation No. 19, para. 24 (t) (i).

¹¹¹² Article 7 (b) of The Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women.

¹¹¹³ IACHR, The Situation of the Rights of Women in Ciudad Juarez, Mexico: The Right to be Free from Violence and Discrimination, OEA/Ser.L/V/II.117, Doc. 44, 7 March 2003, para. 7. See also Violence and Discrimination against Women in the Armed Conflict in Colombia, IACHR, OEA/Ser.L/V/II., Doc. 67, 18 October 2006, para. 17.

administrative, social and economic measures, to ensure the prevention, punishment and eradication of all forms of violence against women”.¹¹¹⁴

The 1995 Beijing Declaration moreover sets forth that states must “[r]efrain from engaging in violence against women and 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”.¹¹¹⁵ The UN Secretary-General in an In-Depth Study on All Forms of Violence against Women also stresses the duty of states to “develop and implement effectively a legal and policy framework for the full protection and promotion of women’s human rights”.¹¹¹⁶ Included in the responsibilities of states is the requirement to enact, implement and monitor legislation covering all forms of violence against women.¹¹¹⁷

That the due diligence standard is a particularly useful device for analysing state inaction in relation to violence on women, including protection against sexual violence, is apparent in statements from various human rights bodies in response to state reports and individual cases. The UN Special Rapporteur on Violence against Women, Yakin Ertürk, has identified it as the most important tool, within the confines of the human rights regime, in eliminating violence against women.¹¹¹⁸ The mandate of the Special Rapporteur was established through Resolution 1994/45, which emphasised:

“the duty of Governments to refrain from engaging in violence against women and to exercise due diligence to prevent, investigate and, in accordance with national legislation, to punish acts of violence against women and to take appropriate and effective action concerning acts of violence against women, whether those acts are perpetrated by the State or by private persons, and to provide access to just and effective remedies and specialized assistance to victims”.¹¹¹⁹

Previous UN Special Rapporteur on Violence against Women, Rhadika Coomaraswamy, has also taken note of the expanded concept of state obligations under international law to exercise due diligence in preventing, prosecuting and punishing private actors who violate women’s rights. She contends that such

¹¹¹⁴ Article 4 (2) (b) of the Protocol on the Rights of Women in Africa.

¹¹¹⁵ Para. 124 (b) of the 1995 Beijing Declaration.

¹¹¹⁶ In-Depth Study on all Forms of Violence against Women, Report of the Secretary-General, UN Doc. A/61/122/Add.1, 6 July 2006, para. 261.

¹¹¹⁷ Ibid, para. 263.

¹¹¹⁸ UN Doc. E/CN.4/2006, 20 January 2006.

¹¹¹⁹ The United Nations Commission on Human Rights in resolution 1994/45, adopted on 4 March 1994, para. 2. Emphasis added.

emergence of state responsibility “plays an absolutely crucial role in efforts to eradicate gender-based violence and is perhaps one of the most important contributions of the women’s movement to the issue of human rights”.¹¹²⁰ The focus on a need for other preventive measures than legal reform alone was argued by Coomaraswamy in a report from 2000, in which she stated that due diligence is more than “the mere enactment of formal legal provisions” and that states must act in good faith to “effectively prevent” violence against women.¹¹²¹

Though the principle has been held by the UN Special Rapporteur on Violence against Women as the yardstick against which to measure whether a state has met or failed in its obligations in confronting violence against women, one must remember the limitations of the theory. Because the duty to “act with due diligence” is rather vague and generally held, the direct obligations that exist in several treaties to combat violence against women may be more precise and far-reaching. Since the due diligence regime is more centred on the *measures* taken rather than results achieved, it is feared that concrete obligations on results are replaced with the due diligence requirement.¹¹²² Because of its evaluation of

¹¹²⁰ UN Doc. E/CN.4/1995/42, para. 107. In fact, Coomaraswamy has created a list of state obligations relating to violence against women. The first step consists of state ratification of human rights instruments, as well as legislative duties to guarantee equality for women in the constitution. The establishment of national legislation and/or administrative sanctions as redress for women subjected to violence is also required. Furthermore, preventive measures such as providing gender-sensitivity training for professionals working within the criminal justice system and police as well as raising awareness through education and the media and in collecting data and statistics should be included. Violence against Women in the Family, Report of the Special Rapporteur on Violence against Women, its Causes and Consequences, Ms. Radhika Coomaraswamy, Submitted in Accordance with Commission on Human Rights Resolution 1995/85, UN Doc. E/CN.4/1999/68, 10 March 1999, para. 25.

¹¹²¹ Report of the Special Rapporteur on Violence against Women, its Causes and Consequences, Ms. Radhika Coomaraswamy, on Trafficking in Women, Women’s Migration and Violence against Women, Submitted in Accordance with Commission on Human Rights Resolution 1997/44, UN Doc. E/CN.4/2000/68, 29 February 2000, paras. 51-53. The Inter-American Commission on Human Rights has also stressed the fact that training of judicial personnel to erase discriminatory reasoning is of the essence, as well as simplifying the criminal justice proceedings when it comes to violence against women. OEA/Ser.L/V/II.97, Doc. 29 rev.1, 29 September 1997, Report on the Situation of Human Rights in Brazil, Chapter VIII & Report of the Special Rapporteur on Violence against Women, its Causes and Consequences, Ms. Radhika Coomaraswamy, Submitted in Accordance with Commission on Human Rights Resolution 1995/85, UN Doc. E/CN.4/1996/53, 5 Feb. 1996, paras. 140-41.

¹¹²² Holtmaat, Rikki, *Preventing Violence against Women: The Due Diligence Standard with Respect to the Obligation to Banish Gender Stereotypes on the Grounds of Article 5 (a) of the CEDAW Convention*, p. 88.

the means employed, it is not the existence of a particular violation that demonstrates the failure to apply due diligence, but rather a lack of reasonableness in the measures of prevention.¹¹²³ For example, violence against women exists in all societies and this fact alone cannot serve as a basis for finding a breach in state obligations. However, one must bear in mind that the obligations on the measures that a state must take exist alongside other demands to produce certain results. Rights in treaties are therefore not supplanted solely by duties to take certain steps without a focus on producing a specific result.

Additionally, the concept does not fully eradicate the two separate spheres of international law, i.e. the public/private divide. As the UN Special Rapporteur on Violence against Women contends, applying the due diligence standard to frame violations of human rights in effect means that private acts of violence are filtered through theories of state responsibility, leaving the non-state actor free from international responsibility - apart from cases involving international crimes.¹¹²⁴ This still creates separate regimes of responsibility for private as opposed to public acts, maintaining the need for linking private violence to acts or passivity of the state in international human rights law. The boundaries of concepts such as prevention, punishment and redress, however, are negotiated and continuously expanded to improve the competence of states in restraining violence inflicted on women.

6.4.5 Prevention through Domestic Criminalisation

The due diligence doctrine thus entails state duties to prevent, investigate, punish and provide remedies for violence against women, regardless of the identity of the perpetrator. Relevant to the question of states' duties to criminalise rape and the matter of its definition, is primarily the obligation to *prevent* such violations. The burden of an efficient regime of protection of human rights is on prevention of breaches and is naturally the fundamental aim of the international human rights regime. In fact, the UN Special Rapporteur on Violence against Women has raised the concern that the application of the due diligence standard to date has first and foremost been utilised to measure state responses to violence after it has occurred, while overlooking the obligation to prevent such violations.¹¹²⁵

The issue of prevention requires of states to provide an efficient penal code. Though arguments can be advanced that preventive measures entail more than criminalising conduct and that other mechanisms may even be more effective, criminal law can act as a catalyst for social change and as a moral force.

¹¹²³ Abi-Mershed, Elizabeth, *Due Diligence and the Fight against Gender-Based Violence in the Inter-American System*, p. 137.

¹¹²⁴ UN Doc. E/CN.4/2006/61, 20 January 2006, para. 61.

¹¹²⁵ *Ibid*, para. 15.

Furthermore, as will be seen in the case law examined below, providing remedies through enacting and effectively applying criminal law as a response to sexual violence has been considered to be the most appropriate avenue of deterrence. However, one must not forget that the main principle in international law is that state parties remain flexible in determining how to give effect to treaties and customary international law. National implementation, in other words, is an internal affair allowing states to conform to treaty provisions in ways that best suit domestic circumstances.

A principle from the general theories on state responsibility in public international law that is well-applied to human rights law is the division of obligations of “means” and “result”.¹¹²⁶ Obligations of means entail an obligation of a specific course of conduct of the state, whereas results refer to the goal without specifying the actions that states must take. A result-based duty would allow for discretion by the state on how to reach the aim. An example is CEDAW, which compels states to eliminate discrimination against women, thereby requiring that states achieve a certain *result*. Most relevant for the evaluation of state responsibility for our consideration, however, are obligations of *means*. An example of such obligations can be deduced from the language of the *Velasquez Rodriguez* case where the Inter-American Court specified that the duty of the state to investigate violations of an individual’s rights was an obligation of means, since it did not require that the investigation produced a specific result, for example, a conviction. Rather, the investigation in question must be undertaken in a serious manner and not as a mere formality.¹¹²⁷ Similarly, though the state has a duty to protect human life and sexual autonomy, it is not obliged to convict in all cases of murder or instances of rape but rather to aim at achieving the appropriate conditions in order to deter such transgressions. Another form of obligation of means is the requirement of the state to enact or repeal certain types of legislation.¹¹²⁸ Accordingly, an obligation to prohibit

¹¹²⁶ These different forms of obligations were detailed in Draft Articles on State Responsibility, Articles 20-21, Report of the ILC on its 29th Session. The distinction is also briefly mentioned in the Draft Articles of 2001 in the Commentary, p. 56 (Article 12, para. 11), discussing “the character” of obligations: “[A] distinction is commonly drawn between obligations of conduct and obligations of result. That distinction may assist in ascertaining when a breach has occurred. But it is not exclusive...”.

¹¹²⁷ *Velasquez Rodriguez Case*, IACtHR, paras. 174-177.

¹¹²⁸ Meron, Theodor, *Human Rights and Humanitarian Norms as Customary Law*, p. 185. An example is provided by the ILC, where a failure to enact legislation required by Article 10 (3) of the ICESCR, which obliges states to make certain categories of employment for minors “prohibited and punishable by law”, would constitute a breach regardless of whether such prohibited employment had occurred or if the omission did not result in a harmful consequence. UN Doc. A/CN.4/SER.A/1977/Add.1 (Part 2), Yearbook of the ILC, 1977, para. 7.

sexual violence domestically and to implement a specific definition of rape may exist, regardless of whether, however unlikely, no instances of sexual violence occurred. The obligation lies in the means of adopting effective provisions, prohibiting the conduct, as well as investigating violations. However, there is no direct obligation for ensuring a specific result in such cases. In short, failure of the state to meet its obligation is not necessarily connected to the result in the individual case, but may also concern the construction and efficiency of the justice machinery.

What measures are then necessary for prevention? The extent of measures has been developed by regional courts and human rights treaty bodies of the UN. The UN Human Rights Committee e.g. requires states to detail the “legislative, administrative, judicial and other measures they take to prevent and punish acts of torture” in periodic reviews.¹¹²⁹ The Inter-American Court of Human Rights has further noted that the duty to prevent “includes all those means of a legal, political, administrative and cultural nature that promote the protection of human rights and ensure that any violations are considered and treated as illegal acts, which, as such, may lead to the punishment of those responsible and the obligation to indemnify the victim for damages. It is not possible to make a detailed list of all such measures, since they vary with the law and the conditions of each state”.¹¹³⁰ As the UN OHCHR proposes, measures of prevention may entail both implementation of policies and legislation, but can in individual cases also imply a duty of operational character.¹¹³¹ However, the first step must necessarily be to incorporate international human rights protection in the domestic legal system. The OHCHR stresses that domestic law must be consistently applied by all competent authorities, independent of the executive, since the preventive effect of legislation will only occur if potential offenders are aware that they will certainly be prosecuted.¹¹³²

¹¹²⁹ General Comment No. 20: Replaces General Comment 7 concerning prohibition of torture and cruel treatment and punishment (Art.7), 10 March 1992, para. 8. Preventive measures beyond the legal system may call for the dissemination of information to the public or in providing education and awareness about violence directed at women, in order to eradicate gender imbalance within a particular community.

¹¹³⁰ *Velasquez Rodriguez Case*, para. 175.

¹¹³¹ Human Rights in the Administration of Justice: a Manual on Human Rights for Judges, Prosecutors and Lawyers, Office of the High Commissioner for Human Rights in Cooperation with the International Bar Association, 2003, p. 779.

¹¹³² *Ibid*, p. 780.

Measures to prevent violence must be “reasonable and appropriate,” which is determined on a case by case basis considering the facts of the particular case.¹¹³³ Certain statements by the Inter-American Human Rights Court emphasise the level of gravity of the offence as an important factor in the level of prevention required, such as in the *Street Children case* concerning the arbitrary deprivation of life of several children in Guatemala. It noted the “particular gravity” of the case, which represented a violation of the State’s “obligation to adopt special measures of protection and assistance for the children within its jurisdiction”.¹¹³⁴ This means that the due diligence concept is rather fluid. The level of preventive measures for a state to undertake thus becomes relative to the prevailing circumstances in the country in question, as well as degree of the gravity of the crime at hand, naturally requiring a more extensive effort for exceptionally grave offences. Though the obligation to prevent violations of course extends to all human rights and freedoms in international law, the case law of international and regional courts and treaty bodies has centred primarily on particularly serious crimes.

When it comes to breaches of the due diligence standard based upon inadequacies in domestic legislation, there are two possible scenarios for instances of violence against women. Firstly, if no provision exists in the municipal law prohibiting the specific offence of violence, granted that such act is considered to be a human rights violation, the state would clearly be in breach of various treaties and, arguably, customary rules. From an evidentiary standpoint, a single case of e.g. rape or domestic violence combined with a lack of legislation would then be sufficient. With rape this would rarely occur since its criminalisation appears to be universal.¹¹³⁵ Even the lack of legislation *per se*

¹¹³³ See e.g. *William Eduardo Delgado Páez v. Colombia*, HRC, para. 5.5, *Plattform "Ärzte für das Leben" v. Austria*, (Application No. 10126/82), ECtHR, Judgment of 21 June 1988, *Joaquín David Herrera Rubio et al. v. Colombia*, Communication No. 161/1983, UN. Doc. CCPR/C/OP/2 at 192 (1990), HRC, para. 10.3, (requiring “effective measures”), *Osman v. United Kingdom*, ECtHR. To a certain extent, whether the measure concerned is reasonable and appropriate will depend on the particular state’s finances, which could result in certain countries claiming to be economically incapable of meeting the positive obligations. However, human rights are minimum standards and apart from progressive obligations in socio-economic rights, the capabilities of a country should not be taken into account in evaluating the implementation of states’ obligations. Hessbruegge, Jan Arno, *Human Rights Violations Arising from Conduct of Non-State Actors*, p. 85. General Comment 3, The Nature of States Parties Obligations (Article 2, para. 1), 14/12/90, ICESCR, para. 1.

¹¹³⁴ *Villagrán Morales et al. Case (the Street Children case)*, (series C), No. 63, IACtHR, Judgment of 19 November 1999, paras. 145-146.

¹¹³⁵ See e.g. this argument in *Prosecutor v. Kunarac, Kovac and Vukovic*, Appeal Judgment of 12 June 2002, para. 195.

may constitute a breach, e.g. concerning the obligation to enact criminal laws prohibiting torture and genocide, of which rape may constitute a sub-category.

More interesting are those cases where a breach is based on the inadequacy of existing legislation in providing effective protection. However, for the state to contravene the due diligence standards founded on an inadequate definition of rape, there must be compulsory international elements of the crime. As will be discussed below, the Inter-American Commission and the European Court are the only regional human rights bodies to have explored these elements, as viewed in the *Miguel Castro-Castro Prison* case and *M.C. v. Bulgaria*, though further guidance can be found in the jurisprudence of international criminal law tribunals.

Regional courts and UN treaty bodies frequently call for a change in domestic laws with which to better prevent violations. As mentioned, an increasing amount of treaties oblige states to enact a particular legislation, leading to a breach upon a lack of such. In general, the Inter-American Court has in several cases ordered internal reform. These include the *Barrios Altos* case where the Court called for the annulment of domestic laws because of their incompatibility with the Convention and the *Hilaire, Constantine and Benjamin et al.* case, where it suggested amendments to domestic legislation.¹¹³⁶ In a dissenting opinion, Judge Cancado Trindade trenchantly summed up the affirmative duties to ensure and guarantee human rights in relation to Article 2 of the American Convention in the following manner:

“the efficacy of human rights treaties is measured, to a large extent, by their impact upon the domestic law of the States Parties. It cannot be legitimately expected that a human rights treaty be ‘adapted’ to the conditions prevailing within each country, as, a contrario sensu, it ought to have the effect of improving the conditions of exercise of the rights it protects in the ambit of the domestic law of States Parties”.¹¹³⁷

As regards legislative measures to suppress violence, the Inter-American Court in an advisory opinion held that “...the passing of a law that is manifestly contrary to the obligations assumed by a State by ratifying the Convention...constitutes a violation of the Convention”.¹¹³⁸ This is the case

¹¹³⁶ *Barrios Altos Case*, (series C), No.75, Judgment of 14 March 2001, IACtHR, paras. 41-44, *Hilaire, Constantine and Benjamin et al Case*, (series C), No. 94, Judgment of 21 June 2002, IACtHR, para. 212.

¹¹³⁷ *Caballero Delgado and Santana Case*, (series C), No. 31, Reparations Judgment of 29 January, 1997, IACtHR, Cancado dissent, para.5.

¹¹³⁸ International Responsibility for the Promulgation and Enforcement of Laws in Violation of the Convention (Arts. 1 and 2 of the American Convention on Human Rights), Advisory Opinion OC-14/94, 9 December 1994, IACtHR, para. 58.

regardless of whether the domestic law is constitutional in the state. The European Court of Human Rights has likewise ordered the reform of legislation on a multitude of matters, including that of sexual violence, and has introduced follow-up mechanisms to evaluate subsequent legislative changes.¹¹³⁹ As such, the enforcement of human rights treaties aims not only to resolve individual cases but also to produce changes in legislation and administrative practices in accordance with the jurisprudence in such systems that provide for adjudicatory bodies.

In this chapter, the focus is on criminal law as the catalyst for the enforcement of human rights norms. This leads to the question of what the link is between human rights law and criminal law. The relationship is one of mutual stimulus. Criminal law protects values inspired in part by human rights regulations, while the protection of a person's human rights may call for the application of criminal law.¹¹⁴⁰ National criminal law in this sense is often built on human rights principles and the international law system serves to enforce such rights. Legislation proscribing violence, in this case rape, is deemed to be a fundamental instrument of prevention. A narrow definition of rape may not only be a violation of international human rights treaties, but leaves little room for other preventive measures to build on. Legislative reform might not be sufficient to redress or prevent sexual violence, but training of personnel in the judicial system and efforts to raise awareness of the crime will have less effect if the definition of rape excludes violations that women experience as violative, as well as procedural obstacles that effectively hamper access to justice. The European Court has on several occasions found that only a *criminal* law provision would provide the necessary deterrence and constitute the effective means required in sexual assault cases as opposed to other forms of protection.¹¹⁴¹ In fact, a greater preponderance to demand protection through domestic criminal law against human rights violations has been noted, particularly in the case law of the European Court of Human Rights.¹¹⁴² What follows is an exploration of the duty to criminalise violence between private individuals.

¹¹³⁹ See below Chapter 6.4.6 and 7. Examples of UN treaty bodies requiring legislative reform: UN Doc A/56/44(Supp), CAT, 2001, para. 7, UN Doc. CAT/C/CR/30/1, CAT, 2003.

¹¹⁴⁰ Trechsel, Stefan, *Comparative Observations on Human Rights Law and Criminal Law*, Saint Louis - Warsaw Transatlantic Law Journal Vol. 2000, p. 6.

¹¹⁴¹ See below Chapter 6.4.6.

¹¹⁴² Pitea, Cesare, *Rape as a Human Rights Violation and a Criminal Offence: The European Court's Judgment in M.C. v. Bulgaria*, 3 J. Int'l Crim. Just. (2005), pp. 455-456.

6.4.6 Jurisprudence Delineating the Obligation to Enact Criminal Laws

6.4.6.1 Case Law on Domestic Violence of the European and Inter-American Human Rights Systems

Several cases from the ECtHR have been particularly enlightening in analysing the importance of criminalisation as a preventive function and state obligation. Few cases that specifically concern sexual violence have been analysed by regional human rights courts. However, those that pertain to domestic violence against women are of special relevance for the analysis of the criminalisation of rape, since both forms of violence are held to be systematic and contain a gender component – that is, most victims are women. Both require sufficient prohibition in domestic criminal laws and an effective judicial system in order to eradicate such a pervasive problem. The argumentation is also similar in that it concerns private acts of violence against women that have previously not been included in the realm of state obligations.

Though more generally concerning violence between private actors, the ECtHR in the 1998 case of *A v. the United Kingdom* examined obligations under Article 3 concerning the prohibition of torture and inhuman or degrading treatment.¹¹⁴³ Applicant A was at the age of six hit with a cane by his stepfather, who was subsequently given a police caution after admitting he administered such punishment. When bruises were found on A during a medical examination three years later, A's stepfather was charged with assault resulting in bodily harm contrary to the Offences Against the Person Act. The jury, on the directions of the trial judge, found the stepfather not guilty because his conduct constituted reasonable chastisement of a child. The European Court found the United Kingdom to be in violation of Article 3, since the authorities had failed to protect him from ill-treatment by the stepfather. On the issue of the fact that the conduct emanated from a private individual, the Court concluded:

“the obligation on the High Contracting Parties under Article 1 of the Convention to secure to everyone within their jurisdiction of the rights and freedoms defined in the Convention, taken together with Article 3, requires States to take measures designed to ensure that individuals within their jurisdiction are not subjected to torture or inhuman or degrading treatment or punishment, including such ill-treatment administered by private individuals. Children and other vulnerable individuals, in particular, are entitled State protection, in the form of effective deterrence, against such serious breaches of personal integrity....The Court recalls that under English law it is a defence to a charge of assault

¹¹⁴³ *A. v. The United Kingdom*, (Application No. 25599/94), ECtHR, Judgment of 23 November 1998.

on a child that the treatment in question amounted to ‘reasonable chastisement’...In the Court’s view, the law did not provide adequate protection to the applicant against treatment or punishment contrary to Article 3.”¹¹⁴⁴

The Court analysed the efficiency of British law in preventing ill-treatment originating from private individuals, combining the general obligations of Article 1 with the substance of Article 3. The Court demanded a more extensive criminal law on prohibiting the use of this level of corporal punishment, emphasising the enactment of an adequate criminal law to safeguard physical well-being as one form of positive action required by the Convention.¹¹⁴⁵ The case was one of the first to discuss positive obligations of states to prevent violence between private individuals. Prevention in this case equalled criminalisation.

In *Bevacqua and S. v. Bulgaria*, the criminal law protection against bodily injury was examined.¹¹⁴⁶ The applicant had been subjected to domestic violence at the hands of her ex-husband but was not permitted to initiate criminal proceedings because the injuries were deemed to have reached only the level of “light bodily injury”. The European Court considered both the right to privacy and family life and the protection against torture and inhuman and degrading treatment, stating that “the authorities’ positive obligations...under Article 8 taken alone or in combination with Article 3 of the Convention, may include, in certain circumstances, a duty to maintain and apply in practice an adequate legal framework affording protection against acts of violence by private individuals”.¹¹⁴⁷ The Bulgarian criminal law was considered to be inadequate since it did not provide specific administrative or police measures in cases of domestic violence. Lack of sufficient measures on the part of the authorities in reaction to the behaviour of the ex-husband therefore reached the level of a violation of Article 8.

Furthermore, the case of *Kontrova v. Slovakia* in 2007 concerned the murder of the applicant’s children by her husband following years of domestic violence and threats to her and the children’s lives.¹¹⁴⁸ The failure of the authorities to

¹¹⁴⁴ *A. v. The United Kingdom*, paras. 22-24. Emphasis added. See also *Tyrer v. United Kingdom*, (Application No. 5856/72), Judgment of 25 April 1978, *Costello-Roberts v. United Kingdom*, (Application No. 13134/87), Judgment of 24 March 1993, ECtHR.

¹¹⁴⁵ It did not, however, categorically state that all forms of corporal punishment must be prohibited, but solely that the provisions in the legislation at hand had failed to effectively protect A.

¹¹⁴⁶ *Bevacqua and S. v. Bulgaria*, (Application No. 71127/2001), Judgment of 12 June 2008, ECtHR.

¹¹⁴⁷ *Ibid.*, p. 65. Emphasis added.

¹¹⁴⁸ *Kontrova v. Slovakia*, (Application No. 7510/2004), Judgment of 31/05/2007, Final Judgment of 24 September 2007, ECtHR.

respond in an efficient and appropriate manner to the threats subsequent to a criminal complaint by Kontrova and emergency phone calls led to a finding of a violation of the state's obligations under Article 2. On the matter of positive obligations in relation to the Article, the European Court stated that it

“involved a primary duty on the State to secure the right to life by putting in place effective criminal-law provisions to deter the commission of offences against the person backed up by law-enforcement machinery for the prevention, suppression and punishment of breaches of such provisions. It also extends in appropriate circumstances to a positive obligation on the authorities to take preventive operational measures to protect an individual whose life is at risk from the criminal acts of another individual”.¹¹⁴⁹

The discriminatory aspect of the failure of the state to act with due diligence in cases of violence against women has been noted. This is important in order to acknowledge the systematic denial of rights that such violence often incurs. In e.g. *Opuz v. Turkey*, which also concerned domestic violence, the ECtHR affirmed that the state can be held responsible for the ill-treatment inflicted on persons by non-state actors, since the obligation to *secure* to everyone within its jurisdiction the rights of the Convention requires the state to take measures to ensure that persons are also protected against ill-treatment by private individuals. Furthermore, “children and other vulnerable individuals, in particular, are entitled to State protection, in the form of effective deterrence, against such serious breaches of personal integrity”.¹¹⁵⁰ After the first major incident of domestic violence causing injuries that were sufficiently severe to endanger her life, the applicant had filed a criminal complaint. However, the husband was released pending trial “considering the nature of the offence and the fact that the applicant had regained full health”.¹¹⁵¹ The Court found that the woman in question belonged to a vulnerable group - women in South-East Turkey - where domestic violence was common and where effective remedies were lacking.¹¹⁵²

¹¹⁴⁹ *Kontrova v. Slovakia*, para. 49. Emphasis added. See also *Branko Tomasic v. Croatia*, (Application No. 46598/06), Judgment of 15 January 2009, ECtHR. In this case, a woman and her child had been killed by the father of the child. Though the man had been imprisoned for threats to the victims, the treatment while in prison was not sufficient. Croatian authorities were held responsible for failure to take adequate measures to prevent the act, e.g. by not providing proper psychiatric care to the perpetrator during his time of imprisonment nor examining him prior to release to determine whether he constituted a threat.

¹¹⁵⁰ *Opuz v. Turkey*, ECtHR, para. 159.

¹¹⁵¹ *Ibid*, para. 169.

¹¹⁵² The Court here relied on statistics and reports by local organisations and international NGOs such as Amnesty International.

Most interestingly, the Court found the lack of effective remedies to constitute a form of discrimination.

The following two cases concern inadequacies of the legal systems in general, and not specifically criminal laws. However, they also serve to underscore the discriminatory treatment of violence against women by domestic justice systems. In *Maria da Penha Maia Fernandes v. Brazil* heard by the Inter-American Commission on Human Rights, the Commission examined the case of Maria de Penha who had been battered by her husband. He attempted to kill her twice and subsequently paralysed her at the time she was 38.¹¹⁵³ The case, including an appeal, had not been finalised by the Brazilian justice system during the 15 years prior to the complaint to the Commission, a period during which her husband was free. The Commission found not only the legislation insufficient but also that Brazil had not fulfilled its due diligence obligations, stating that “discriminatory judicial ineffectiveness creates a climate that is conducive to domestic violence, since society sees no evidence of willingness by the State, as the representative of society, to take effective action to sanction such acts”.¹¹⁵⁴ The Commission found a direct connection between state inaction and the perpetuation of private acts of violence since the state aided and encouraged the behaviour of the private perpetrator through its passivity.

The Inter-American Commission in 2007 again reviewed domestic abuse and the murder of the applicant’s children by her ex-husband in *Jessica Gonzales and others v. the United States*.¹¹⁵⁵ The applicant had repeatedly called the police over several hours reporting that her estranged husband had kidnapped her three minor children despite a restraining order, to which they failed to respond. Though not judging the merits *per se* but rather the question of admissibility, the Commission significantly stated that such inaction by the authorities could constitute a violation of the American Declaration, since the police arguably “engage in a systematic and widespread practice of treating domestic violence as a low-priority crime, belonging to the private sphere, as a result of discriminatory stereotypes about the victims”.¹¹⁵⁶ The failures of the authorities would accordingly affect women disproportionately, since they comprised the majority of victims. The lack of effective remedies in the prevention of violence was thereby ascribed a discriminatory component in the structurally poor treatment of female victims and the forms of violence to which this group is particularly subject.

¹¹⁵³ *Maria da Penha v. Brazil*, Case 12.051, Report No. 54/01, 16 April 2001, IACHR.

¹¹⁵⁴ *Ibid*, para. 56.

¹¹⁵⁵ *Jessica Gonzalez and others v. the United States*, Report 52/07, Petition 1490-05, Admissibility Decision, 24 July 2007, IACHR.

¹¹⁵⁶ *Ibid*, para. 58.

The analysis of the above cases can also be applied to cases of rape in many states. Since primarily women are victims of rape, the lack of effective preventive measures in comparisons to other offences implies a discriminatory element.

6.4.6.2 Case Law on Sexual Violence

The European Court of Human Rights has analysed the extent of positive obligations in the prevention on rape through criminal law in several cases, though solely a few regard the definition of the offence. *Aydin v. Turkey*, which will be discussed further in the chapter on the prohibition of torture, concerned the rape of a girl while in detention.¹¹⁵⁷ That rape was held to attain the level of torture because the physical and mental elements were sufficiently severe. The fact that the perpetrator was a state actor also made the finding of torture more uncontroversial. The state was found to have failed in both the direct perpetration of the act but also in subsequently failing to investigate and treat the allegations in a serious manner as well as to remedy the sexual violence. The case is of particular importance in that it was the first case to establish rape as torture in the human rights field. However, it does not particularly discuss the criminal law on rape. Similarly, rape was held to constitute torture and a violation of the right to privacy in *Mejia v. Peru*, dealt with by the Inter-American Commission on Human Rights, but the Commission did not discuss the legislative framework or the elements of the crime.¹¹⁵⁸

In *C.R. v. The United Kingdom*, the extension of the definition of rape through interpretation was examined by the European Court of Human Rights.¹¹⁵⁹ The failure to apply an exclusion of marital rape by the British courts was argued to constitute a violation of *nullum crimen sine lege*. The Court stated: “The essentially debasing character of rape is so manifest that the result...that the applicant could be convicted of attempted rape, irrespective of his relationship with the victim - cannot be said to be at variance with the object and purpose of Article 7.”¹¹⁶⁰ The Court further held that “the abandonment of the unacceptable idea of a husband being immune against prosecution for rape of his wife was in conformity not only with a civilised concept of marriage but also, and above all, with the fundamental objectives of the Convention, the very essence of which is

¹¹⁵⁷ *Aydin v. Turkey*, ECtHR.

¹¹⁵⁸ *Raquel Martí de Mejía v. Perú*, Case 10.970, Report No. 5/96, OEA/Ser.L/V/II.91 Doc. 7 at 157, (1996), IACHR.

¹¹⁵⁹ *C.R. v. United Kingdom*, Judgment of 22 November 1995.

¹¹⁶⁰ *Ibid*, para. 42. Article 7 aims to ensure that no one is subjected to arbitrary prosecution.

respect for human dignity...”.¹¹⁶¹ The case did not explicitly express positive obligations on states with regard to criminalising rape since it evaluated the retroactive application of the law. However, obligations on the abolition of marital rape exclusions could be implied.

The European Court examined responsibility for establishing an effective legal and judicial framework with regard to rape in *X and Y v. The Netherlands*.¹¹⁶² The case concerned a mentally disabled girl living in a privately operated home for disabled children. The applicant was raped by the son-in-law of the director of the home, causing severe mental and physical trauma. The girl’s father filed a complaint on her behalf. However, owing to deficiencies in Dutch criminal law requiring persons over the age of 16 to personally file criminal complaints, the national authorities were unable to prosecute. The Court found that the Netherlands had failed in its obligations to provide preventive and effective remedies against the human rights violation of rape and stated:

“[a]lthough the object of Article 8 is essentially that of protecting the individual against arbitrary interference by the public authorities, it does not merely compel the State to abstain from such interference: in addition to this primarily negative undertaking, there may be positive obligations inherent in an effective respect for private or family life....These obligations may involve the adoption of measures designed to secure respect for private life even in the sphere of the relations of individuals between themselves”.¹¹⁶³

The question of which measures were required by the positive obligations of the state was raised by the Netherlands, which argued that the Convention allowed states to choose appropriate means of securing respect for people’s private lives. The applicant held that solely criminal law provided the requisite level of protection in cases of sexual violence. The Court concluded:

“...the choice of the means calculated to secure compliance with Article 8 in the sphere of the relations of individuals between themselves is in principle a matter that falls within the Contracting States’ margin of appreciation. In this connection, there are different ways of ensuring ‘respect for private life’, and the nature of the State’s obligation will depend on the particular aspect of private life that is at issue. Recourse to the criminal law is not necessarily the only answer”.¹¹⁶⁴

¹¹⁶¹ *C.R. v. United Kingdom*, para. 42.

¹¹⁶² *X and Y v. The Netherlands*, ECtHR.

¹¹⁶³ *Ibid*, para. 23.

¹¹⁶⁴ *Ibid*, para. 24.

However, in stressing the importance of an adequate criminal law in such cases, the Court continued:

“The Court finds that the protection afforded by the civil law in the case of wrongdoing of the kind inflicted on Miss Y is insufficient. This is a case where fundamental values and essential aspects of private life are at stake. Effective deterrence is indispensable in this area and it can be achieved only by criminal law provisions; indeed, it is by such provisions that the matter is normally regulated.”¹¹⁶⁵

This means that the proper deterrence of sexual violence necessitates a prohibition in criminal law, though other measures may also be required. Criminal law that does not fully protect a person from sexual violence may therefore entail a breach of a state’s obligation to protect persons within its jurisdiction, and recourse to civil remedies alone does not constitute sufficient protection. An interesting point raised by the Commission is that respect for sexual self-determination may indeed entail that the state *refrains* from legislating in this area:

“[i]t is generally accepted that it is necessary for the legislator to set rules in order to protect those citizens whose ability of self-determination in respect of sexual advances of others is insufficient, such as young people, persons who by reason of mental or physical disability are deemed unable to determine their own will or manifest it...In this area it is more difficult for the legislator to set rules in order to safeguard the physical integrity of the persons concerned since it carries with it the risk of unacceptable interference by the state in the right of the individual to respect for his sexual private life under Article 8...”¹¹⁶⁶ However, such obligations were ultimately judged to be necessary.

The question raised in *Stubbings and Others v. The United Kingdom* concerned whether the unavailability of civil remedies in connection with sexual offences was considered to be a lack of efficient recourse.¹¹⁶⁷ In this case, four women had allegedly suffered sexual abuse as children by various perpetrators, memories of which they had recovered as adults while in therapy. The applicants attempted to bring civil proceedings against the alleged offenders, but the Limitation Act 1980 required that such claims be filed within six years of the eighteenth birthday of an applicant. Accordingly, they were prevented from

¹¹⁶⁵ *X and Y v. The Netherlands*, para. 27.

¹¹⁶⁶ *X and Y v. The Netherlands*, Report of the Commission, adopted on 5 July 1983, para. 55.

¹¹⁶⁷ *Case of Stubbings and Others v. The United Kingdom*, (Application Nos. 22083/93; 22095/93), Judgment of 22 October 1996, ECtHR.

suing the offenders. However, according to British *criminal* law there was no such statute of limitation for serious offences such as rape. One of the complainants, Ms. Stubbings, turned to the European Court claiming that the Limitation Act prevented them from receiving effective civil remedies subsequent to sexual violation and that the British government had failed to protect their right to respect for privacy. As in the *X and Y v. the Netherlands* case, the Court affirmed the state's positive obligations on prevention of sexual violence, stating:

“Sexual abuse is unquestionably an abhorrent type of wrongdoing, with debilitating effects on its victims. Children and other vulnerable individuals are entitled to State protection, in the form of effective deterrence, from such grave types of interference with essential aspects of their private lives.”¹¹⁶⁸

However, concerning the lack of recourse to civil remedies the Court concluded that effective remedies existed through the penal code:

“protection was afforded. The abuse of which the applicants complained is regarded most seriously by the English criminal law and subject to severe maximum penalties...Provided sufficient evidence could be secured, a criminal prosecution could have been brought at any time and could still be brought...”¹¹⁶⁹

Furthermore: “in principle, civil remedies are also available provided they are sought within the statutory time limit. It is nonetheless true that under the domestic law it was impossible for the applicants to commence civil proceedings against their alleged assailants after their 24th birthdays...However...Article 8 does not necessarily require that States fulfil their positive obligations to secure respect for private life by the provision of unlimited civil remedies in circumstances where criminal law sanctions are in operation”.¹¹⁷⁰

Referring to the principle of margin of appreciation that allows state parties flexibility in deciding upon appropriate measures, the Court did not find a violation of Article 8. The conclusion from the two cases above is that civil remedies in themselves do not constitute sufficient recourse in response to sexual violence and that the minimum standard is a functional criminal law system. Scholars commenting on the American Convention have also emphasised that while civil remedies may be reasonable measures required by states parties,

¹¹⁶⁸ *Case of Stubbings and Others v. The United Kingdom*, para. 64.

¹¹⁶⁹ *Ibid*, para. 65.

¹¹⁷⁰ *Ibid*, para. 66.

effective criminal law responses to violence against women by private actors must form the first test of a state's due diligence to ensure that acts of gender-based violence are treated as illegal acts resulting in punishment of offenders.¹¹⁷¹

The case of *M.C. v. Bulgaria* examined by the European Court of Human Rights has greatly advanced the theory of positive state obligations on the efficiency of national legislation prohibiting rape.¹¹⁷² The applicant, a 14-year-old girl, claimed to have been raped by two men but upon filing a complaint to the police, investigation was terminated due to insufficient evidence of an attack, with specific reference to a lack of proof of coercion shown through resistance. A medical examination revealed evidence of sexual activity and bruises on the girl's neck. However, this was not considered sufficient. The applicant claimed a violation of her rights under the Convention had occurred with reference to the restrictive domestic law and practice in rape cases in Bulgaria. It was argued that the investigation did not meet the state's positive obligations to provide effective legal protection against rape and sexual abuse and thereby failed to safeguard the right to privacy and protection against torture and inhuman or degrading treatment. As such, the Court evaluated three separate but interconnected issues in light of state obligations to prohibit rape: the adequacy of the definition of rape in the penal code, the prosecutorial practice and the effectiveness of the investigation in the specific case, with the latter two questions dependent on the first.

Article 152 § of the Bulgarian Criminal Code defined rape as:

“Sexual intercourse with a woman

- 1) incapable of defending herself, where she did not consent;
- 2) who was compelled by means of force or threats;
- 3) who was brought to a state of defencelessness by the perpetrator.”

The Supreme Court of Bulgaria had interpreted that ‘non-consent’ could be deduced from the situations covered in subparagraphs 2 or 3 – that is, the use of force, threats or a state of defencelessness were elements of ‘non-consent’.¹¹⁷³ A ‘state of defencelessness’ entailed situations of incapacity to resist physically due to disability, old age, illness or because of the use of alcohol, medicines or drugs.¹¹⁷⁴ The Supreme Court had stated that ‘force’ was not limited to direct

¹¹⁷¹ Ewing, Anthony P., *Establishing State Responsibility for Private Acts of Violence Against Women Under the American Convention on Human Rights*, p. 773.

¹¹⁷² *M.C. v. Bulgaria*, ECtHR.

¹¹⁷³ *Ibid*, para. 83.

¹¹⁷⁴ *Ibid*, para. 79.

violence, but could also consist in placing the victim in a situation where she saw no other option but to submit.¹¹⁷⁵ The Bulgarian definition of rape was restrictive in several regards. First and foremost, it limited acts of rape to sexual intercourse and unlike most common law countries, required means of force, threats or a state of defencelessness rather than focusing on the victim's possible non-consent. Given that the law in effect required evidence of the use of violence, excessive emphasis was in practice put on evidence of physical resistance on the part of the victim. Domestic appeals were rejected since

“...there can be no criminal act...unless the applicant was coerced into having sexual intercourse by means of physical force or threats. This presupposes resistance, but there is no evidence of resistance in this particular case....There are no traces of physical force such as bruises, torn clothes etc.”¹¹⁷⁶

Rape was only possible between strangers - that is, not in cases such as the one in question where the applicant knew the alleged offenders.¹¹⁷⁷ The law thereby excluded the prosecution of various sexual acts of a non-consensual nature where no force was used as a means.

The ECtHR, in evaluating the criminal elements of the Bulgarian penal code, conducted an ambitious comparative research of national criminal legislation throughout Europe.¹¹⁷⁸ It also reviewed case law from the ICTY, analysing both the *Furundzija* and *Kunarac* cases (referred to below) despite the fact that they concern international criminal law and regard instances of rape in times of armed conflict. According to the *Kunarac* decision, force is not an element of rape, but rather sexual penetration without the victim's consent, given voluntarily. In fact, the Court explained: “While the above definition was formulated in the particular context of rapes committed against the population in the conditions of an armed conflict, it also reflects a universal trend towards regarding lack of consent as the essential element of rape and sexual abuse.”¹¹⁷⁹

The Court noted that in the legal definition of rape in most European countries, a lack of consent is seen as the key element. In common law countries, legislation in general defines rape as non-consensual sexual relations, whereas in the majority of civil law states a reference to the use of force or threats of violence exists. Significantly, the Court pointed out that in case law and legal theory, a lack of consent rather than force is seen as the foremost element of the

¹¹⁷⁵ *M.C. v. Bulgaria*, para. 84.

¹¹⁷⁶ *Ibid.*, paras. 64-65.

¹¹⁷⁷ *Ibid.*, para. 122.

¹¹⁷⁸ *Ibid.*, paras. 88-100.

¹¹⁷⁹ *Ibid.*, para. 163.

crime of rape even in such jurisdictions.¹¹⁸⁰ The Court discussed the fact that there is a clear evolution in international law towards focusing more on the individual's sexual autonomy, and was mindful of the fact that the development of law on the definition of rape reflects "the evolution of societies towards effective equality and respect for each individual's autonomy".¹¹⁸¹ The Court was aware that research had demonstrated that women often do not physically resist rape, either due to being physically unable to do so by being paralysed with fear, or by aiming to protect themselves from the effects of further force.¹¹⁸² It is therefore more conducive to examine non-consent through the framework of coercive circumstances. This raises the question of whether the Court was more interested in the *effect* of laws on rape and how they are interpreted in practice, rather than on their formulation. For instance, the Court observed:

"Regardless of the specific wording chosen by the legislature, in a number of countries the prosecution of non-consensual sexual acts in all circumstances is sought in practice by means of interpretation of the relevant statutory terms...and through a context-sensitive assessment of the evidence."¹¹⁸³

The Court further stated:

"What is decisive, however, is the meaning given to words such as 'force' or 'threats' or other terms used in legal definitions. For example, in some jurisdictions 'force' is considered to be established in rape cases by the very fact that the perpetrator proceeded with a sexual act without the victim's consent or because he held her body and manipulated it in order to perform a sexual act without consent...Despite differences in statutory definitions, the courts in a number of jurisdictions have developed their interpretation so as to try to encompass any non-consensual sexual act."¹¹⁸⁴

¹¹⁸⁰ *M.C. v. Bulgaria*, para. 159.

¹¹⁸¹ *Ibid*, para. 165.

¹¹⁸² *Ibid*, para. 164.

¹¹⁸³ *Ibid*, para. 161.

¹¹⁸⁴ *Ibid*, para. 171. The Court further stated that the shortcomings in the investigation were due to "...the investigator's and the prosecutors' opinion that since what was alleged to have occurred was a 'date rape', in the absence of 'direct' proof of rape, such as traces of violence and resistance or calls for help, they could not infer proof of lack of consent and, therefore, of rape from an assessment of all the surrounding circumstances". (para. 179). Further: "...the investigation and its conclusions must be centred on the issue of non-consent". (para. 181.)

The definition of rape is here evaluated in conjunction with its practice, causing confusion as to the appropriate standard established by the Court. Certain countries have interpreted this statement to mean that positive obligations emanate from the practical interpretation of the definition rather than the construction of such in the penal code.¹¹⁸⁵ If that is the case, serious concern regarding legal certainty between the disparity of the criminal law provision and its use must be considered. However, the Court also concluded:

“...any rigid approach to the prosecution of sexual offences, such as requiring proof of physical resistance in all circumstances, risks leaving certain types of rape unpunished and thus jeopardizing the effective protection of the individual’s sexual autonomy. In accordance with contemporary standards and trends in that area, the Member State’s positive obligations under Articles 3 and 8 of the Convention must be seen as requiring the penalisation and effective prosecution of any non-consensual sexual act, including in the absence of physical resistance by the victim”.¹¹⁸⁶

The Court also referred to Recommendation Rec (2002)5 of the Committee of Ministers, which obliges states to penalise all non-consensual sexual acts.¹¹⁸⁷ This clearly establishes the obligation to *penalise* non-consensual sexual acts, which implies the criminalisation of this specific formulation of the definition of rape. Some authors support the notion that the case actually directs states on how their domestic criminal laws must be drafted, interpreted and applied.¹¹⁸⁸ However, as pointed out, both the language used in the ruling and the Committee of Ministers’ recommendation, to which it refers, could also be interpreted as solely requiring criminalisation of non-consensual acts, not necessarily as a crime of rape, but possibly also as sexual offences of lower gravity. In the

¹¹⁸⁵ See Sweden, Prop. 04/05:45 Bilaga 9, p. 208. See, also, the support for this notion in Asp, Petter, *M.C. v. Bulgaria - A Swedish Perspective*, Scandinavian Studies in Law, Volume 54, Criminal Law, Stockholm Institute for Scandinavian Law, (2009). Asp argues that the fact that the Court examined the *practice* of the definition of rape implies that the design of the law *per se* is not a violation of Article 3.

¹¹⁸⁶ *M.C. v. Bulgaria*, para. 166.

¹¹⁸⁷ *Ibid*, para. 101.

¹¹⁸⁸ Pitea, Cesare, *Rape as a Human Rights Violation and a Criminal Offence: The European Court’s Judgment in M.C. v. Bulgaria*, p. 454. Joanne Conaghan also asserted that the Court in this case “...endeavours to prescribe clear normative limits on the content and application of rape law in individual States. Put simply, rape law which fails adequately to protect the dignity and autonomy of individuals, whether in form or application, is a breach of those individuals”. See Conaghan, Joanne, *Extending the Reach of Human Rights to Encompass Victims of Rape: M.C. v. Bulgaria*, *Feminist Legal Studies* (2005) 13:145-157, p. 155.

statement the Court did not specify obligations as to the construction of the definition – that is, which criminal elements it must entail, but rather that the state must provide protection against non-consensual sexual acts. A definition that includes non-consensual acts in its interpretation of force or coercion might thus not be in breach of the Convention.

As a result, the Court found that Bulgaria had failed in its obligations due to its lack of focus on the matter of non-consent in the investigation and in its conclusions. It held that state parties to the European Convention have positive obligations to enact criminal legislation to effectively punish rape and sexual violence, and to apply such legislation over the course of the investigation and prosecution.¹¹⁸⁹ The Court further declared that rape constitutes torture or inhuman or degrading treatment as well as a violation of the right to privacy and that the state had therefore contravened Articles 3 and 8 of the ECHR, thereby extending the jurisprudence of the *X and Y* case, which found a violation of Article 8 alone. The Court did not, however, specify whether the violation rose to the higher level of torture or simply inhuman and degrading treatment. By applying both Articles 3 and 8 in conjunction, the Court emphasised that rape causes multiple fundamental harms, infringing both the physical and mental integrity of the victim (Article 3) and the sexual autonomy of the individual (Article 8). Recognition of insufficient legislation as a violation of Article 3 was a major advancement in the jurisprudence on sexual violence, since it carries with it a connotation of a violation of a “fundamental value” that is non-derogable and non-qualified.

By analysing the common nature of rape attacks and the behaviour of the victim during the course of it, in relation to the definition of rape, the Court in effect discussed the importance of substantive gender equality as an aspect of human dignity.¹¹⁹⁰ The non-discrimination principle is therefore viewed in light of Articles 3 and 8, and a minimum standard imposed on the criminalisation of rape domestically. It should, however, be noted that the Court does not discuss the fact that the definition is not gender-neutral, through its construction of *actus reus*, in that solely women can be victims of rape. This discriminatory aspect was outside the scope of review for the Court and was consequently not mentioned.

The question arises in considering the Court’s review of national criminal laws in the region, whether the standard for the interpretation of how to protect

¹¹⁸⁹ The Court stated that “the investigation and its conclusions must be centred on the issue of non-consent”.

¹¹⁹⁰ The Court e.g. discussed the fact that women often do not physically resist. See para. 164. Rudolf, Beate & Eriksson, Andrea, *Women’s Rights Under International Human Rights Treaties: Issues of Rape, Domestic Slavery, Abortion, and Domestic Violence*, p. 512.

human dignity is to be measured simply by what is the common regional standard. The margin of appreciation is considered but then dismissed for the benefit of a minimum standard in the regulation on rape. However, the scope of the minimum standard is constrained, in part, by the already existing legislation of the member states, apart from the standards set by the *ad hoc* tribunals. In a way, the Court simply affirms a standard that already exists in many of the state parties. On the domestic flexibility in constructing a definition of rape, the Court stated:

“In respect of the means to ensure adequate protection against rape States undoubtedly enjoy a wide margin of appreciation. In particular, perceptions of a cultural nature, local circumstances and traditional approaches are to be taken into account. The limits of the national authorities’ margin of appreciation are nonetheless circumscribed by the Convention provisions.”¹¹⁹¹

It further held: “While the choice of means to secure compliance with Article 8 in the sphere of protection against acts of individuals is in principle within the State’s margin of appreciation, effective deterrence against grave acts such as rape, where fundamental values and essential aspects of private life are at stake, requires efficient criminal-law provisions.”¹¹⁹²

The Council of Europe, in a recommendation by the Committee of Ministers, has further expressed the necessity of criminalising non-consensual sexual acts in order to afford women satisfactory protection against violence.¹¹⁹³ Several suggestions are made for the revision of domestic laws of member states, including ensuring that the criminal law reflects that sexual violence is a violation of the individual’s “physical, psychological and/or sexual freedom and integrity, and not solely a violation of morality, honour or decency”.¹¹⁹⁴ Member states must also penalise any sexual acts committed against non-consenting persons, even where no signs of resistance are evident.¹¹⁹⁵

This in turn has influenced the language of the Draft Convention on Preventing and Combating Violence against Women and Domestic Violence of 2009 of the Council of Europe, which obliges states to “take the necessary

¹¹⁹¹ *M.C. v. Bulgaria*, para. 154.

¹¹⁹² *Ibid*, para. 150.

¹¹⁹³ Rec(2002)5 of the Committee of Ministers of the Council of Europe on the protection of women against violence.

¹¹⁹⁴ *M.C. v. Bulgaria*, para. 34.

¹¹⁹⁵ *Ibid*, para. 35.

legislative or other measures” to ensure that the following conduct is criminalised:

- 1) a, engaging in non-consensual vaginal, anal or oral penetration of the body of another person with any bodily part or object;
- b) engaging in non-consensual acts of a sexual nature with a person;
- c) causing another person to engage in non-consensual acts of a sexual nature.¹¹⁹⁶

Interestingly, the Article further specifies that such legislative measures should also apply to situations of international and non-international armed conflicts. Though it is included in a convention on violence against women, the language of the provision is gender-neutral. It should be noted that the Article regards the prohibition of not solely rape, but also on sexual violence in general. However, it still indicates the appropriate elements for the crime of rape.

In the case of *The Miguel Castro-Castro Prison v. Peru* in 2006, the Inter-American Court discussed rape and sexual violence in relation to torture and inhumane and degrading treatment and offered its own tentative definition of rape.¹¹⁹⁷ This matter concerned the treatment of inmates at the Miguel Castro-Castro prison who were subjected to a violent attack by state agents. Approximately 40 people died and many were injured, some through sexual violence - particularly female inmates after being transferred to a police hospital. Several women were found to have been subjected to sexual violence by being forced to remain nude in the hospital while being surrounded and guarded by men, which was considered a violation of their right to humane treatment under Article 5 (2) of the American Convention and thereby of their human dignity. Most interestingly, the Court discussed an incident when a female inmate at the hospital was subjected to a finger vaginal inspection, carried out by several hooded individuals at the same time, on the pretext of conducting a medical examination. The Court resorted both to international criminal law and comparative domestic criminal law and emphasised:

“[r]ape does not necessarily imply a non-consensual sexual vaginal relationship, as traditionally considered. Sexual rape must also be understood as an act of vaginal or anal penetration, without the victim’s consent, through the use of other parts of the aggressor’s body or objects, as well as oral penetration with the virile member”.¹¹⁹⁸

¹¹⁹⁶ Draft Convention on Preventing and Combating Violence against Women and Domestic Violence, CAHVIO (2009) 32 Prov., Council of Europe, Strasbourg, 15 October 2009, Article 27.

¹¹⁹⁷ *Case of the Miguel Castro-Castro Prison v. Peru*, 25 November 2006, IACtHR.

¹¹⁹⁸ *Ibid.*, para. 310.

The discussion on the definition of rape was secondary to the matter and was provided little analysis in the case. Perhaps one cannot even go so far as saying that a particular definition was adopted, but rather a general discussion on the *actus reus* of rape and its liberal interpretation under international law. The Court did assume rape to be a non-consensual act and did not mention the element of force. However, no further insight was provided into its understanding of the concept of non-consent. The Court did not describe the manner in which it reached its conclusion, except to generally state that it had drawn inspiration from international criminal law and domestic criminal law. It did not specify whether it referred to the jurisprudence of the *ad hoc* tribunals or the Rome Statute, nor with which national legislation it had made comparison.

Quoting the European Court of Human Right's reasoning in *Aydin v. Turkey*, the Court acknowledged that rape of a detainee by a state agent was especially gross and reprehensible, in view of the vulnerability of the victim and the abuse of power exercised by the perpetrator. The Court also made plain that sexual violence against women is exacerbated when women are imprisoned.¹¹⁹⁹ Taking into account the severe physical and emotional trauma experienced by the victim, the latter being difficult to overcome with time, the Court found that the rape reached the level of torture, as defined in the Inter-American Convention to Prevent and Punish Torture.¹²⁰⁰ The Court was not restricted to review violations solely from the perspective of the American Convention, but from other conventions that may "specify and complement the State's obligations with regard to the compliance of the rights enshrined in the American Convention".¹²⁰¹ This is also apparent in that the Court made reference to the American Convention on the Prevention, Punishment and Eradication of Violence Against Women (Belém do Para), stating that apart from reviewing Article 5 of the American Convention "it is necessary to point out that Article 7 of the Convention of Belém do Pará expressly states that the States must ensure that the State authorities and agents abstain from any action or practice of violence against women",¹²⁰² thus displaying a particular sensitivity to the precarious situation of the female victims in the case. It was the first time that the Court had employed said Convention in its case law.

¹¹⁹⁹ *Case of the Miguel Castro-Castro Prison v. Peru*, para. 312.

¹²⁰⁰ *Ibid*, para. 312.

¹²⁰¹ *Ibid*, para. 379.

¹²⁰² *Ibid*, para. 292.

6.4.6.3 Conclusions on Obligations in Case Law to Prevent Sexual Violence

As viewed, states' duties stretch from preventing breaches of human rights norms through various measures, both by establishing an efficient legal framework and operationalising such provisions, as well as responding to violations. Though the European Court in the cases on rape has acknowledged a margin of appreciation for states in relation to their domestic legislation, it nevertheless has applied a strict scrutiny in several respects. In reviewing the jurisprudence of the Court, one can evince five points of positive state obligations that the Court has distilled from the European Convention.¹²⁰³ Most relevant for this thesis, it includes 1) the duty to put in place a *legal framework* that provides effective protection for the rights in the Convention, as observed in *X and Y v. the Netherlands* and *M.C. v. Bulgaria*. The ruling in *M.C. v. Bulgaria* suggests a trend of viewing a lack of consent as the essential element of rape and sexual abuse.

The concurring opinion of Judge Tulkens in *M.C. v. Bulgaria* is of interest because it enters the area of criminology and elaborates on the deterrent value of criminal proceedings. While the judge conceded that recourse to criminal law was the understandable remedy for crimes of such gravity as rape, he emphasised that criminal law is not the sole answer to preventing violations. Instead he argued that criminal proceedings should remain a last resort and "that their use, even in the context of positive obligations, calls for a certain degree of 'restraint'...",¹²⁰⁴ quoting a Report on Criminalisation by the European Committee on Crime Problems, which outlines numerous factors that influence the effectiveness of general deterrence.¹²⁰⁵ However, the judge continued that once a state has opted for a system of protection based upon criminal law, "it is of course essential that the relevant criminal-law provisions are fully and rigorously applied in order to provide the applicant with practical and effective protection".¹²⁰⁶ The fact that the Court has promoted criminal law as the sole remedy in the effective deterrence against crime has been criticised also in literature. For example, the focus on criminal remedies should not relieve states of their duty to promote and protect rights through other means.¹²⁰⁷ Is this taken

¹²⁰³ Starmer, K, *Positive Obligations under the Convention*, Jowell, J & Cooper, J, (eds.), in *Understanding Human Rights Principles*, Hart Publishing, 2001, pp. 146-147.

¹²⁰⁴ *M.C v. Bulgaria*, Concurring Opinion, para. 2.

¹²⁰⁵ European Committee on Crime Problems, Report on Decriminalisation, Strasbourg, Council of Europe, 1980.

¹²⁰⁶ *M.C v. Bulgaria*, Concurring Opinion, para. 3.

¹²⁰⁷ Pitea, Cesare, *Rape as a Human Rights Violation and a Criminal Offence: The European Court's Judgment in M.C. v. Bulgaria*, p. 456, who argues that international law should be more flexible.

to mean that only because the state in question has opted for criminal proceedings as a remedy to rape victims, such provisions must reach a certain minimum requirement – that is, prohibiting non-consensual sexual acts, but that no such requirement would be made if the state had chosen other measures as a recourse to the violation? Such a reading of his statements would mean that the margin of appreciation for states in choosing remedies would be unacceptably wide and incompatible with the Court’s statements in *Stubbings*, declaring civil remedies an inefficient remedy in cases of sexual abuse.

Furthermore, states have 2) the duty to *prevent* breaches of rights.¹²⁰⁸ The operationalisation of prevention was e.g. discussed in *E. and others v. The United Kingdom* where the state should have known that a risk of sexual abuse existed and taken appropriate measures of prevention. This awareness of the state of a possible violation could plausibly also be relevant in situations of recidivism of crime, where the state has refrained from investigating and prosecuting. It might also include cases where a pattern of violations has come to the state’s attention, indicating a lack of efficient preventive measures.

The matter of means as opposed to results is evident to a certain extent in the cases. In both the *M.C. v. Bulgaria* and *X and Y v. The Netherlands* cases, a possible causality between domestic legislation and the instance of rape was sufficient to find a breach. In the latter case, the state submitted that the sexual assault would still have occurred even if it had been punishable and the ability to prosecute available, an argument which was dismissed by the Court.¹²⁰⁹ In the *Velasquez Rodriguez* case, the Inter-American Court maintained that the duty to investigate is a duty in the course of preventing human rights violations, even though the victim in this case might still have been killed by the state had such legislation been in place. Likewise, in *E. and others v. The United Kingdom* the state argued with reference to the sexual abuse that “it has not been shown that matter would have turned out differently” had the authorities monitored the situation fully, i.e. holding that the Court should apply a “but for” test of causality.¹²¹⁰ The Court replied that “[t]he test under Article 3...does not require it to be shown that ‘but for’ the failing or omission of the public authority ill-treatment would not have happened. A failure to take reasonably available measures which could have had a real prospect of altering the outcome or mitigating the harm is sufficient to engage the responsibility of the State”.¹²¹¹

¹²⁰⁸ See *Osman v. the United Kingdom*, ECtHR.

¹²⁰⁹ *X and Y v. The Netherlands*, Report of the Commission, adopted on 5 July 1983, para. 61.

¹²¹⁰ *E and others v. The United Kingdom*, ECtHR, para. 99.

¹²¹¹ *Ibid.*

It is therefore not necessary to prove the exact causality between the rape and the lack of administrative or criminal procedures in the particular case but it is presumed that major deficiencies in a legal system serve to encourage both impunity and in the long run offences such as sexual violence. The structure developed by the state *per se* is seen as the underlying factor in the high incidence of such crimes. As mentioned in the general discussion on due diligence, an increased likelihood of offences such as sexual violence is to be presumed where the state fails to take effective measures to prevent and punish those crimes. The state is, in conclusion, under the due diligence regime not obligated to guarantee a certain result, but only to take reasonably available measures. If the state takes such measures, without succeeding in altering or mitigating the harm, the state cannot be held responsible.

Case law further points to 3) the obligation to provide *information* and advice relevant to a breach of a right,¹²¹² and 4) the responsibility to *respond* to breaches of rights, as viewed in *Aydin v. Turkey*. In *Aydin v. Turkey*, the European Court delineated the appropriate remedies in rape cases, including a certain quality of medical examination of rape victims. The positive obligations also include 5) the duty to provide *resources* to those whose rights are at risk.¹²¹³ The Inter-American Court, in promulgating its due diligence theories, has mainly dealt with cases of disappearance with unknown perpetrators, thereby focusing on the states' *response* to the breaches, e.g. to effectively investigate and prosecute the perpetrators. However, the Court has also stressed the main obligation of prevention of violations.

The cases of *X and Y v. the Netherlands* and *M.C. v. Bulgaria* are of particular interest for this thesis. In *X and Y v. the Netherlands*, the Court stated that civil law remedies in cases of rape represented an insufficient response when the state has a choice of means. However, the Court did not specify the content of what criminal law provisions should entail in general but, as always, concentrated on the question at hand – that is, the requirement that the victim personally had to initiate proceedings as an obstacle to her right to privacy. The definition of the crime was not evaluated as such and the fact that it involved a requirement of physical force was not raised. In *M.C. v. Bulgaria*, the Court allowed a certain level of discretion in the formulation of a definition of rape. This discretion, however, was circumscribed by the practical effects of the definition, which necessitated a minimum standard among member states of the elements of rape. This required a focus on non-consent. All the same, the positive obligation established in the case was drawn from the “present day requirements”, implying that the standard was concluded through a survey of current regulations in

¹²¹² See e.g. *Guerra v. Italy & Lopez Ostra v. Spain*, ECtHR.

¹²¹³ *Airey v. Ireland*, ECtHR.

member states rather than the result of a progressive analysis by the Court. However, the dynamic interpretation of the convention also leads to an evolutionary approach, thus treating the convention as a living document. As such, strides gained in e.g. the advancement of women's rights are reflected in the ruling in the emphasis on the sexual autonomy of the individual.

It is also noteworthy that the Court's reliance on international criminal law in evincing the proper standard rather than referring solely to the varying approaches of the member states, demonstrates an increased openness to other areas of international law. This was similarly seen in the *Miguel Castro-Castro Prison* case. This speaks of a willingness to harmonise rules on similar matters in public international law and perhaps a growing appreciation for using general principles as a source of international law. Although the language in *M.C. v. Bulgaria* could have been stronger in the formulation of the obligations of states, e.g. clearly stating that a definition of rape must contain the element of non-consent rather than recognising laws that solely have this *effect*, it does point to the general development in international law in focusing on the sexual autonomy of the individual. Also the *Miguel Castro-Castro Prison* case points to this trend.

The conclusion to the review of the case law is therefore that the prohibition on sexual violence has developed as an implicit standard in the interpretation of various human rights treaties. It is not sufficient that states criminalise sexual violence. Such laws must be *efficient* if they are to deter such serious offences as rape. A development can hereby be seen from requiring a criminalisation of rape domestically, to demanding a specific *content* of the law and elements of the offence. This reflects the general tendency in international law to increasingly oblige states to enact specific criminal laws. Thus, international human rights law no longer solely entails the purpose of restraining state interference, but rather *demand*s interference by the state into matters of sexual autonomy.

6.4.6.4 Relevant Views and Statements from UN Treaty Bodies

The positive obligations of states regarding domestic criminal law have not been the province of regional human rights courts alone. Various UN treaty bodies in country reports or in response to individual communications have also criticised states for failing to provide sufficient legislation to prevent or punish rape. The CEDAW Committee, UNCAT and the UN Human Rights Committee have all issued statements requesting states to provide efficient redress in situations of sexual violence,¹²¹⁴ to amend penal codes containing inadequate punishment, e.g. in those jurisdictions that erase the criminal liability of rape suspects where the

¹²¹⁴ UN Doc. A/57/38 (2002): Portugal (CEDAW), UN Doc. CAT/C/GTM/CO/4 (2006): Guatemala (CAT).

perpetrator marries the victim,¹²¹⁵ or laws requiring the consent of the complainant before prosecuting.¹²¹⁶ The UN Human Rights Committee has expressed the view that ensuring effective remedies for rape victims is a necessity in order to guarantee equal protection of both genders.¹²¹⁷

In reviewing the periodic reports that state parties to CEDAW submit to the Committee, one of the issues considered is the existing domestic legislation on violence against women. The Committee has on several occasions commented that criminal law legislation has been too restrictive or lacking in affording effective protection to women. In the list of issues with regard to the consideration of the periodic report of the Czech Republic, the Committee expressed concern as to the definition of rape in the state's criminal law. Criticism was twofold: the fact that the definition of rape was based on the use of force, rather than lack of consent, and that rape within marriage was not criminalised.¹²¹⁸ In its concluding observation on Hungary, the Committee expressed concern that sexual crimes were treated as offences against decency rather than a violation of a woman's right to bodily security. The fact that the definition of rape was founded on the use of force and not on lack of consent was also condemned.¹²¹⁹ The Committee has similarly urged states to amend legislation to explicitly define the crime of rape as "sexual intercourse without consent".¹²²⁰

In 2005 the CEDAW Committee reviewed a case under the Optional Protocol, concerning a woman subjected to domestic violence by her husband, *A.T. v. Hungary*.¹²²¹ As mentioned earlier, domestic violence raises similar issues of due diligence obligations as sexual violence committed by private individuals and entails an analogous form of review. Ms. A.T had been regularly assaulted but despite initiating both civil and criminal proceedings aiming to prosecute her husband and to bar him from entering the apartment, both procedures proved unsuccessful. No women's shelters existed that could accommodate her and her disabled child, and restraining orders were not available in cases of domestic violence. The Committee first of all noted that according to General

¹²¹⁵ UN Doc. A/55/38 (2000): Romania (CEDAW), UN Doc. A/56/38 (2001): Vietnam (CEDAW), UN Doc. CAT/C/CR/31/6 (2004): Cameroon (CAT).

¹²¹⁶ UN Doc. CCPR/CO/80/COL (2004): Colombia (HRC).

¹²¹⁷ UN Doc. CCPR/C/79/Add. 54 (1995): Russian Federation, (HRC), para. 14,

¹²¹⁸ List of Issues and Questions with Regard to the Consideration of Periodic Reports, Czech Republic, UN Doc. CEDAW/C/CZE/Q/3, 22 February 2006.

¹²¹⁹ UN Doc. A/57/38 (2002): Hungary, (CEDAW), paras. 333-334.

¹²²⁰ UN Doc A/57/38 (2002): Estonia, (CEDAW), para. 98, UN Doc. A/55/38 (2000): Lithuania, para. 151.

¹²²¹ *Ms. A.T. v. Hungary*, Communication No.2/2003, 26 January 2005, CEDAW.

Recommendation No. 19, states may be held responsible for private acts if they fail to act with due diligence. It raised several points of concern, firstly noting the prevalence of domestic violence in Hungary as well as a lack of specific legislation to combat it and therefore encouraged a specific law prohibiting such conduct. The Committee recorded the fact that Hungary admitted that it was not “capable of providing immediate protection to her against ill-treatment by her former partner and, furthermore, that legal and institutional arrangements in the State party are not yet ready to ensure the internationally expected, coordinated, comprehensive and effective protection and support for the victims of domestic violence”.¹²²² The Committee affirmed that violence against women is a form of discrimination when it affects women disproportionately and, pursuant to Article 2 of the Convention, state parties are obliged to ensure the *practical* realisation of gender equality.

The CEDAW Committee in 2007 reviewed two further cases on the topic of domestic violence.¹²²³ In *Sahide Goekce v. Austria*, the female applicant’s husband abused her over the course of several years and finally killed her in front of their children. The authorities had initially responded by issuing a prohibition to return for the husband on several occasions as well as ordered his detention. However, considering the lack of response to frequent emergency phone calls by the victim, also a few hours prior to her death, coupled with information given to the police about a firearm in the possession by the husband, the Committee held that the police knew or should have known of the danger to the woman. It obliged the state to “strengthen implementation and monitoring of...related criminal law, by acting with due diligence to prevent and respond to such violence against women...”.¹²²⁴ Furthermore: to “vigilantly and in a speedy manner prosecute perpetrators of domestic violence in order to convey to offenders and the public that society condemns domestic violence as well as ensure that criminal and civil remedies are utilized...”.¹²²⁵

General remarks from various organs and officials of the UN also call for the reform of restrictive laws on rape. Deputy Secretary-General Asha-Rose Migiro in 2009 stated that a legal framework that effectively protects women from violence is essential. Domestic laws attended by difficulty still exist. These include the non-recognition of marital rape and, most relevantly, definitions of

¹²²² *Ms. A.T. v. Hungary*, para.9.3.

¹²²³ *Sahide Goekce v. Austria*, Communication No. 5/2005, 6 August 2007, *Fatma Yildirim v. Austria*, Communication No. 6/2005, 6 August 2007 (CEDAW). Both cases contain similar facts and the same conclusions by the Committee and solely the first case will therefore be discussed.

¹²²⁴ *Sahide Goekce v. Austria*, para. 12.3. (a).

¹²²⁵ *Ibid*, para. 12.3. (b).

rape that rest on the use of force and not on the absence of consent.¹²²⁶ This indicates that it is not only the regional human rights courts that have evaluated the substance of the criminalisation of rape as a matter of human rights law - it is also a practice within the UN system. Though the statements have been rather sparsely formulated and primarily involve a general obligation to provide more effective remedies for rape victims, the treaty bodies have on occasion assessed the definition itself of rape as an impediment to the full enjoyment of women's human rights.

6.4.7 Failure of State Obligations to Prevent Single Cases of Rape

The question inevitably arises of how one is to measure or prove the efficiency of a state's attempts to prevent and punish a certain crime. Can a single case of rape be used as evidence of a state's breach of the due diligence doctrine, or is a pattern of state passivity in response to a certain form of violation necessary to demonstrate a violation? Can the government of a country where rape is prevalent be held responsible based solely upon statistics? In the following, the question of the scope required to prove a state's lack of prevention of rape will be analysed.

As regards positive obligations, a state may satisfy its duties by enacting certain provisions without necessarily meeting each individual claim.¹²²⁷ Certain authors have expressed the opinion that the general rules on state responsibility indicate that state complicity is principally to be found in cases of *systematic* acts or omissions.¹²²⁸ Celina Romany, for example, argues that complicity depends on the verifiable existence of a parallel state with its own system of justice - a state that systematically deprives individuals of their human rights. Pervasive violence inflicted on women is cited as an example.¹²²⁹ The social context is often raised in case law as an indicator of a failure of due diligence. Romany's view is that this contextualisation is crucial to an understanding of state responsibility for violations of women's rights. The systematic exclusion of women in

¹²²⁶ New York, 4 March 2009, Deputy-Secretary-General's Remarks to the Joint Dialogue of the Commission on the Status of Women and the Commission on Crime Prevention and Criminal Justice, 53rd session, CEDAW.

¹²²⁷ Cook, Rebecca, *State Responsibility for Violations of Women's Rights*, p. 150.

¹²²⁸ Romany, Celina, *State Responsibility Goes Private: A Feminist Critique of the Public/Private Distinction*, p. 100.

¹²²⁹ *Ibid*, p. 100. Romany argues that state complicity in private violations against women is not established by random incidents of non-punishment of violence against women, e.g. the non-punishment of a particular murderer.

international law leads to a normative link between general rules on state responsibility and international human rights law.¹²³⁰

However, legal doctrine indicates that even a single breach of an international human rights duty is sufficient to constitute an internationally wrongful act.¹²³¹ It is also continually emphasised in the commentary to the Draft Articles on state responsibility that obligations can only be determined by the primary rules and that e.g. the passage of incompatible legislation may constitute such a breach.¹²³² Andrew Clapham states that this proposition also can be applied to the due diligence standard, e.g. in single cases of private killings or private racial discrimination, if evidence indicates that the state failed to curtail, prevent or punish such action.¹²³³ Rebecca Cook contends that both individual events and accumulated statistics can serve as evidence of a state breach of obligations. State complicity is thus more *obvious* when the violence in question is of a pervasive or persistent character.¹²³⁴ In similar vein, Henry Steiner observes that while human rights treaties do not require violations to be possessed of a systemic character, such cases will mainly be regarded by international and regional organs.¹²³⁵ This does not, however, equal a requirement.

In the jurisprudence of the Inter-American Court, much emphasis has been placed on a *consistent* lack of protection on the part of authorities. In the *Velasquez Rodriguez* case, the Inter-American Court considered that the general human rights situation in Honduras was of consequence when delineating the accountability of the state for violence that might or might not have emanated from private individuals. The fact that disappearances were a common occurrence in Honduras was essential to establish in order to prove the inefficiency of the government to prevent, punish and investigate such crimes. It implied either state involvement or support. The Court stated:

¹²³⁰ Romany, Celina, *State Responsibility Goes Private: A Feminist Critique of the Public/Private Distinction*, p. 102.

¹²³¹ Kamminga, Menno, *Inter-State Accountability for Violations of Human Rights*, p. 170.

¹²³² Draft Articles on State Responsibility, p. 57 (Article 12, para. 12).

¹²³³ Clapham, Andrew, *Human Rights in the Private Sphere*, p. 106.

¹²³⁴ Cook, Rebecca, *State Responsibility for Violations of Women's Rights*, p. 151.

¹²³⁵ Steiner, Henry, *International Protection of Human Rights, in International Law*, ed. Malcolm Evans, 2nd ed, p. 771. Steiner finds that though an individual injury may be examined by UN treaty organs and regional courts, violations are rarely “idiosyncratic, disconnected from a larger political system or prevailing cultural practices. They tend to fall within a practice or pattern - perhaps widespread torture...”.

“...while the State is obligated to prevent human rights abuses, the existence of a particular violation does not, in itself, prove the failure to take preventative measures. On the other hand, subjecting a person to official, repressive bodies that practice torture and assassination with impunity is itself a breach of the duty to prevent violation of the rights to life and physical integrity of the person, even if that particular person is not tortured or assassinated, or if those facts cannot be proven in a concrete case”.¹²³⁶

In other words, a limited number of cases involving a certain human rights abuse may not be sufficient to prove a lack of due diligence, since a state cannot be expected to anticipate all eventualities and eradicate all forms of violence. Instead, the question for consideration is whether or not the state has undertaken its duties to prevent and punish seriously. Interestingly, the Court stated that in order to prove a breach of due diligence, it was not necessary to provide evidence in the particular case before the Court beyond finding the scenario likely in the prevailing circumstances of the country. While the burden of proof before the Court is on the victim, it could change in accordance with indirect or circumstantial evidence, even presumptions.¹²³⁷ As such, an official practice of disappearances tolerated by the government, combined with evidence in the individual case linking it to the official practice would be sufficient. The prevalent social conditions were thus important in the assessment.

The Inter-American Court in the subsequent *Godínez Cruz* case also concluded that unlike criminal proceedings in domestic courts, international human rights tribunals may, apart from direct evidence, rely on circumstantial evidence and presumptions so long as they are consistent with the facts.¹²³⁸ The Court proceeded to detail the general practice of disappearances in Honduras and the common pattern that they followed. Witnesses to disappearances in general were called to testify. Though the exact circumstances of the disappearance of Mr. Godínez were unclear, as well as the identities of those responsible, the Court held that three elements were sufficient to find Honduras in breach of its due diligence obligations, namely: “(1) a practice of disappearances carried out or tolerated by Honduran officials existed between 1981 and 1984; (2) the circumstances surrounding the disappearance of Saúl Godínez coincide with those of that practice; and (3) the government of Honduras failed to guarantee

¹²³⁶ *Velasquez Rodriguez* case, para. 175.

¹²³⁷ *Ibid*, paras. 123-126. See, also, the ECtHR, e.g. Case of *Khamila Isayeva v. Russia*, (Application No. 6846/02), 15 November 2007, para. 100 ff.

¹²³⁸ *Godínez Cruz Case*, para. 136.

the human rights affected by that practice.”¹²³⁹ This further supports the reasoning that there does not need to be direct evidence of a contravention in a single case in order to establish a breach of due diligence, if there exists a general pattern of such violations in the country concerned.

Ewing claims that the existence of systematic state omissions is not explicitly required in order to establish state responsibility under the American Convention, but may in effect be necessary, especially to prove a breach of the duty to investigate and punish.¹²⁴⁰ This can be adduced from the case of *Fairen Garbi & Solis Corrales*,¹²⁴¹ where the Court did not find evidence of a violation by the state, albeit the case also concerned disappearances in Honduras. The decisive difference was that the victims lacked the political activity typical of those in the demonstrated common practice of vanished persons in Honduras. This means that where the particular case is built on presumptive evidence drawn from state practice, the single case must retain a strong link to the systematic denial of rights.

In 2001 the Inter-American Commission on Human Rights reviewed Brazil’s measures to prevent and punish domestic violence.¹²⁴² The report concerned the state’s response in a particular case of such violence. The Commission found Brazil lacking in its due diligence obligations to prevent violence in a case where there was clear evidence against the accused. However, the Commission noted that the case under consideration was “part of a general pattern of negligence and lack of effective action by the State in prosecuting and convicting aggressors”.¹²⁴³ It made clear: “tolerance by the State organs is not limited to this case; rather, it is a pattern”.¹²⁴⁴ It further stated that the failure did not restrict itself solely to a lack of prosecution of that crime and conviction of the perpetrator, but also to “prevent these degrading practices”.

¹²³⁹ *Godinez Cruz Case*, para. 156. Similarly, the UN Human Rights Committee in a case also concerning disappearance and subsequent killings stated, regarding the burden of proof, that due weight must be given to the applicant’s allegations since frequently the state party alone has access to relevant information and evidence. There was no conclusive evidence as to the identity of the murderers in this case but, considering witness statements about the common occurrence of kidnapping and torture by Colombian military personnel, it was held likely that the military did bear responsibility for the acts. *Joaquín David Herrera Rubio et al. v. Colombia*, Communication No. 161/1983, UN. Doc. CCPR/C/OP/2, HRC, (1990).

¹²⁴⁰ Ewing, Anthony P., *Establishing State Responsibility for Private Acts of Violence Against Women Under the American Convention on Human Rights*, p. 789.

¹²⁴¹ *Fairen Garbi & Solis Corrales*, (series C), No. 6, IACtHR, Judgment of 15 March 1989.

¹²⁴² *Maria da Penha v. Brazil*, Case 12.051, Report No. 54/01, IACHR, 16 April 2001.

¹²⁴³ *Ibid*, para. 56.

¹²⁴⁴ *Ibid*, para. 55.

In 2005 the CEDAW Committee published a report on Mexico that particularly focused on the plight of women in the Chihuahua area, which had come to the attention of the Committee through correspondence by various non-governmental organisations. Worrying numbers of women were being abducted, raped and murdered in this region, causing the Committee to evaluate the effectiveness of measures taken by the Mexican authorities to prevent and punish such atrocities. The Committee found a serious lapse in compliance with the Convention, as “evidenced by the persistence and tolerance of violations of women’s human rights”.¹²⁴⁵ It emphasised the fact that this was a situation of widespread violations of women’s rights, stating: “we are faced not with an isolated although very serious situation, nor with instances of sporadic violence against women, but rather with systematic violations of women’s rights, founded in a culture of violence and discrimination that is based on women’s alleged inferiority, a situation that has resulted in impunity”.¹²⁴⁶

In the case of *A.T v. Hungary*, discussed earlier, the CEDAW Committee also registered the prevalence of domestic violence in Hungary when determining violations by the state in the single case.¹²⁴⁷ As with *Ireland v. UK* heard by the ECtHR, though it concerned methods of questioning suspects, in this case the official tolerance of inhuman and degrading treatment was presumed by way of an accumulation of identical or analogous breaches, which taken together were sufficiently numerous and inter-connected to amount to a pattern or system.¹²⁴⁸ A single case would therefore not have been sufficient to prove state acquiescence. Though the perpetrators were part of the state machinery, the failure to investigate by the state was discussed in general terms. In the case of *E. and others v. the United Kingdom*, regarding sexual and other physical abuse in the family, the fact that the ECtHR discerned a “pattern of lack of investigation, communication and co-operation by the relevant authorities” was decisive to find a violation by the state.¹²⁴⁹ This has led certain authors to conclude that the threshold of finding a violation of a positive obligation in the European context has been set high by requiring a pattern of systematic negligence.¹²⁵⁰

¹²⁴⁵ CEDAW/C/2005/OP.8/MEXICO, para. 263. Article 8 of the Optional Protocol of CEDAW states that an inquiry procedure can be initiated by the Committee in cases of “reliable information indicating grave or systematic violations by a State Party”.

¹²⁴⁶ CEDAW/C/2005/OP.8/MEXICO, para. 261.

¹²⁴⁷ *Ms. A.T v. Hungary*, (CEDAW), paras. 9.3 and 9.4.

¹²⁴⁸ *Ireland v. The United Kingdom*, (Application No. 5310/71), ECtHR, Judgment of 18 January 1978, para 159.

¹²⁴⁹ *E. and others v. The United Kingdom*, ECtHR, para. 100.

¹²⁵⁰ Hofstötter, Bernhard, *European Court of Human Rights: Positive Obligations in E. and others v. United Kingdom*, p. 528.

In several cases before the ECtHR, states have been held responsible in situations of ill-treatment between private individuals under Articles 2 and 3, with the requirement that the state knew of a risk but failed to take precautions to prevent abuse.¹²⁵¹ As such, it seems that the state incurs responsibility for rape between non-state actors in situations where there exists a substantial risk of its occurring, whether in one case or through evidence of a general prevalence of such conduct. Noëlle Quénivet argues that in situations where the common occurrence of sexual violence e.g. has been widely recognised through reports of NGOs and/or international organisations, or from substantial accumulations of complaints, it must be presumed that there was state awareness of the patterns of abuse and thus a responsibility to prevent recurrences exists, as well as to investigate and punish offenders.¹²⁵² However, as Ewing makes clear, it may be difficult in many states to compile statistics on violence against women.¹²⁵³ The question also arises of how to substantiate a state violation based upon statistics of sexual violence and to appraise any measures taken by the state, as opposed to such factors as inherent difficulties from an evidentiary standpoint in substantiating rape cases.

In a report by the Inter-American Commission on access to justice for female victims of violence, the use of statistics is emphasised as an important tool in gauging the performance of states' in meeting their due diligence obligations. Though from the standpoint of particular provisions in the Inter-American Convention on Women, its reasoning is generally applicable. Accordingly:

“The obligation of due diligence to prevent situations of violence, especially where widespread or deeply-rooted practices are concerned, imposes upon the States a parallel obligation. On the one hand, States should monitor the social situation by producing adequate statistical data for designing and assessing public policies. On the other hand, States should take into account the policies implemented by the civil society. The obligation undertaken in Article 7.b of the Convention of Belém do Pará must be read in combination with the obligation established in Article 8.h to guarantee that statistics and other relevant data on the causes, consequences and incidence of violence against women are researched and compiled with a view to evaluating the effectiveness of measures to

¹²⁵¹ *Case of Mahmut Kaya v. Turkey*, (Application No. 22535/93), ECtHR, Judgment of 28 March 2000, *Z. and others v. The United Kingdom*, *Osman v. United Kingdom*, *E. and others v. The United Kingdom*.

¹²⁵² Quénivet, Noëlle, *Sexual Offenses in Armed Conflict & International Law*, p. 65.

¹²⁵³ Ewing, Anthony P, *Establishing State Responsibility for Private Acts of Violence Against Women Under the American Convention on Human Rights*, p. 790.

prevent, punish and eradicate violence against women and then formulating and introducing any needed changes.”¹²⁵⁴

Firm guidelines exist on how to correctly gather national statistics on incidents of violence against women, including methods, frequency and public accessibility.¹²⁵⁵ As highlighted by the Commission, statistics can be particularly useful evidence in conditions where violence is widespread in order to indicate that the state knew, or ought to have known, of any risk of its occurring. It also palpably demonstrates the failure of the state in providing *effective* measures. Arguably, violence against women is widespread in all societies to a higher or lesser degree.

General Recommendation No. 19 also obliges states to compile statistics and conduct research on “the extent, causes and effects of violence, and on the effectiveness of measures to prevent and deal with violence” against women, as does the Declaration on the Elimination of Discrimination against Women.¹²⁵⁶ The UN has further emphasised the importance of judicial statistics in the sphere of violence against women: “Although criminal court cases represent a very small and non-representative sample of cases of violence against women, court statistics are important. They can contribute to understanding the response of the criminal justice system to violence against women. In particular, the effectiveness of laws and sanctions designed to protect women can be assessed through statistics that track repeat offenders.”¹²⁵⁷ In addition, “Accurate and comprehensive data and other documentation are crucial in *monitoring and enhancing State accountability* for violence against women and for devising effective state responses. States’ role in promoting research, collecting data and compiling statistics is addressed in policy instruments.”¹²⁵⁸ Deficiencies in producing uniform and reliable national statistics may not only serve to make the problem of violence against women invisible but also hinder the development of efficient measures that match the “severity and magnitude of the problem”.¹²⁵⁹ The Inter-American Commission of Women of the OAS has stated: “The

¹²⁵⁴ Access to Justice for Women Victims of Violence in the Americas, OAE/Ser.L/V/II, doc. 68, January 20, 2007, IACHR, para. 42.

¹²⁵⁵ Ibid, para. 44.

¹²⁵⁶ Para. 24 (c) of Recommendation No. 19 and Article 4 (k) of the Declaration on the Elimination of Discrimination against Women.

¹²⁵⁷ Report of the UN Secretary-General, In-Depth Study on All Forms of Violence against Women, UN Doc. A/61/122/Add.1, 6 July 2006, para. 209.

¹²⁵⁸ Ibid, para. 274. Emphasis added.

¹²⁵⁹ Access to Justice for Women Victims of Violence in the Americas, OAE/Ser.L/V/II, doc. 68, 20 January 2007, IACHR, para. 190.

absence of gender-disaggregated data and statistics on the incidence of violence makes the elaboration of programs and the monitoring of progress very difficult. The lack of data impedes efforts to design specific intervention strategies.”¹²⁶⁰ Furthermore, as will be evinced below, the various regional courts have relied on statistics in several cases of discrimination.

As for evaluating remedies, the Inter-American Court in an Advisory Opinion declared: “a remedy which proves illusory because of the general conditions prevailing in the country, or even in the particular circumstances of a given case, cannot be considered effective. That could be the case, for example, when practice has shown its ineffectiveness...”¹²⁶¹ This is of particular interest in cases of rape, where convictions are difficult owing to evidentiary requirements and the very nature of the offence. Most cases depend solely on the statements of victims and there is usually a lack witnesses. How is the inefficiency of judicial redress measured in rape cases? Is it by means of statistics on the amount of cases reported as opposed to those reaching the justice system, or the number of convictions? If a state records low rates of convictions in rape cases, does that mean its domestic remedies are inadequate or is it solely a reflection of the difficulties of prosecuting rape? What may be required is a cross-cultural comparison of prosecution in rape cases. However, a low incidence in rape charges may be linked to various cultural factors, such as whether women have unaccompanied access to public life, and, of course, the definition of rape itself and its acknowledgment of women’s experiences. The highest rates of violence in statistics may in fact be found in countries that are generally known to be gender-equal and have a wide definition of rape, since more victims of rape feel comfortable about reporting it.¹²⁶²

¹²⁶⁰ Inter-American Commission of Women of the OAS, *Violence in the Americas - A Regional Analysis*, including a review of the implementation of the Inter-American Convention on the Prevention, Punishment, and Eradication of Violence against Women, July 2001, pp. 79-80.

¹²⁶¹ Judicial guarantees in States of Emergency, Advisory Opinion OC-9/87, 6 October 1987, IACtHR, para. 24.

¹²⁶² WHO World Report on Violence and Health, (2002), Final Report by Ms. Gay J McDougall, Special Rapporteur, *Contemporary Forms of Slavery: Systematic Rape, Sexual Slavery and Slavery-Like Practices During Armed Conflict*, UN Doc. E/CN.4/Sub.2/1998/13, 22 June 1998. The United Nations Interregional Crime & Justice Research Institute especially notes that countries such as Sweden, with greater gender equality, demonstrate a higher incidence of sexual violence, which is concluded to be a result of the fact that victims in such countries are more inclined to report sexual incidents, including minor ones. See *Criminal Victimization in International Perspective, Key Findings from the 2004-2005 ICVS and EU ICS*, p. 78.

Low conviction rates for crimes such as sexual assault may indicate that the criminal law is ineffective in preventing this form of violence, but at the same time reflect a failure in punishing perpetrators. This could be an effect of the definition of rape, but might also be a symptom of corruption and a lack of both police training and of those working in the judicial system, etc. Since conviction rates for crimes of violence on women are disconcertingly and disproportionately low in many states,¹²⁶³ this certainly presents a challenge.

It must, however, be borne in mind that in the cases of *X and Y v. the Netherlands* and *Stubbings v. the UK*, the European Court solely evaluated existing remedies in rape cases, in civil and criminal law, without analysing how the law had been applied by the state in general. Here the law itself was the cause of the violation and a single case displaying the anomalies of the law was deemed sufficient. The difference in analysis and investigation by the Court must lie in the fact that in the disappearances and domestic violence cases, the fault of the state could not be traced to the criminal law regarding those forms of violence. Rigorous criminal law prohibitions outlawing such conduct did exist in the respective countries, but it was rather the disregard of the law that caused the breach of the applicants' human rights violations. The situation in *X and Y v. the Netherlands* did not warrant an investigation into the practice of the Dutch government as it was apparent that the criminal law, by excluding the prosecution of rapes against a certain group of society, was defective and the

Similarly, a EU report of 2009 places Sweden at the top of reported rapes and the lowest numbers in Eastern Europe. This is generally understood not as a sign that more rapes take place in Sweden, but rather a higher preponderance among victims to report the crime. The report notes that states where the definition of rape is wide will result in greater proportions of sexual offences being considered rape. *Different Systems, Similar Outcomes? Tracking Attrition in Reported Rape Cases Across Europe*, Lovett, Jo & Kelly, Liz, funded by the European Commission Daphne II Programme, CWASU, (2009), p. 18. Studies further show that Pakistan has the lowest level of rapes of any member state of the UN. This, however, is in part attributable to the lack of reporting by victims owing to the severity of punishment and the conditions required to establish the crime of rape. A woman may also be charged with adultery if she cannot prove that she was raped. *Cross-National Comparisons of Rape Rates: Problems and Issues*, UNECE-UNODC, Working Paper No. 18, 28 October 2004, submitted by John Jay College of Criminal Justice, USA, p. 3. Furthermore, it may be due to a lack of reporting the crime but also larger cultural differences such as restrictions on the free movement of women, which limits the risks of stranger-rape. Sexual morality is also distinctly different between cultures. Because women engage in sexual relations with casual acquaintances to a higher degree in liberal Western countries and the interaction between genders is more common, the risk of sexual attacks therefore increases.

¹²⁶³ Ewing, Anthony P., *Establishing State Responsibility for Private Acts of Violence Against Women Under the American Convention on Human Rights*, p. 776. See also reports in previous footnote.

effect of the law was obvious. Similarly, the case of *M.C. v. Bulgaria* assessed the criminal law itself, but the Bulgarian state practice in connection with the law was also mentioned. This appears to have been done merely to confirm the Court's reasoning that the current definition resulted in an unwanted outcome, rather than pointing to government passivity. Thus the criminalisation of rape must not only be evaluated from the standpoint of efficiency measured by statistics, but also in relation to such aspects as non-discrimination - as in the cases of *X and Y v. the Netherlands* and *M.C. v. Bulgaria*.

In conclusion, whether a single case of rape or evidence of a pattern of abuse is required in the particular circumstances in order to demonstrate a failure to prevent the occurrence of sexual violence will depend on the claims in the particular case. A failure on the state to prevent sexual violence through criminal law can be found both in single cases where the law e.g. excludes protection for certain individuals, but also through a systematic failure to prevent such violence, whether this is connected to the criminal law or other measures.

6.5 Margin of Appreciation - Flexibility in National Implementation?

The issue of flexibility in national implementation of human rights obligations and margin of appreciation is important to briefly discuss since it informs the full extent of state obligations and has been mentioned in several cases concerning sexual violence. Since issues of women's rights and sexuality can be particularly sensitive for many states that ratify treaties, the question is pertinent since it may lead regional courts and treaty bodies to take this into consideration when interpreting the provisions.

A general principle in international law is that a party may not invoke provisions within its national law to justify a failure to abide by its obligations in accordance with a treaty.¹²⁶⁴ However, states generally have the freedom to choose the method of implementation of their international responsibilities. Though not fully reflecting the complexities of domestic implementation, the methods can roughly be divided into *monism*, where international and domestic law are viewed as a unified system in which treaty regulations become directly applicable upon ratification, and *dualism*.¹²⁶⁵ Dualism treats domestic and international law as two separate legal entities, where the latter has to be transformed or incorporated into national legislation in order to take effect. While international law imposes certain obligations on the state, e.g. to prevent and punish human rights violations, the formulation of the rights are often

¹²⁶⁴ Article 27 of the Vienna Convention on the Law of Treaties.

¹²⁶⁵ Steiner, Henry, Alston, Philip, Goodman, Ryan, *International Human Rights in Context, Law, Politics, Morals*, p. 1096.

sufficiently wide to allow for various means when implementing the right, and consequently lead to domestic differences.

As mentioned above in the discussions on the case law of the European Court of Human Rights, the Court has developed the principle of a ‘margin of appreciation’, in which the state is provided with a certain flexibility in implementing a particular right. This is evidence that the European Convention largely reflects a principle of subsidiarity. The margin of appreciation functions both as a standard of review and as a substantive norm for interpreting the European Convention.¹²⁶⁶ According to Judge Macdonald in the European Court of Human Rights it “[c]an be seen as a label about the appropriate scope of [international judicial] supervisory review...The scope of review refers to the intensity of judicial scrutiny of a challenged decision in order to see if it amounts to an unjustifiable breach of...standards”.¹²⁶⁷ Since the Convention places the onus of securing the rights it embodies on the contracting states, member states are granted a certain amount of discretion in the manner chosen to implement the Convention at the national level. It provides judges with flexibility in reviewing decisions by the national authorities that come before it, but also a restraint in that the Court refrains from appraising findings on certain topics. The ECtHR has not only applied the margin of appreciation doctrine as a means of determining the level of review – that is, strict scrutiny or with deference - but in surveying levels coherence among member states, it has used it to determine the *substance* of rights and the scope of state obligations. This was particularly evident in the case of *M.C. v. Bulgaria* where the examination of member states’ legislation served both to determine the level of scrutiny and the content of positive obligations.

The width of the margin of appreciation varies from one case to another, causing concerns of legal uncertainty.¹²⁶⁸ Since the doctrine is not explicit in the European Convention but has developed through case law, its scope and determination is difficult to predict. However, in reviewing case law it becomes apparent that three factors are chiefly employed to engage its use. Considerations include i) the advantage of the national authorities in question to determine the particular issue, especially subjective norms that depend on circumstances, ii) the nature of the contested rights and iii) the indeterminacy of the applicable

¹²⁶⁶ Shelton, Dinah, *The Boundaries of Human Rights Jurisdiction in Europe*, 13 Duke Journal of International and Comparative law, vol. 13, (Winter 2003), pp. 129-130.

¹²⁶⁷ Macdonald, Ronald, *The Margin of Appreciation*, in *The European System for Protection of Human Rights*, eds. Macdonald, Matscher and Petzold, Dordrecht, Boston: Martinus Nijhoff, (1993), p. 84. See the discussion below on the margin of appreciation.

¹²⁶⁸ Brems, Eva, *Human Rights: Universality and Diversity*, Martinus Nijhoff, (2001), pp. 363-364.

standard.¹²⁶⁹ In the course of determining the latter point, the European Court has frequently made use of comparisons between contracting states in order to establish whether there is an emerging consensus. The margin of appreciation for states thereby naturally becomes wider in matters where a significant difference in practice exists among countries. Where there is a significant non-uniformity, the Court may determine that it is in the best interest to defer to national authorities and restrict the judicial review. The practice of such norms may therefore vary considerably between member states. The result of the doctrine is that authorities in different states may reach diverse, while lawful, decisions on the same matter and application of the same international norm.

The rationale is that flexibility must be provided for in order for states to adapt rights in ways that make them effective in domestic contexts, taking into consideration the particulars of the culture. The doctrine provides for legal pluralism within human rights law, in a sense accommodating cultural relativism to a certain degree. As such, the Court may on specific culturally sensitive issues grant a wider scope of discretion to domestic authorities. Women's rights and questions of sexual autonomy may be especially controversial. For that reason there is a risk that a greater tolerance of domestic varieties is allowed.

Naturally this system has not escaped criticism. Dinah Shelton sees it as a problem that, in adopting this approach, the Court risks applying the lowest common denominator as the basis for its decisions instead of teleologically delineating the rights in the Convention.¹²⁷⁰ The doctrine could reinforce the perception of international law as that of non-law, as "a loose system of non-enforceable principles, containing little, if any real constraints on state power" thereby undermining the perceived fairness of law, e.g. that similar cases are treated in like manner.¹²⁷¹ The law then becomes the result of a survey analysis. The lowest common denominator in *M.C. v. Bulgaria* appears to be the focus on non-consent in practice, rather than explicitly requiring non-consent as an element of the definition of the crime. Could the Court have been more decisive in its findings in this case? In determining the relevant standard in criminalising rape the Court in effect concluded that the majority of member states rules; i.e. the definition of rape, or the interpretation and practice, in the majority of countries become the appropriate standard. In that sense the court is reduced to a role of recording statistics and to applying the common denominator as law. The *M.C. v. Bulgaria* decision does not *per se* allow a wide margin of appreciation,

¹²⁶⁹ Brems, Eva, *Human Rights: Universality and Diversity*, p. 367-397. See also Shany, Yuval, *Toward a General Margin of Appreciation Doctrine in International Law?*, p. 927.

¹²⁷⁰ Shelton, Dinah, *The Boundaries of Human Rights Jurisdiction in Europe*, p. 134.

¹²⁷¹ Shany, Yuval, *Toward a General Margin of Appreciation Doctrine in International Law?*, p. 912.

since the Court obliges states to reform their criminal laws to cover on the core element of non-consent. However, the Court seemed to allow the states discretion on how to formulate such legislation.

Other regional human rights systems do not have such an explicit standard of review. One must bear in mind that the European human rights system is built on a “common heritage of political traditions, ideals, freedom and the rule of law”.¹²⁷² While the continent is not homogenous, shared values facilitate a consensus-driven notion of human rights. In contrast, wide contextual differences at the universal level do not as easily allow for a similar construction as a margin of appreciation. However, leeway is provided through the general flexibility in methods of implementation in international law.¹²⁷³ It should be remembered that states also have the option to make reservations on certain derogable obligations in a ratified treaty, though this may be restricted in instances that violate its “object and purpose”. As will be considered in the chapter on international criminal law, the complementarity regime of the ICC allows for the primacy of the domestic justice system, leaving the formulations of the international crimes to national penal codes as well as their prosecution. In this particular capacity international law in general allows for a certain degree of national self-determination on implementation. However, as mentioned, this flexibility is increasingly restricted.

6.6 Conclusions on State Obligations

Public international law, as a regime largely founded on the free will of states and protective of their internal affairs, has traditionally concerned itself with the acts of states and inter-state relationships. The structure of international human rights has challenged this precept in regulating the relationship between states and individuals. The general rules pertaining to state responsibility in international law uphold the strict focus on states and solely attribute actions of private individuals to the state under limited circumstances. Within the field of international human rights law, the scope of state responsibility has, however, expanded through the adoption of the due diligence principle, creating further

¹²⁷² Preamble, European Convention on Human Rights.

¹²⁷³ The UN HRC has referred to a version of margin of appreciation in their views. See e.g. *Shirin Aumeeruddy-Cziffra and 19 Other Mauritian Women v. Mauritius*, UN Doc. CCPR/C/12/D/35/1978, UN Human Rights Committee (HRC), 9 April 1981, para. 9.2 (b) 2 (ii) 1 “The Committee is of the opinion that the legal protection or measures a society or a State can afford to the family may vary from country to country and depend on different social, economic, political and cultural conditions and traditions.” It has also been implied in e.g. the Inter-American Human Rights System. See discussion in Arai-Takahasi, Yutaka, *The Margin of Appreciation Doctrine and the Principle of Proportionality in the Jurisprudence of the ECHR*, Intersentia, (2001), p. 4.

obligations to prevent and punish violations that occur between private individuals. So while the analysis still concerns the actions of states, their duties have increased, as have the possibilities of responsibility for private acts of violence. The notion of state control has thus been revolutionised, increasingly including more acts in the sphere over which the state is deemed to have control. This is of the utmost importance for the recognition of violence against women as violations of international human rights law, since such acts frequently are perpetrated by private actors. Thus the public/private divide in international law, much criticised by feminist authors, still exists but has begun to erode.

The due diligence principle to prevent human rights violations includes the obligation to implement domestic criminal laws relating to specific rights, including the prohibition on rape. Failure to implement such legislation may consequently be seen as a contravention of international law and not solely failure in the application of the law. The *content* of such laws is increasingly circumscribed in certain regional contexts as well as indicated e.g. by the CEDAW Committee. This indicates obligations to centre the definition of rape on the element of 'non-consent' rather than 'force'. Though case law delineating the content of the due diligence principle frequently takes into account cases of systematic violations of a human right, the systematic nature of the violation is not necessarily an element. Also single cases of rape, as a consequence of e.g. insufficient legislation, may be considered a human rights violation, as viewed in the *M.C. v. Bulgaria* and *X and Y v. the Netherlands* cases. This is an indication of the general progression of international law in extending obligations for states to protect individuals in their jurisdiction, as well as the increasingly narrow flexibility in the choice of enacted domestic laws. If this trend continues it is likely that even more specific obligations on the elements of the crime of rape will emerge, as developed both by regional human rights courts and UN treaty bodies.

7. The Recognition of Rape as a Violation of International Human Rights Law

Subsequent to the general discussion on obligations for states to prevent and punish human rights violations and delineating the appropriate measures that a state must take to eradicate such violence, there now follows a more detailed analysis of which specific international human rights norms are relevant. This chapter will therefore examine which international human rights norms may include the prohibition of rape, as interpreted by international and regional human rights treaty bodies and courts. To a certain extent this has already been touched upon in the previous chapter on state obligations, but will be discussed more in-depth for the purpose of clarifying the scope of state obligations.

7.1 Is There a Human Right to Sexual Autonomy?

The gain in categorising violence against women, in particular rape, as a human rights concern, is multiple. The measures to eliminate such violence become legal entitlements for individuals and are not left to the discretion of states. It leads to access of important mechanisms, such as regional courts and UN treaty bodies. It also provides a framework within which to measure progress of states. The rights framework can further lend legitimacy to the actions of institutions and organisations, both internationally and on the grass-roots level in the particular country, to push for changes in legislation and practice. Recognising an international human right to protection from rape thus has many advantages.

Few human rights treaties expressly protect the person's right to sexual autonomy. Such autonomy, however, has been interpreted under the *chapeau* of various other human rights provisions. The only explicit obligation for states is contained in the 2003 Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, obliging states to protect women from violence both in the public and private spheres. Under the right to dignity, it specifies that states parties "shall adopt and implement appropriate measures to ensure the protection of every woman's right to respect for her dignity and protection of women from all forms of violence, particularly sexual and verbal violence".¹²⁷⁴ Additionally, under the provisions of Article 4 on the right to life, integrity and security of the person, states must take appropriate and effective

¹²⁷⁴ Art. 3 of Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa. The Protocol came into effect in 2005 subsequent to 15 ratifications. As of January 2009, the Protocol had been ratified by 26 states. The ratification process has been one of remarkable speed, demonstrating wide support for the documents among leaders of African states.

measures to “enact and enforce laws to prohibit all forms of violence against women including unwanted or forced sex whether the violence takes place in private or public”. The Protocol also specifically requires states to protect women against rape and sexual exploitation in armed conflict.¹²⁷⁵ The Protocol has been greeted as a particularly progressive treaty in focusing as on the autonomy of women in relation to bodily integrity and reproductive capabilities and its significance is believed to extend well beyond Africa.¹²⁷⁶ Additionally, the 1994 Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women in general terms defines violence against women to include rape and other forms of sexual abuse.¹²⁷⁷ The rights and obligations in the Convention are therefore also applicable to sexual violence. Remarkably, CEDAW fails to mention violence against women as a concern and does not discuss the sexual autonomy or reproductive capabilities of women. The UN Declaration on the Elimination of Violence against Women, promulgated by the UN General Assembly subsequent to the Convention, however, denounces sexual violence as a form of sex discrimination.¹²⁷⁸

The Beijing Platform for Action, the final act from the World Conference on Women in 1995 has declared: “the human rights of women include their 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” and the right “to a safe and satisfying sex life”.¹²⁷⁹ The prohibition of rape has been interpreted to entail a reproductive implication in that it may lead to pregnancy, or to such physical or mental trauma as to reduce women’s chances to bear future children.¹²⁸⁰ A prohibition of rape would thus assist in assuring the woman’s right to choose freely the number and spacing of children. Sexual autonomy thereby becomes an integral part of the right to family planning.

The statement in the Platform for Action was a new development on sexual autonomy within the international human rights discourse. It affirmed that

¹²⁷⁵ Art.11, Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa.

¹²⁷⁶ The Protocol on the Rights of Women in Africa: An Instrument for Advancing Reproductive and Sexual Rights, Center for Reproductive Rights, February 2006, p.1.

¹²⁷⁷ Art. 2 of the Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women. The Convention has been ratified by all but two member states of the OAS: Canada and the United States.

¹²⁷⁸ Art. 1 of the UN Declaration on the Elimination of Violence against Women.

¹²⁷⁹ Beijing Platform for Action, Fourth World Conference on Women, Un Doc. A/CONF.177/20, 15 September, 1995, para. 96.

¹²⁸⁰ Eriksson, Maja Kirilova, *Reproductive Freedom In the Context of International Human Rights and Humanitarian Law*, p. 329.

sexuality is a fundamental aspect of human dignity, the core of the international human rights regime, since it emphasises the self-determination of the individual also in sexual matters, an intimate aspect of a person's life. While the Platform does not constitute a binding document, it nevertheless demonstrates the growing recognition of sexual health as a major concern of the human rights agenda. The Platform, as a consensus document of the 180 participating states, demonstrates a broad acceptance of the right.¹²⁸¹

The Platform frames sexual freedom as a reproductive right, which includes the rights of freely deciding on the number and timing of children, the information with which to plan such matters, as well as the right to highest attainable sexual and reproductive health.¹²⁸² Framing sexuality in terms of reproductive rights involves certain terminological concerns, since it implies that protection only pertains to reproductive sex, excluding sexual relations for non-reproductive purposes. Reproductive sex may be construed as a more legitimate consideration for the international community, as opposed to all forms of sexual interactions. Sexual relations are thus primarily viewed from the perspective of its biological function of procreation. As certain authors argue, women's sexual equality should be afforded greater attention, and not solely with regard to reproductive health, since sexual self-determination is interconnected with several fundamental human rights.¹²⁸³ Though it is frequently held that control over reproduction and sexuality is an essential precondition for the ability of women to exercise other rights and fulfil basic needs, it must be emphasised that because sexuality is an essential component of human dignity, it is also an important right in itself and not merely as a means of furthering other aims.¹²⁸⁴

"Sexual rights" is in fact increasingly developing as a concept and while there is no agreed upon definition, it is generally understood to include such aspects as reproductive rights, protection from sexual violence, the right to bodily integrity

¹²⁸¹ However, reservations were made to several articles.

¹²⁸² The Beijing Platform for Action, para. 95. The Protocol on the Rights of Women in Africa also obliges states to respect the sexual health of women, including the right to control their fertility. The prohibition of sexual violence, however, is not explicitly mentioned in this context. See Article 14. It is the first legally binding human rights instrument to expressly articulate women's reproductive rights as human rights.

¹²⁸³ Jansen, Yakaré-Oulé, *The Right to Freely Have Sex? Beyond Biology: Reproductive Rights and Sexual Self-Determination*, 40 Akron L. Rev. 311, (2007), p. 313.

¹²⁸⁴ Freedman, Lynn, *Censorship and Manipulation of Reproductive Health Information*, in *The Right to Know: Human Rights and Access to Reproductive Health Information*, ed. Sandra Coliver, (1995), University of Pennsylvania Press, p. 5.

and freedom from discrimination in relation to sexual orientation.¹²⁸⁵ Rather than centring on the *content* of women's choices, the concept entails the woman's ability to maintain control over her physical integrity and reproductive capabilities and to not engage in sexual activities without consent.¹²⁸⁶ It is therefore pertinent to the right to make decisions – that is, sexual autonomy. In that particular function it contains both positive rights to autonomy and dignity in connection with the person's sexual life, but also negative rights in the form of freedom from harassment, violence and discrimination in respect of the person's sexual identity.¹²⁸⁷ The fact that sexual rights as a concept has not been widely accepted has been criticised in so far as the nature of such violence is not fully recognised.¹²⁸⁸

By viewing sexuality and sexual violence as a international human rights affair, it could be argued that the international community has in effect “invited the state into our beds” and turned private sex into a public concern.¹²⁸⁹ Turning such a personal and intimate act into an international issue is therefore frequently met with scepticism. As with women's rights in general, conflicts arise with regard to morality, culture, religion and claims of the right to privacy. Sexual matters, however, are increasingly a public concern, partly due to new advances concerning e.g. the prevention of HIV, progress in reproductive technology, and the rights and freedoms of sexual minorities.¹²⁹⁰

Though sexual rights as a concept is still under development, the right to sexual self-determination has been interpreted within the scope of several existing international human rights. The right to sexual freedom has primarily been interpreted to entail a right of freedom from pressure, force and coercion. However, a right to sexual freedom, as an element of the right to privacy, has not only been interpreted to entail freedom from coercive sexual relations, but also a right to enjoyment of sexual relations without discrimination, which particularly

¹²⁸⁵ Fried, Susana & Landsberg-Lewis, Ilana, *Sexual Rights: From Concept to Strategy*, in *Women and International Human Rights Law*, vol. 3, Transnational Publishers, ed. Kelly Askin & Dorean Koenig, (2001), p. 93.

¹²⁸⁶ Ibid, p. 116, Scheinin, Martin, *Sexual Rights as Human Rights - Protected under Existing Human Rights Treaties?*, *Nordic Journal of Int'l L.* 67:17 (1998), p. 18.

¹²⁸⁷ Fried, Susana, *Controlling Women's Sexuality: The Case for Due Diligence, Due Diligence and its Application to Protect Women from Violence*, Martinus Nijhoff, (2008), p. 260.

¹²⁸⁸ Lai, Sarah, Ralph, Regan, *Female Sexual Autonomy and Human Rights*, 8 *Harv. Hum. Rts. J.* 201, (1995), p. 227.

¹²⁸⁹ Phillips, Oliver, *A Brief Introduction to the Relationship Between Sexuality and Rights*, 33 *Ga. J. Int'l & Comp. L.* 451, Winter 2005, p. 454.

¹²⁹⁰ Childs, Mary, *Review Article, Sexual Autonomy and Law*, 64 *Mod. L. Rev.* 309, (2001), p. 309.

flows from the case law on sodomy laws in the European Court of Human Rights.¹²⁹¹ A progression is therefore evident from viewing sexual autonomy in terms of reproductivity to a right to freely choose to engage in sex without outside coercion, and that such a right applies equally to all without discrimination. In the following, various human rights norms of relevance to the prohibition of rape will be discussed and the scope of state obligations analysed.

7.2 The Prohibition of Torture and Inhuman or Degrading Treatment

7.2.1 The Elements of Torture

The qualification of rape as torture has been accepted in the fields of international human rights law, international humanitarian law and international criminal law. The prosecution of rape by the *ad hoc* tribunals has given rise to a thorough analysis of the crime of torture in the context of international criminal law. The understanding of torture within the human rights context has similarly expanded and been provided with a more gender-sensitive interpretation. In this section I will therefore explain the scope of its definition and its application to rape in human rights law. Owing to innovations in the approach in international criminal law and their contrast with human rights law, substantial space will also be provided to this area of law. This will bring to the fore the fundamental differences between these regimes, since their approach to the definition of torture diverges. The acknowledgment in both areas that rape can constitute torture *per se* signifies the gravity attached to sexual violence by the international community. The parallel analysis of torture in these two realms has brought with it intriguing new and unexplored avenues for discussion. Because rape has primarily been discussed as a violation of the prohibition against torture, inhuman or degrading treatment will only be discussed to a limited degree.

Though in certain instances torture by the state occurs as a form of aberration by a state official violating state regulations, state-sponsored torture is predominantly committed as a result of an explicit state policy or a toleration of such conduct.¹²⁹² Studies indicate that the form of torture women are most frequently subjected to is that of sexual violence, a method considered particularly effective as a method of e.g. intimidation, since it can be inflicted without leaving visible physical scars, it causes severe trauma and can lead to

¹²⁹¹ See e.g. *Dudgeon v. The United Kingdom*, (Application No. 7525/76), ECtHR, Judgment of 22 October 1981.

¹²⁹² Steiner, Henry, Alston, Philip, Goodman, Ryan, *International Human Rights in Context, Law, Politics, Morals*, p. 225.

additional consequences such as impregnation or venereal disease.¹²⁹³ Similar to other forms of torture, rape can be employed in systematic and structured ways. Torture is confirmed to be one of the most serious of human rights violations in a multitude of regional and universal documents and its prohibition has been accepted as customary international law.¹²⁹⁴ The overwhelming acceptance of torture as an international violation in various regimes of international law, as well as its qualification as a *ius cogens* rule, a non-derogable norm and an obligation *erga omnes* to the community of states, is chiefly due to the acknowledgement of its capability in destroying the personality and assaulting the human dignity of a person.¹²⁹⁵ The UN Special Rapporteur on Torture proposes that what distinguishes man from other beings is the quality of individual personality arising from man's inherent dignity, both which are targets for the torturer. Torture can therefore be a violation of both the physical and mental integrity of the person, rendering the victim inhuman by deprivation of human qualities.¹²⁹⁶

The crime of torture has been defined in three human rights instruments, although a prohibition is contained in all major human rights treaties.¹²⁹⁷ While the 1975 UN Declaration on Torture is a non-binding document, the definition of torture served as an inspiration for the UN Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment of 1984, though more narrow in scope.¹²⁹⁸ The UN Convention against Torture is widely

¹²⁹³ For example as a method of interrogation. See Pearce, Hannah, *An Examination of the International Understanding of Political Rape and the Significance of Labelling it Torture*, International Journal of Refugee Law, 2002 14(4):534, p. 539.

¹²⁹⁴ General Comment No. 2, Implementation of Article 2 by States Parties, UNCAT, UN Doc. CAT/C/GC/2, 24 January, 2008, para. 1.

¹²⁹⁵ Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Report of the Special Rapporteur, Mr. P. Kooijmans, Appointed Pursuant to Commission on Human Rights Resolution 1985/33, UN Doc. E/CN.4/1986/15, 19 February 1986, para. 3. General Comment No. 2, Implementation of Article 2 by States Parties, paras. 1-5. See also *Barcelona Traction Case*, ICJ.

¹²⁹⁶ UN Doc. E/CN.4/1986/15, pp. 1-2.

¹²⁹⁷ Torture is also prohibited under Article 5 of the 1948 Universal Declaration of Human Rights, Article 7 of the ICCPR, Article 3 of the ECHR as well as several articles in the Geneva Conventions of 1949 e.g. Common Article 3.

¹²⁹⁸ Art 1 (1): "For the purposes of this Declaration, torture means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted by or at the instigation of a public official on a person for such purposes as obtaining from him or a third person information or confession, punishing him for an act he has committed or is suspected of having committed, or intimidating him or other persons. It does not include pain or suffering arising only from, inherent in or incidental to, lawful sanctions to the extent consistent with the Standard Minimum Rules for the Treatment of Prisoners." The Declaration does not contain the prohibited purpose of "any reason based on discrimination of any kind", as in the UN Convention against Torture.

accepted to be the primary international source for the definition of torture.¹²⁹⁹ Torture is defined as

“any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity”.¹³⁰⁰

The Convention prohibits torture at all times, stipulating that “no exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture”. States are further obliged to ensure that acts of torture are offences under their criminal laws.¹³⁰¹

A definition is also contained within the provisions of Article 2 of the Inter-American Convention to Prevent and Punish Torture. It prohibits

“[a]ny act intentionally performed whereby physical or mental pain or suffering is inflicted on a person for purposes of criminal investigation, as a means of intimidation, as personal punishment, as a preventive measure, as a penalty, or for any other purpose. Torture shall also be understood to be the use of methods upon a person intended to obliterate the personality of the victim or to diminish his physical or mental capacities, even if they do not cause physical or mental anguish...”.

In several respects, this definition is wider in scope than that found in the UN Convention against Torture in several respects. The American Convention does not contain an exclusive list of purposes for which torture is used, but provides examples and opens the way for other possibilities by stating “or for any other purposes”. Also, it does not require a specific level of pain since it does not contain the element of “severe” physical or mental suffering. In fact, if the perpetrator has an intent to “obliterate the personality of the victim or to diminish his physical or mental capacities”, there is no requirement of physical or mental distress. The categories of persons held to be liable for committing torture are similar to those found in the UN Convention and are specified in Article 3:

¹²⁹⁹ See e.g. *Prosecutor v. Delalic et al.*, Judgment of 16 November 1998, para. 258, *Prosecutor v. Furundzija*, Judgment of 10 December 1998, paras. 160-161.

¹³⁰⁰ Article 1 of UN Convention against Torture.

¹³⁰¹ *Ibid*, Article 4.

“a) A public servant or employee who acting in that capacity orders, instigates or induces the use of torture or who directly commits it or who, being able to prevent it, fails to do so;

b) A person who at the instigation of a public servant mentioned in subparagraph (a) orders, instigates, or induces the use of torture, directly commits it or is an accomplice thereto.”

What is apparent from the definitions in the two Conventions and the UN Declaration is that the definition of torture generally contains four main elements: (i) mental or physical pain, (ii) a specific purpose of the act (iii) intent and (iv) the identity of the perpetrator, requiring some form of state nexus. Though there are certain dissimilarities between the documents, as the ICTY in *Delalic* held, the definition in the UN Convention against Torture includes the elements of the Declaration on Torture and the Inter-American Convention, thus reflecting customary international law.¹³⁰² A European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment also exists but contains no definition of torture.¹³⁰³ Instead, the scope of the prohibition of torture in the European context has primarily been interpreted by the European Court of Human Rights.

The scope of the prohibition of torture as a human rights violation is mainly to be found in the case law of two regional human rights courts: the ECtHR and the Inter-American Court of Human Rights, as well as the UN Committee against Torture. Even though it is clear that torture concerns acts of a “particular intensity and cruelty”¹³⁰⁴ the UN treaty bodies and regional human rights courts have avoided listing specific acts that could rise to such levels, emphasising instead that the concept of torture is relative. Such matters as the nature and context of the ill-treatment, its duration and its physical and mental effects as well as the sex, age and state of health of the victim may be taken into account.¹³⁰⁵ A general unwillingness also exists in differentiating between torture

¹³⁰² *The Prosecutor v. Delalic et al*, Judgment of 16 November 1998, para. 459.

¹³⁰³ The Convention is enforced through the Committee of ECPT which visits member states and examines the treatment of persons deprived of their liberty. At the moment the Convention has 47 member states. See Council of Europe, CPT webpage.

¹³⁰⁴ *Ireland v. United Kingdom*, Judgment of 18 January 1978, ECtHR, para. 167.

¹³⁰⁵ Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Report of the Special Rapporteur, Mr. P. Kooijmans, Appointed Pursuant to Commission on Human Rights Resolution 1985/33, UN Doc. E/CN.4/1986/15, 19 February 1986, para. 35, *Soering v. The United Kingdom*, (Application No. 14038/88), ECtHR, Judgment of 7 July 1989, para. 100.

and inhuman and degrading treatment, since the threshold often is unclear.¹³⁰⁶ Furthermore, ill-treatment is often an accessory to torture and the two concepts are therefore intertwined.¹³⁰⁷ However, ill-treatment differs in the severity of pain experienced and does not require proof of one of the listed proscribed purposes.¹³⁰⁸ The UN General Assembly has stated that torture is “an aggravated and deliberate form of cruel, inhuman and degrading treatment or punishment”,¹³⁰⁹ which is similarly argued by the European Court of Human Rights.¹³¹⁰ In e.g. *Ireland v. the United Kingdom*, the ECtHR stated that the distinction “derives principally from a difference in the intensity of the suffering inflicted”.¹³¹¹ The ECtHR has also acknowledged that the Convention is a living instrument, which must be interpreted in the light of present-day conditions, meaning that certain acts once classified as inhuman or degrading treatment, as opposed to torture, could in the future be classified differently. This is because of rising standards in the protection of human rights, requiring a stricter review of assessing breaches.¹³¹² The effect of this distinction is that certain state obligations apply solely to torture, e.g. the obligation in the UN Convention against Torture to criminalise torture, the prohibition of non-refoulement and extradition obligations.¹³¹³ Furthermore, torture alone incurs obligations to apply the principle of universal jurisdiction and is recognised as *ius cogens*.¹³¹⁴ Similar

¹³⁰⁶ Nowak, Manfred, *UN Covenant on Civil and Political Rights, CCPR Commentary*, 2nd revised ed., N.P.Engel Publisher, (2005), p. 160. CCPR General Comment No. 2, para. 3, CCPR General Comment 20, para. 3.

¹³⁰⁷ Report of the Special Rapporteur on Torture and Cruel, Inhuman or Degrading Treatment or Punishment, Manfred Nowak, UN Doc. A/HRC/7/3, 15 January 2008, para. 33.

¹³⁰⁸ General Comment No. 2, para. 10, Report of the Special Rapporteur on the Question of Torture, Manfred Nowak, UN Doc. E/CN.4/2006/6, 23 December 2005, para. 35. See also case law e.g. *the Greek Case*, 1969 Y.B Eur. Conv. H.R.

¹³⁰⁹ GA Resn. 3452 (XXX), 9/12/75, Article 1 (2).

¹³¹⁰ *Ireland v. United Kingdom*, ECtHR, para. 167.

¹³¹¹ *Ibid*, para. 167.

¹³¹² *Selmouni v. France*, ECtHR, para. 101.

¹³¹³ Articles 3, 4, and 8 of UN Convention against Torture. In general, state obligations regarding the UN Convention against Torture are detailed in Article 2 and compel states to take effective legislative, administrative, judicial or other measures to prevent acts of torture, which are the same common requirements as for human rights in general.

¹³¹⁴ UN Doc. E/CN.4/2006/6, 23 December 2005, para. 37. Universal jurisdiction is provided in Article 5 (2) of UNCAT. However, it contains the precondition that the alleged torturer is present on the territory. See further discussion on torture and obligations to provide domestically for universal jurisdiction in UN Doc. A/HRC/4/33, 15 January 2007, para. 41, Copelon, Rhonda, *Gender Violence as Torture: The Contribution of CAT General Comment No. 2*, p. 241, footnote 48.

protection is therefore not afforded to victims of inhuman or degrading treatment.

Apart from these criteria, the UN Special Rapporteur on Torture has in several reports discussed the notion of *powerlessness*.¹³¹⁵ Torture accordingly presupposes a situation where the victim is powerless, i.e. under the total control of another person, as in cases of deprivation of personal liberty.¹³¹⁶ In fact, further criteria with which to distinguish torture from inhuman or degrading treatment is the powerlessness of the victim.¹³¹⁷ In order to bring a gender perspective to the definition of torture, the Special Rapporteur suggests interpreting the notion of powerlessness in a gender-conscious manner.¹³¹⁸ Most importantly, the Rapporteur notes that rape is an “extreme expression of this power relation, of one person treating another person as merely an object”.¹³¹⁹ In order to make evident such powerlessness in the private sphere, the degree of powerlessness of the victim will have to be tested. Such a test consists of inquiring into whether the subject was “unable to flee or otherwise coerced into staying by certain circumstances”. Other factors such as sex, age, physical and mental health as well as religion might affect the determination of the element of powerlessness.¹³²⁰ This element is evident in violence in the private sphere in the sense that it is expressed in the intention to keep the victim in “a permanent state of fear based on unpredictable violence by seeking to reduce the person to submission and destroy his/her capacity for resistance and autonomy with the ultimate aim of achieving total control”.¹³²¹

With this additional component, will the differentiation between private and public rape diminish in so far as the power relations could be deemed to be inherently oppressive in cases of sexual violence? The Rapporteur appears to suggest that inequality of the two genders in general might create such a state of powerlessness. Accordingly: “a society’s indifference to or even support for the subordinate status of women, together with the existence of discriminatory laws

¹³¹⁵ UN Doc. E/CN.4/2006/6, 23 December 2005, paras. 39-40.

¹³¹⁶ Ibid, para. 39. Christoph Burchard also stresses the social aspect of torture. According to Burchard, torture is not primarily an act of violence but rather a manifestation of a subjugation of a human being, who is made to experience helplessness and powerlessness. This emphasises the harm of torture as a disregard for the autonomy aspect of human dignity. See Burchard, Christoph, *Torture in the Jurisprudence of the Ad Hoc Tribunals*, p. 176.

¹³¹⁷ Ibid, para. 39.

¹³¹⁸ UN Doc. E/CN.4/2006/6, 23 December 2005, para. 39.

¹³¹⁹ UN Doc. A/HRC/7/3, 15 January 2008, para 28.

¹³²⁰ Ibid, para 28.

¹³²¹ Ibid, para. 45.

and a pattern of state failure to punish perpetrators and protect victims, create the conditions under which women may be subjected to systematic physical and mental suffering, despite their apparent freedom to resist”.¹³²² The addition of this element has, however, been criticised from a feminist viewpoint for focusing the assessment of torture on the victim rather than on the acts of the perpetrator.¹³²³

Does the introduction of an element of powerlessness add to the evaluation of whether torture exists or is it simply an additional hurdle to prove? The Rapporteur eloquently discusses the nature of rape and the effect of discriminatory state practices in creating conditions of powerlessness for women, yet the other four elements of the torture definition must still be proved. Despite its not being stated in the report, it is possible that a finding of such powerlessness in cases of rape could well inform the existence of the other elements, e.g. mental and physical suffering as well as intent and purpose. It seems that the purpose of introducing this element is to more readily find the existence of state involvement in the private sphere, since the Committee has frequently found the establishment of torture in the form of gender-based violence solely in situations of captivity, such as detention, directly involving a state actor. The Rapporteur phrases his discussion on powerlessness as such: “[w]hereas detention contexts are classic situations of powerlessness, it can also arise outside of detention or direct State control”.¹³²⁴ Powerlessness would therefore include situations outside the common cases of captivity. This consequently increases the obligations on states to provide protection also in situations between private actors.

7.2.2 State Nexus

Of particular consequence in the analysis of sexual violence as torture is the requirement in the definition that the perpetrator forms part of the state machinery, or that evidence of acquiescence by the state exists in order for the act to constitute torture. As such, the person concerned need not be a state official but must act in an official capacity, which abides by general rules on state responsibility in international law. The UN Committee against Torture

¹³²² UN Doc. A/HRC/7/3, para. 29.

¹³²³ Copelon, Rhonda, *Gender Violence as Torture: The Contribution of CAT General Comment No. 2*, p. 242, footnote 52. Copelon argues that it would lead to such questions as why the woman didn’t leave and put blame on women. Additionally, it would disregard the fact that many women who are subjected to private violence are not powerless, but rather make a decision, often to acquiesce and survive or protect others. However, in my view, this would still constitute powerlessness.

¹³²⁴ UN Doc. A/HRC/7/3, 15 January 2008, para. 68.

explicitly emphasises that “the Convention imposes obligations on States Parties and not on individuals” and that the extent of that responsibility includes “the acts and omissions of their officials and others, including agents, private contractors, and others acting in official capacity or acting on behalf of the State, in conjunction with the State, under its direction or control, or otherwise under color of law”.¹³²⁵

The first appointed UN Special Rapporteur on Torture, in his initial report in 1986, called for the necessity of retaining the “qualified perpetrator” element because “private acts of brutality - even the possible sadistic tendencies of particular security officials - should not imply State responsibility, since these would usually be ordinary criminal offences under national law”.¹³²⁶ The purpose is to condemn torture because of its official, systematic and discriminatory nature and an act does not necessarily reach the level of torture simply because of its cruelty, but rather due to its being condoned by the state.¹³²⁷ The threshold for finding an act or custom to be torture is therefore high. Early reports of the Special Rapporteur for this reason focused mainly on torture in detention settings and in relation to political dissidents.¹³²⁸ This strict prerequisite has been particularly detrimental with regard to violations against women, since such acts primarily occur within the home or by family members or other known perpetrators, without connections to the state. The Special Rapporteur on Torture acknowledges that the requirement of state involvement has frequently been used to exclude violence towards women from the scope of Convention.¹³²⁹ Though the requirement of a state nexus exists to limit the regulation to specifically grave acts of violence and not to the types of crimes found in everyday life, the effect is that sexual violence only attains the level of a human rights violation if the rape is connected to the public realm. This touches upon the very core of the discussion on the public/private division of international law.

However, the UN Special Rapporteur on Torture has interpreted “acquiescence” in broad terms: “the authorities’ passive attitude regarding customs broadly accepted in a number of countries (e.g. sexual mutilations...) might be considered as ‘consent or acquiescence’, particularly when these

¹³²⁵ General Comment No. 2, para. 15.

¹³²⁶ Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Report by the Special Rapporteur, Mr. P. Kooijmans, appointed pursuant to Commission on Human Rights resolution 1985/33, UN Doc. E/CN.4/1986/15, para. 38.

¹³²⁷ Oosterhoff, Pauline, Zwanikken, Prisca & Ketting, Evert, *Sexual Torture of Men in Croatia and Other Conflict Situations: An Open Secret*, Reproductive Health Matters 2004:12 (23), p. 69.

¹³²⁸ UN Doc. E/CN.4/1986/15, 19 February 1986.

¹³²⁹ UN Doc. A/HRC/7/3, 15 January 2008, p. 7.

practices are not prosecuted as criminal offences under domestic law, probably because the State itself is abandoning its function of protecting its citizens from any kind of torture”.¹³³⁰ Koojimans emphasises: “States shall provide appropriate protection under law against such treatments, even when the perpetrators are ‘private’ persons rather than ‘public officials’.”¹³³¹ The UN Committee against Torture has also adopted a wide approach, evident in its general comment on the implementation of Article 2 in its stating: “[s]ince the failure of the State to exercise due diligence to intervene to stop, sanction and provide remedies to victims of torture facilitates and enables non-state actors to commit acts impermissible under the Convention with impunity, the State’s indifference or inaction provides a form of encouragement and/or de facto permission”.¹³³²

As discussed in the chapter on state responsibility, a lack of criminalisation or passivity in the context of widespread abuse can be sufficient to prove a state nexus. The Committee has qualified the degree of due diligence and argued that in cases where the state *knows or has reasonable grounds to believe* that acts of torture or ill-treatment are being committed by private actors, the state bears responsibility if it fails to prevent, punish and investigate.¹³³³ The due diligence principle has been applied to gender-based violence such as rape and domestic violence.¹³³⁴

¹³³⁰ UN Doc. E/CN.4/1986/15, para. 38.

¹³³¹ *Ibid.*, para. 49.

¹³³² General Comment No. 2, para. 18. The Committee has further expanded the notion of “state officials” in cases concerning states with no legitimate government. See e.g. *Elmi v. Australia*, Comm. No. 120/1998, UN Doc. CAT/C/22/D/120/1998, 14 May 1999, where a Somali national claimed a risk of being tortured upon return to his home country by the Hawiya clan, a group that controlled most of Mogadishu. It was held that in the absence of a legitimate government, the clan could be characterised as public officials since the clans had taken on the role of quasi-governmental institutions and provided certain public services. However, the indication seems to be that the interpretation of the state nexus is solely extended to groups that *de facto* perform state functions in the absence of a legitimate government. Interestingly, the CAT Committee in its concluding comments on Burundi in 2006 discussed the issue of sexual violence in the context of armed conflicts and held that it was “alarmed at the reports of large-scale sexual violence against women and children by state officials and members of armed groups, as well as at the systematic use of rape as a weapon of war, which constitutes a crime against humanity”. The Committee noted the apparent impunity of the perpetrators of the acts through solutions such as extrajudicial or amicable settlements e.g. by administrative bodies rather than legal institutions. Such practices included the expunging of punishment for rape upon marriage between perpetrator and victim. Committee against Torture, Concluding Comments on Burundi, 20 November 2006, UN Doc. CAT/C/BDI/CO/1, para. 11. The Comment is of importance in that it discusses sexual violence as a form of torture, through the categorisation as a crime against humanity, and that it acknowledges the role of the non-state actor, i.e. the armed factions and the nexus to the state.

¹³³³ General Comment No. 2, para. 18.

¹³³⁴ *Ibid.*, para. 18.

The UN Human Rights Committee has further commented on the applicability of the prohibition on torture in the ICCPR on acts perpetrated by private individuals in stating: "...it is also the duty of public authorities to ensure protection by the law against such treatment even when committed by persons acting outside or without any official authority".¹³³⁵ In its General Comment No. 20, the HRC again confirms the positive duties of states by obliging them to ensure the person's protection against acts of torture stating:

"It is the duty of the State party to afford everyone protection through legislative and other measures as may be necessary against the acts prohibited by article 7, whether inflicted by people acting in their official capacity, outside their official capacity or in a private capacity."¹³³⁶

Thus, though a nexus to the state is an explicit element, the acts over which the state is deemed to have control has increased also in the interpretation of the definition of torture.

7.2.3 Views and Cases on Rape as a Form of Torture

7.2.3.1 The UN System

Does rape then fall within the confines of the definition of torture as set down in the UN Convention against Torture? Designating rape as an instance of torture is important in that torture "carries additional stigma for the State and reinforces legal implications".¹³³⁷ As early as 1986, a report by the UN Special Rapporteur contained a detailed, yet not exclusive, list of acts constituting torture where sexual aggression is specified, including rape and the insertion of objects into the orifices of the body.¹³³⁸ Several subsequent reports have also clearly established

¹³³⁵ General Comment 7, UN Human Rights Committee, para. 2. Though the HRC has not clearly defined what constitutes torture, it appears to rely on the definition in UNCAT in their general comments and views. See Safferling, Christoph, *Towards an International Criminal Procedure*, Oxford University Press, (2001), p. 128.

¹³³⁶ General Comment 20, UN Human Rights Committee, Article 7, para. 2.

¹³³⁷ UN Doc. A/HRC/7/3, 15 January 2008, p. 6.

¹³³⁸ UN Doc. E/CN.4/1986/15, para. 119. In a study of the work of Special Rapporteur Kooijmans, it was, however, noted that he rarely considered the application of the definition of torture to violence against women and that such ill-treatment largely went uninvestigated. For example, though he acknowledged rape as torture, he did not discuss the frequency which rape was used as torture, and the condemnation of rapes in the Yugoslavia conflict focused on the harm of the community rather than on the individual rape victims. See *Token Gestures: Women's Human Rights and UN Reporting*. The Special Rapporteur on Torture, Washington DC, International Human Rights Law Group, 1993.

the possibility of rape used as torture.¹³³⁹ Country reports by the UN Special Rapporteur have confirmed instances where rape has been employed as a form of torture.¹³⁴⁰ The UN Human Rights Committee in commenting on the ICCPR also considers restrictive national laws and practices prohibiting rape a concern with regard to the prohibition of torture or inhuman and degrading treatment.¹³⁴¹ Its General Comment on the Equality of Rights between men and women indicates that rape could well be a violation of Article 7 of the ICCPR, i.e. torture or inhuman or degrading treatment.¹³⁴² In a progressive report in 2008, Special Rapporteur on Torture, Manfred Nowak, discussed the subject of sexual violence as torture, and such “private harms” were specifically analysed in order to interpret the definition of torture in a gender-inclusive manner.¹³⁴³ All states have also been called upon to adopt a gender-sensitive approach in the fight against torture in a General Assembly Resolution, paying special attention to violence against women and girls.¹³⁴⁴ Nowak has criticised countries that limit rape to carnal access since it reduces such acts solely to penetration and admonishes states not to prosecute sexual violence as minor offences.¹³⁴⁵ He has further discussed restrictive laws on rape as representing obstacles to access to justice for victims and as impediments to redress for torture victims, e.g. laws focusing on evidence of physical resistance by the victim. It is also stressed that in situations where the aggressor has complete control over the victim, the issue of consent is rendered irrelevant.¹³⁴⁶

¹³³⁹ UN Doc. E/CN.4/1992/SR.21, para. 35, UN Doc. E/CN.4/1995/34, para. 19, UN Doc. A/HRC/7/3, para. 26

¹³⁴⁰ UN Doc. E/CN.4/1995/34, 12 January 1995, e.g. paras. 51, 170 & 244 (Bangladesh, Ecuador, El Salvador), UN Doc. E/CN.4/1997/7/Add.2, 15 October 1996, Visit by the Special Rapporteur to Pakistan, paras. 14, 16 & 41, Civil and Political Rights, Including the Questions of Torture and Detention, Report of the Special Rapporteur, Sir Nigel Rodley, Visit to Turkey, UN Doc. E/CN.4/1999/61/Add.1, 27 January 1999, para. 14, Civil and Political Rights, Including the Questions of Torture and Detention, Report of the Special Rapporteur, Sir Nigel Rodley, Visit to Brazil, UN Doc. E/CN.4/2001/66/Add.2, 30 March 2001, Civil and Political Rights, Including the Questions of Torture and Detention, Report of the Special Rapporteur, Theo van Boven, UN Doc. E/CN.4/2003/68/Add.2, 3 February, 2003.

¹³⁴¹ General Comment 28, Equality of Rights Between Men and Women (Article 3), U.N. Doc. CCPR/C/21/Rev.1/Add.10 (2000), HRC, Article 7.

¹³⁴² General Comment 28, Equality of Rights Between Men and Women (Article 3), para. 11.

¹³⁴³ UN Doc. A/HRC/7/3, 15 January 2008.

¹³⁴⁴ UN Doc. A/RES/63/166, 19 February 2009, para. 9.

¹³⁴⁵ Ibid, para. 35, referring to a case in the Mexican justice system where an act of oral sex was charged as a “libidinous act”. See *Ana Maria Velasco contra Doroteo Blas Marcelo*, 79/2006, juzgado Primero Penal de Tenango de Valle, Estado de Mexico.

¹³⁴⁶ UN Doc. A/HRC/7/3, paras. 62-63.

The injuries of sexual violence are readily found within the elements of the definition of torture in so far as rape involves a physical contact by way of unwanted sex, be it penetration or other forms of sexual acts, causing both physical and mental injuries. In fact, the unique harms of rape as torture, as opposed to other forms of torture, has been emphasised by the UN Special Rapporteur on Torture, recording such features as the resulting isolation of the injured party, since in certain cultures the victim may be rejected or subjected to reprisals by her community or family, sometimes resulting in destitution. Additional harms might include an inability to indulge in intimate relationships, not to mention the risk of venereal disease or unwanted pregnancy.¹³⁴⁷ As is often stressed in the jurisprudence of the *ad hoc* tribunals, rape can be employed as a means of humiliating and destroying family and community cohesion.¹³⁴⁸ It has been argued that the psychological impact may be even greater in situations of armed conflict since "...the emotional devastation of rape is...aggravated in a state of war, when family, social, protective and legal structures have broken down."¹³⁴⁹ The Rapporteur has stated: "Rape is a particularly despicable assault against human dignity. Women are afflicted in the most sensitive part of their personality and the long-term effects are bound to be extremely harmful whereas in most cases the necessary psychological treatment and care can and will not be afforded."¹³⁵⁰ The stigma attached to rape may lead to reluctance on the victim's part to seek redress.¹³⁵¹ Thus when rape is applied as a method of torture, impunity for the perpetrator appears disproportionately higher than for other methods of torture.¹³⁵²

The types of rape reaching the level of torture can be divided into those of the public versus the private sphere,¹³⁵³ the former alone traditionally viewed as included in the scope of the torture definition. This essentially comprises violence against women in custody, including rape e.g. while in detention. It is generally understood that the risk of torture is most prevalent in situations of custody of the military, police or special security authorities, with the most brutal

¹³⁴⁷ UN Doc. E/CN.1/1993/26, 15 December 1992, para. 580.

¹³⁴⁸ UN Doc. A/HRC/7/3, para. 36.

¹³⁴⁹ Askin, Kelly, *War Crimes Against Women; Prosecution in International War Crimes Tribunals*, p. 265.

¹³⁵⁰ UN Doc. E/CN.1/1993/26, 15 December 1992, para. 580.

¹³⁵¹ UN Doc. E/CN.4/1995/34, 12 January 1995, Report of the Special Rapporteur, Mr. Nigel S. Rodley, submitted pursuant to Commission on Human Rights Resolution 1992/32, para. 19.

¹³⁵² *Ibid*, para. 19.

¹³⁵³ UN Doc. A/HRC/7/3, para. 34.

violations occurring during arrest and in the initial periods of detention.¹³⁵⁴ The jurisprudence on this matter has thus for the most part concentrated on rape during detention because of the apparent finding of a state nexus. In fact, this form of rape has even been considered particularly serious. The European Court of Human Rights has stated: “rape of a detainee by an official of the State must be considered to be an especially grave and abhorrent form of ill-treatment given the ease with which the offender can exploit the vulnerability and weakened resistance of the victim”.¹³⁵⁵

The UN Special Rapporteur on Torture has also recognised rape as a form of torture, mostly in cases where a state official had directly participated as a perpetrator, such as detention.¹³⁵⁶ In fact, Rapporteur Kooijmans has noted that “[s]ince 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 the right to physical integrity of the human being, they accordingly constituted an act of torture”.¹³⁵⁷ The concluding observations and general comments from UNCAT also indicate that rape under certain circumstances may amount to torture.¹³⁵⁸ Similarly, such statements primarily concern sexual violence inflicted on victims in detention or when taken into custody, or in other situations where the perpetrator is clearly a state actor, such as military personnel.¹³⁵⁹ In such

¹³⁵⁴ Nowak, Manfred, *UN Covenant on Civil and Political Rights, CCPR Commentary*, p. 179.

¹³⁵⁵ *Aydin v Turkey*, ECtHR.

¹³⁵⁶ UN Doc. E/CN.4/1992/SR.21, para. 35, UN Doc. E/CN.4/1995/34, para. 19. In Report of the Special Rapporteur, Mr. Nigel S. Rodley, submitted pursuant to Commission on Human Rights Resolution 1992/32, UN Doc. E/CN.4/1995/34, para. 18, the following: “In certain countries, rape and other forms of sexual assault were reported to be common means of torture. It was alleged in the case of one country that 85 per cent of women held in police custody were subjected to some form of sexual abuse, including rape. Although allegations of sexual abuse were occasionally received wherein men were the target, the vast majority of such allegations concerned women. When sexual abuse occurred in the context of custodial detention, interrogators were said to have used rape as a means of extracting confessions or information, to punish, or to humiliate detainees. In some instances, the gender of an individual constituted at least part of the very motive for the torture itself, such as in those where women were raped allegedly for their participation in political and social activism.”

¹³⁵⁷ UN Doc. E/CN.4/1992/SR.21, para. 35.

¹³⁵⁸ UN Doc A/57/44, (2002): Indonesia, CAT/C/XXVII/Concl. 3: Conclusions and Recommendations of the Committee Against Torture: Indonesia, 22/11/2001, para. 7 (f), UN Doc. CAT/C/CR/29/3, (2002): Spain, para. 9, UN Doc. CAT/C/PHL/CO/2, (2009): The Philippines, para. 18, UN Doc. CAT/C/DZA/CO/3, (2008): Algeria, para. 15.

¹³⁵⁹ UN Doc A/57/44, (2002): Zambia para. 7, UN Doc. CAT/C/LKA/CO/2, (2005): Sri Lanka, para. 13, CAT/C/TGO/CO/1, (2006): Togo, para.12

cases UNCAT has requested states to monitor violence inflicted in detention or prison, to promptly investigate complaints, and where necessary to prosecute and provide legal redress to victims.¹³⁶⁰ The exclusive focus on such traditional settings has been particularly detrimental to female victims.

Early decisions by UNCAT in the main disregarded individual communications concerning sexual violence as torture committed by private actors as falling outside the scope of the definition of torture in the Convention, thereby displaying a lack of gender-sensitivity. For example, in the case of *G.R.B. v. Sweden*, the Committee examined a claim by a Peruvian citizen who had been captured, held prisoner for two days and raped by members of the group Sendero Luminoso. According to the complainant, she reported the matter to the police, who failed to investigate the matter. The communication concerned the denial of asylum by Sweden and the matter of *non-refoulement*. The Committee found that rape by a non-state actor was beyond the scope of the *non-refoulement* protection of the UN Convention against Torture in that no consent or acquiescence by the state could be proved.¹³⁶¹ In *V.L. v. Switzerland*, the Committee against Torture stated: “[t]he sexual abuse by the police in this case constitutes torture even though it was perpetrated outside formal detention facilities”. This indicated that even in circumstances where the perpetrator was a member of the government, if rape was committed outside the context of detention it is be difficult to attribute the act to the state.¹³⁶²

As to the purpose of rape, it has been acknowledged that torture can be committed for any number of reasons. There is no requirement under customary international law that such conduct must *solely* be perpetrated for one of the prohibited purposes of torture, such as discrimination.¹³⁶³ Sexual gratification may therefore form a motive. It should be noted that where the state consents or acquiesces to acts committed by private actors, the state acquires responsibility for the purpose of the non-state actor.¹³⁶⁴ In a recent report, the UN Special

¹³⁶⁰ See e.g. UN Doc. CAT/C/CR/32/5, (2004): Chile, UN Doc. CAT/C/CR/28/4 (2002): Russian Federation, UN Doc. CAT/CECU/CO/3, (2006): Ecuador, UN Doc. CAT/C/NPL/CO/2, (2006): Nepal, UN Doc. CAT/C/USA/CO/2, (2006): USA.

¹³⁶¹ *G.R.B. v. Sweden*, Comm. No. 83/1997, UN Doc CAT/C/20/D/83/1997, (1998), (CAT).

¹³⁶² *V.L. v. Switzerland*, UN Doc. CAT/C/37/D/262/2005, (CAT), para. 8.10.

¹³⁶³ Askin, Kelly, *Prosecuting Wartime Rape and Other Gender-Related Crimes Under International Law: Extraordinary Advances, Enduring Obstacles*, p. 15. The listed purposes are: “...obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind...”. See Article 1 of the UN Convention against Torture.

Rapporteur on Torture asserted that with regard to violence against women, the purpose element would be inherently met if it could be proved that the acts under consideration were gender-specific. Gender-specific acts are understood to be informed by gender either through form or purpose, which aim at correcting behaviour that transgress gender roles, or intend to assert male domination over women.¹³⁶⁵ General Comment No. 2 of the Committee against Torture further points to the discriminatory aspect of gender-based violence, such as sexual violence, which affects women disproportionately.¹³⁶⁶

The Inter-American Commission on Human Rights in a report on the human rights situation in Haiti similarly held that rape *per se* fulfilled the purpose requirement: “Rape and the threat of rape against women also qualifies as torture in that it represents a brutal expression of discrimination against them as women.”¹³⁶⁷ Sexual abuse and rape have also been characterised as gender-based acts in other reports.¹³⁶⁸ UNCAT e.g. obliges states to inform the Committee in their country reports on whether their domestic legislation on torture contains specific provisions on gender-based breaches of the Convention, including sexual violence. This includes requesting information on the domestic definition of rape, as an indication of its implementation of Article 4 of the Convention.¹³⁶⁹

¹³⁶⁴ Copelon, Rhonda, *Gender Violence as Torture: The Contribution of CAT General Comment No. 2*, p. 252. The state or public official must therefore not share the purpose of the private actor.

¹³⁶⁵ UN Doc. A/HRC/7/3, p. 7.

¹³⁶⁶ General Comment No. 2, paras. 20-22.

¹³⁶⁷ Report on the Situation of Human Rights in Haiti 1995, OAE/Ser.L/V/II.88, Doc. 10 rev., 9 February 1995, para. 134. The state here failed to take action against rapes by paramilitaries and roving gangs.

¹³⁶⁸ UN Doc. E/CN.4/1995/34, 12 January 1995, Report of the Special Rapporteur, Mr. Nigel S. Rodley, submitted pursuant to Commission on Human Rights Resolution 1992/32, para. 16, UN Doc. A/55/290, 11 August 2000, para. 5.

¹³⁶⁹ See e.g. UN Doc. CAT/C/SWE/Q/5, February 2008, list of issues to be considered during the examination of the fifth periodic report of Sweden, para. 7. UNCAT in fact holds in its general comment on article 2 that gender is a key factor to bear in mind when implementing the convention and that it informs the ways that women are subject to or at risk of torture and also the consequences thereof. See UN Doc. CAT/C/GC/2, 24 January 2009, para. 22. See, also, report of Bosnia and Herzegovina where UNCAT poses the following question to be answered with regard to Article 4 in the periodic report: “Please provide information in relation to any measures undertaken to harmonize the entity level laws prohibiting and making punishable the crime of torture with the Criminal Code and the Criminal Procedure Code of Bosnia and Herzegovina. Please provide also information on how rape and other forms of sexual abuse are defined under national legislation and describe how different parts of the State party respect and prosecute these crimes, including statistics on the number and results of prosecutions.”, 2nd to 5th periodic reports of Bosnia and Herzegovina, as received on 9 November 2009, CAT/C/BIH/2-5, p. 18.

Rape is arguably an example of the perpetuation of male dominance through violence, and therefore the purposive element would be automatically met by its constituting discrimination. This leads to the conclusion that rape as a matter of course fulfils the necessary elements of severe pain and suffering by its very nature, as well as serving a discriminatory purpose. This would appear to disregard the plight of the male rape victim, since a group based on gender is excluded from the automatic finding of the purpose element. However, General Comment No. 2 states that men also in certain circumstances can be subjected to gendered violence such as rape, and the discriminatory aspect of such sexual violence may under certain circumstances also be presumed, e.g. in armed conflict.¹³⁷⁰

7.2.3.2 Regional Human Rights Courts

The link to, and the scope of, state responsibility in prohibiting torture has principally been developed in the case law of the regional human rights courts and the *ad hoc* tribunals of Rwanda and former Yugoslavia. As will be demonstrated, the reasoning of the European Court has advanced greatly over time, and so has its willingness to extend the interpretation of those acts which are to be included in the definition of torture. In its early case law, there was a reluctance to interpret rape as a violation beyond inhuman treatment. Sexual violence was essentially seen as a private form of violence, with the attendant pain and suffering not reaching the required level of severity. By recognising rape simply as inhuman treatment, not only did this fail to attach the appropriate stigma to the violence but excluded certain forms of protection that are provided to victims of torture.

One of the earlier cases that touched upon the matter, *Cyprus v. Turkey*, held that the “wholesale and repeated” rapes executed by Turkish troops constituted inhuman treatment.¹³⁷¹ The events were described in the following manner:

“Women of all ages from 12 to 71 [were repeatedly raped], sometimes to such an extent that the victims suffered haemorrhages or became mental wrecks. In some areas, enforced prostitution was practiced, all women and girls being collected and put into separate rooms in empty houses, where they were raped repeatedly by the Turkish troops. [In certain cases] members of the same family were repeatedly raped, some in front of

¹³⁷⁰ General Comment No. 2, para. 22. It reads “[m]en are also subject to certain gendered violations of the Convention such as rape or sexual violence and abuse. Both men and women and boys and girls may be subject to violations of the Convention on the basis of their actual or perceived non-conformity with socially determined gender roles.”

¹³⁷¹ *Cyprus v. Turkey*, Report of the Commission, (Application Nos. 6780/74 & 6950/75), Judgment of 10 July, 1976, paras. 373-374.

their own children. In other cases, women were brutally raped in public. Rapes were on many occasions accompanied by brutalities such as violent biting of the victims to the extent of severe wounding, hitting their heads on the floor and wringing their throats almost to the point of suffocation.”¹³⁷²

The Commission found that the conduct of the troops was intended to destroy the Greek population in the occupied areas in order to create a Turkish region and that the acts of sexual violence were brutal, but it did not find a sufficient level of gravity nor the purposive element met. Thus, despite the gruesome nature of the acts, they did not reach the level of torture.

In the case of *X and Y v. the Netherlands*, Article 3 prohibiting torture was not deemed applicable and the discriminatory rape legislation was solely discussed as a violation of the right to privacy. The case of *Aydin v. Turkey* before the European Court of Human Rights concerned rape of the applicant while in the custody of state security forces.¹³⁷³ This was the first case acknowledging acts of sexual violence as a form of torture within the European context. The Court discussed the nature of rape and concluded: “[r]ape leaves deep psychological scars on the victims which do not respond to the passage of time as quickly as other forms of physical and mental violence. The applicant also experienced the acute physical pain of forced penetration, which must have left her feeling debased and violated both physically and emotionally.”¹³⁷⁴ The purposive element was also established in so far as rape had occurred in the course of interrogations. Perfunctory investigation by the state authorities denied the applicant an effective remedy and access to court. The Court stated that effective and thorough investigations in cases of rape should include an exploration of corroborating evidence and an examination of the victim by independent medical professionals.¹³⁷⁵ The wording of the ruling emphasised that the rape of a detainee by a state actor was “an especially grave and abhorrent form of ill-treatment” owing to the vulnerable position of the victim, which indicated that the setting of detention was determinative in designating the rape as torture.¹³⁷⁶ This was also emphasised in the *Miguel Castro-Castro Prison* case by the Inter-American Court. It is natural that cases involving a state official as a perpetrator have been viewed as a more natural fit within a field of law that concerns itself with the actions of the state, and it is reasonable that a prison or detention setting serves to easily establish a coercive setting. However, can we conclude that the

¹³⁷² *Cyprus v. Turkey*, para. 358.

¹³⁷³ *Aydin v. Turkey*, ECtHR.

¹³⁷⁴ *Ibid*, para. 83.

¹³⁷⁵ *Ibid*, para. 98.

¹³⁷⁶ *Ibid*, para. 83.

identity of the perpetrator is determinative also of the *gravity* of the offence, which must be measured by the effect on the victim?

The most illustrative case on this subject, *M.C. v. Bulgaria*, has been dealt with in the previous chapter and will therefore not be repeated. Here the European Court, in a departure from the *X and Y v. the Netherlands* case, discussed the restrictive definition of rape in the domestic legislation in terms of torture and inhuman and degrading treatment before concluding that Bulgaria had failed in its positive obligations to prevent incidents of rape in its lacking an adequate penal code and practice. However, the Court did not specify whether the conduct specifically reached the level of torture, or solely amounted to inhuman or degrading treatment. In this respect it found that though the rape had occurred between two private individuals, the definition of rape and the code of practice of the justice system represented a violation which emanated from the state. The implication is that the legislation adopted by the state *de facto* encouraged impunity, and thereby the perpetration of sexual violence.

As indicated, the ECtHR has mainly discussed the criminalisation of rape in primarily three cases, two of which concerned Article 3, prohibiting torture and inhuman and degrading treatment. Solely in the case of *Aydin v. Turkey* did the Court clearly state that the rape constituted torture, whereas in *M.C. v. Bulgaria* the Court simply found a violation of Article 3 without specifying whether it reached the threshold of torture. The fact that the rape was directly perpetrated by a state actor in the *Aydin* case, as opposed to a private individual in *M.C. v. Bulgaria*, most likely influenced the Court's finding in more readily defining the sexual violence as torture, abiding by the traditional definition of the crime. In the case of *X and Y v. the Netherlands*, the Court did not even consider the sexual violence to be a violation of Article 3, which has been explained by the strong sense of a public/private divide still prevalent in 1985 and, as in the *Aydin* case, the Court wishing to retain the application of Article 3 to solely cases involving a state actor.¹³⁷⁷ The Court has, however, received criticism for its narrow scope of interpretation in *Aydin*.¹³⁷⁸ As Ivana Radacic points out, the assessment of the severity of the treatment is frequently evaluated in connection with the responsibility of the state, e.g. in the *Aydin* case where rape committed in detention by a state actor was regarded as particularly grave and abhorrent.¹³⁷⁹ This diverges from the reasoning in the *Kunarac* decision, discussed below, in which the ICTY found that acts such as rape *per se* establish the suffering

¹³⁷⁷ *Aydin v. Turkey*, p. 364.

¹³⁷⁸ Radacic, Ivana, *Rape Cases in the Jurisprudence of the European Court of Human Rights: Defining Rape and Determining the Scope of the State's Obligations*, European Human Rights Law Review, Vol. 2008, No. 3, 2008, p. 363.

¹³⁷⁹ *Ibid.*, pp. 363-364.

sufficient to characterise it as an act of torture. Thus, regardless of the actor, the severity of the act itself should be evaluated in like manner.

In *Mejia Egocheaga v. Peru*, the Inter-American Commission on Human Rights held the state responsible for not providing effective means against the rape of a woman.¹³⁸⁰ Raquel Mejia was raped by Peruvian security forces in a raid on civilians suspected of having ties with insurgents. Her husband was a known political activist. Though Mejia did not report the rape until several years afterwards and with no corroborative evidence in existence, the Court presumed the facts of the assault to be true. Similar to its reasoning in the *Velasquez Rodriguez* and *Godinez Cruz* cases, the Commission found the strong circumstantial evidence to be sufficient – for example, the rapist was wearing a Peruvian army uniform and the complainant lived in an area where the military commonly committed violations of human rights. Reports by intergovernmental and non-governmental bodies spoke of a pattern of rape by the security forces in Peru, as part of a campaign to intimidate suspected insurgents, which corroborated the petitioner's allegations. Her claim was seen as a typical example of the systematic practice of sexual violence.¹³⁸¹ There were no effective remedies within Peru's legal system for a person to pursue a legal claim against the security forces and receive an impartial investigation and hearing. No individuals in the Security Forces accused of sexual abuse were convicted and the Commission concluded that, in respect of rape, impunity was pervasive. In conclusion, the state apparatus in that particular context was ineffective in providing redress for the crime of rape, which accordingly violated the prohibition of torture and the state's positive obligation.

The Inter-American Commission affirmed: "Current international law establishes that sexual assault committed by members of the security forces, whether as a result of deliberate practice promoted by the state or as a result of failure by the state to prevent the occurrence of this crime, constitutes a violation of the victim's human rights, especially the right to physical and mental integrity."¹³⁸² In order to declare rape torture, the Commission, in addition to the framework of the American Convention on Human Rights and the Inter-American Convention on Torture, further noted the prohibition of rape also in international humanitarian law, quoting the 1949 Geneva Conventions and the

¹³⁸⁰ *Raquel Martí de Mejia v. Peru*, IACHR.

¹³⁸¹ *Ibid*, section B 1a. Quoting e.g. the UN Special Rapporteur on Torture, Amnesty International and Human Rights Watch.

¹³⁸² *Ibid*, para. 251.

1977 Additional Protocols, the Statute of the ICTY, as well as statements by the ICRC.¹³⁸³ On the level of harm, the Commission argued:

“Rape causes physical and mental suffering in the victim. In addition to the violence suffered at the time it is committed, the victims are commonly hurt or, in some cases, are even made pregnant. The fact of being made the subject of abuse of this nature also causes a psychological trauma that results, on the one hand, from having been humiliated and victimized, and on the other, from suffering the condemnation of the members of their community if they report what has been done to them.”¹³⁸⁴

The Commission referred to the jurisprudence of the ECtHR and concluded that the concept of private life includes an individual’s sex life. It can be used as a method of psychological torture by humiliating, victimising and imposing on the sufferer a fear of public ostracism.¹³⁸⁵ On the purposive element of torture, the Commission said it was satisfied that rape was utilised for reasons of personal punishment and intimidation. The perpetrator told Mrs. Mejia that, like her husband, she was wanted as a subversive. The qualified perpetrator element was met in that the perpetrator was a member of the armed forces. It found that rape not only constituted an act of torture but also an outrage to the victim’s dignity, included in the concept of “private life”. Again, the case was innovative in its analysis of the nature of rape and its interpretation as torture, but the prerequisite was the evident state nexus in the form of a state perpetrator while the victim was in detention.

Other cases of the Inter-American Commission have likewise concerned the state’s lack of protection and prosecution in rape cases, leading to other findings of violations of the right to humane treatment and due process rights.¹³⁸⁶ In the

¹³⁸³ *Raquel Martí de Mejía v. Peru*, Analysis 3a. Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, 8 June 1977, 1125 U.N.T.S. 3 (Additional Protocol I), Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts, 8 June 1977, 1125 U.N.T.S. 609 (Additional Protocol II).

¹³⁸⁴ *Ibid*, Analysis 3a.

¹³⁸⁵ *Ibid*, V (B), 3 a.

¹³⁸⁶ The Commission in a report on the human rights situation in Haiti particularly emphasised: “rape represents not only inhumane treatment that infringes upon physical and moral integrity under Article 5 of the Convention, but also a form of torture...”. In this context, sexual violence was judged to be the result of repression for political purposes, the intention to destroy any democratic movement through the use of sexual crimes. Report on the Situation of Human Rights in Haiti 1995, OAE/Ser.L/V/II.88, Doc. 10 rev., 9 February 1995, paras. 132-133.

case of *Ana, Beatriz, and Celia González Pérez*, the Inter-American Commission analysed violence administered to three sisters, including rape, by Mexican armed forces.¹³⁸⁷ It is noteworthy that the Commission reached the conclusion that rape constituted torture by way of a thorough review of documents and cases, including case law of the ICTY, statements by the UN Special Rapporteur on Violence against Women, the UN Special Rapporteur against Torture, and the European Court of Human Rights. Those sources affirmed that rape could constitute torture under international human rights law.¹³⁸⁸ As previously mentioned, in *The Miguel Castro-Castro Prison v. Peru* case, the Inter-American Court also discussed the sexual violence of prison inmates by prison guards as a form of torture or inhuman treatment.¹³⁸⁹ It emphasised the particularly grave nature of such violence when committed by state agents and in the prison setting. The Inter-American system has thus discussed rape as torture in cases only where sexual violence directly emanates from a state actor. It has, however, been progressive in aiming to achieve a common standard by reviewing international instruments and case law, also in international criminal law.

Jurisprudence from the African human rights system is generally scarce and in particular regarding sexual violence. Rape was among other claims raised in a case of the African Commission on Human Rights against Mauritania in 2000. The matter concerned a group of Black Mauretanians detained and charged with intent to overthrow the government by issuing a manifesto on discrimination against their ethnic group.¹³⁹⁰ The conditions in detention facilities, including rape of female members of the group, were considered to amount to torture and

See also El Salvador, Case no. 10.772, report no. 6/94, Admissibility and Merits, 1 Feb., 1994. In this case, concerning the rape of a seven-year-old girl, the violence inflicted was also discussed in the context of the right to human treatment. The rape was committed by a soldier but it was the subsequent acquiescence that formed the basis of state responsibility for the violation. According to the Commission: “The Government’s passive and indifferent attitude in a case involving such cruelty and contempt for even the most elementary principles of human dignity, indicates a willingness on the part of military and judicial authorities to tolerate and cover up heinous crimes such as the one denounced...”. (para 3.b). No investigation was initiated into the matter and the mother was told by the military authorities that her efforts were pointless. The passivity led to a finding of a violation of the right to have one’s physical and moral integrity respected, as well as honour and dignity intact, in Articles 5 and 11 of the American Convention. The case again did not specify whether the acts constituted torture or rather inhuman or degrading treatment.

¹³⁸⁷ *Ana, Beatriz and Celia Gonzalez Perez*, Mexico, 4 April 2001, IACHR.

¹³⁸⁸ *Ibid*, paras. 43-53.

¹³⁸⁹ *Case of the Miguel Castro-Castro Prison v. Peru*, 25 November 2006, IACtHR.

¹³⁹⁰ *Malawi African Association and Others v Mauritania*, African Commission on Human and Peoples’ Rights, Comm. Nos. 54/91, 61/91, 98/93, 164/97, 196/97 and 210/98, (2000).

cruel, inhuman and degrading treatment, in contravention of Article 5 of the African Charter on Human and Peoples' Rights. The Commission did not, however, specify whether the rapes constituted torture or inhuman treatment and was sparse on such argumentation in its judgment.

7.2.4 International Criminal Law - A New Direction in Interpreting the Torture Definition?

7.2.4.1 State Nexus

The following cases will be further discussed in the chapters on the case law of the two *ad hoc* tribunals and thus solely analysed in the context of rape as torture.

Celebici was the first instance in the *ad hoc* tribunals where an accused person was convicted of torture based upon rape.¹³⁹¹ When Bosnian Muslim and Croats attacked the Konjic commune in Bosnia and Herzegovina, targeting Bosnian Serb homes, a prison camp was established to house the Serbs. Detainees were killed, tortured and sexually assaulted over a period of months during their confinement. Delic, who was working at the camp, was charged with torture under Article 2 of the Statute as a grave breach of the 1949 Geneva Conventions, as well as under Article 3 of the Statute as a violation of the laws or customs of war, both concerning the *actus reus* of rape. In order to determine whether rape could constitute torture, the Trial Chamber turned to the elements of torture found in the UN Convention against Torture. The UN Convention against Torture as a human rights treaty was in this case applied in an extra-conventional manner. The Tribunal concluded that the rape in question did indeed reach the level of torture, since the victim had suffered severe mental and physical pain and suffering. The offence was intentional and was also committed for several of the prohibited reasons listed in the Convention. In the view of the Tribunal, rape by, or at the instigation of, a public official always serves as either punishment, coercion, discrimination or intimidation as required under the Convention against Torture, which are inherent to an armed conflict.¹³⁹² In cases such as this, where women were separated from their families and held in detention centres guarded by men, the risk of rape was especially high.

In determining the level of suffering, the Trial Chamber found that it was evidently sufficient, bearing in mind that the victim lived in a "state of constant fear and depression, suicidal tendencies, and exhaustion, both mental and physical".¹³⁹³ The requirement of proving pain and suffering in connection to the

¹³⁹¹ *The Prosecutor v. Delalic et al*, Judgment of 16 November 1998.

¹³⁹² *Ibid*, para. 495.

¹³⁹³ *Ibid*, para. 942.

rape was later modified by the Tribunal in the *Kunarac* case, where the pain element was presumed once the rape had been substantiated.¹³⁹⁴ The Trial Chamber judges also declared that the “condemnation and punishment of rape becomes all the more urgent where it is committed by, or at the instigation of, a public official, or with the consent or acquiescence of such an official”.¹³⁹⁵ In several subsequent cases, the ICTY pronounced that the state nexus requirement in the UN Convention against Torture reflected a consensus “representative of customary international law”.¹³⁹⁶

However, this was modified in the *Kunarac* case. Here, the definition of torture was again discussed thoroughly by the Tribunal and the issue of a state nexus in international humanitarian law and human rights law was chiefly explored. First, the Tribunal concluded that there had been relatively few attempts to define the crime of torture, concluding:

“the definition of torture under international humanitarian law does not comprise the same elements as the definition of torture generally applied under human rights law. In particular, the Trial Chamber is of the view that the presence of a state official or of any other authority-wielding person in the torture process is not necessary for the offence to be regarded as torture under international humanitarian law”.¹³⁹⁷

In a persuasive manner, the Tribunal argued: “the characteristic trait of the offence in this context is to be found in the *nature* of the act committed rather than in the status of the person who committed it”.¹³⁹⁸ The Tribunal observed that the particular setting of international humanitarian law and international criminal law might well warrant a different definition. Though it in previous cases had fully adopted the definition of torture set down in the UN Convention against Torture, it affirmed that there were “specific elements that pertain to torture as considered from the specific viewpoint of international criminal law relating to armed conflicts”.¹³⁹⁹ The Tribunal noted that the Convention against Torture did in fact state that the definition therein should be applied only in the context of the Convention. Since the Convention was created to apply at an interstate level, it was aimed at delineating state obligations. In explaining the specificity of the body of international humanitarian law, the Tribunal identified

¹³⁹⁴ *Prosecutor v. Kunarac, Kovac and Vukovic*, Appeal Judgment of 12 June 2002, para. 151.

¹³⁹⁵ *Prosecutor v. Kunarac, Kovac and Vukovic*, Judgment of 22 February 2001, para. 495.

¹³⁹⁶ *Prosecutor v. Delalic et al.*, Judgment of 16 November 1998, para. 258, *Prosecutor v. Furundzija*, Judgment of 10 December 1998, paras. 160-161.

¹³⁹⁷ *Prosecutor v. Kunarac, Kovac and Vukovic*, Judgment of 22 February 2001, paras. 496-497.

¹³⁹⁸ *Ibid*, para. 495. Emphasis added.

¹³⁹⁹ *Ibid*, para. 468.

two structural differences between the two bodies of law and generally discussed the public/private divide found in international law:

“Firstly, the role and position of the state as an actor is completely different in both regimes. Human rights law is essentially born out of the abuses of the state over its citizens and out of the need to protect the latter from state-organised or state-sponsored violence. Humanitarian law aims at placing restraints on the conduct of warfare so as to diminish its effects on the victims of the hostilities.

“In the human rights context, the state is the ultimate guarantor of the rights protected and has both duties and a responsibility for the observance of those rights. In the event that the state violates those rights or fails in its responsibility to protect the rights, it can be called to account and asked to take appropriate measures to put an end to the infringements.

“In the field of international humanitarian law, and in particular in the context of international prosecutions, the role of the state is, when it comes to accountability, peripheral. Individual criminal responsibility for violations of international humanitarian law does not depend on the participation of the state and, conversely, its participation in the commission of the offence is no defence to the perpetrator.

....

“Secondly, that part of international criminal law applied by the Tribunal is a penal law regime. It sets one party, the prosecutor, against another, the defendant. In the field of international human rights, the respondent is the state. Structurally, this has been expressed by the fact that human rights law establishes lists of protected rights whereas international criminal law establishes lists of offences.”¹⁴⁰⁰

The Trial Chamber went on to refer to various provisions contained in the 1949 Geneva Conventions and the Additional Protocols. The Tribunal ruled: “In this context, the participation of the state becomes secondary and, generally, peripheral. With or without the involvement of the state, the crime committed remains of the same nature and bears the same consequences... The involvement of the state does not modify or limit the guilt or responsibility of the individual who carried out the crimes in question.”¹⁴⁰¹ This refers to the Statute of the ICTY, which affirms individual criminal responsibility regardless of the official

¹⁴⁰⁰ *Prosecutor v. Kunarac, Kovac and Vukovic*, Judgment of 22 February 2001, para. 470.

¹⁴⁰¹ *Ibid.*, para. 493.

status of the perpetrator.¹⁴⁰² The ICTY in the *Kunarac* case also quoted the legal reasoning of the *Flick* judgment at Nuremberg in which the tribunal held: “[i]t is asserted that international law is a matter wholly outside the work, interest and knowledge of private individuals. The distinction is unsound. International law, as such, binds every citizen just as does ordinary municipal law. Acts adjudged criminal when done by an officer of the Government are criminal also when done by a private individual. The guilt differs only in magnitude, not in quality.”¹⁴⁰³

The Trial Chamber in the *Kunarac* decision in conclusion enumerated the three elements of the definition of torture that constituted the status of *customary* international law, namely:

- “(i) Torture consists of the infliction, by act or omission, of severe pain or suffering, whether physical or mental;
- (ii) This act or omission must be intentional;
- (iii) The act must be instrumental to another purpose, in the sense that the infliction of pain must be aimed at reaching a certain goal.”¹⁴⁰⁴

The Trial Chamber listed certain purposes of torture that have crystallised in customary law, including (a) obtaining information or a confession, (b) punishment, intimidation or coercion of the victim or a third person, (c) discrimination, on any ground, against the victim or a third person.¹⁴⁰⁵ The Chamber avoided speculation on any other purposes constituting customary international law by proclaiming that in the present case, the intent of the perpetrator certainly fell under the listed goals.

The Appeals Chamber in the *Kunarac* case concurred with the finding of the Trial Chamber and first asserted that the definition of torture found in the UN Convention against Torture, including the public official nexus, reflected customary international law. However, the Chamber then concluded that “the public official requirement is not a requirement under customary international

¹⁴⁰² Statute of the International Tribunal for the Former Yugoslavia, Articles 1 and 7. Article 7 (1): “A person who planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of a crime referred to in articles 2 to 5 of the present Statute, shall be individually responsible for the crime.”

¹⁴⁰³ *United States v. Friedrich Flick et al*, 1947, referred to in *Kunarac*, Judgment of 22 February 2001, paras. 488-95.

¹⁴⁰⁴ *Prosecutor v. Kunarac, Kovac and Vukovic*, Judgment of 22 February 2001, para. 483.

¹⁴⁰⁵ *Ibid*, para. 485.

law in relation to the criminal responsibility of an individual for torture *outside* of the framework of the UN Torture Convention”.¹⁴⁰⁶

The lack of a requirement of state nexus with regard to torture is further apparent in other documents pertaining to IHL or international criminal law. The Commentary to Article 4 of Additional Protocol II of the 1949 Geneva Conventions, when discussing offences contained in Article 4(2) such as torture, states: “The most widespread form of torture is practised by public officials for the purpose of obtaining confessions, but torture is not only condemned as a judicial institution; the act of torture is reprehensible in itself, *regardless of its perpetrator*, and cannot be justified in any circumstances”.¹⁴⁰⁷

The Elements of Crimes of the ICC lists torture as either a crime against humanity or a war crime. Neither definition requires that the act be committed by a state official as opposed to the definition in the UN Convention against Torture.¹⁴⁰⁸ Torture as a crime against humanity does, however, require that the victim be “in the custody or under the control of the perpetrator”.¹⁴⁰⁹ Here one sees the use of the term “under control” similar to the concept of powerlessness adopted by the UN Special Rapporteur. Control or power over another person therefore appears to be a new element that modifies or perhaps solely clarifies the definition of the UN Convention against Torture. If such control or power is presumed in situations of rape, and physical and mental pain is inherent to sexual violence, torture will automatically be proved if there is evidence of rape. The *Kunarac* decision had not been rendered at the time of the promulgation of the Rome Statute. The exclusion of the state nexus in the Statute does not therefore follow from the case law of the *ad hoc* tribunals but represents the opinions of participating states at the Rome Conference. One can therefore speculate on whether an interpretation of torture as an expression of customary law has developed in the context of international criminal law that does not require a state nexus.

¹⁴⁰⁶ *Prosecutor v. Kunarac, Kovac and Vukovic*, Judgment of 12 June 2002, para. 148. Emphasis added.

¹⁴⁰⁷ Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), 8 June 1977, Commentary, Part II: Humane Treatment, para. 4533. Emphasis added.

¹⁴⁰⁸ See below Chapter 9.3.2. For critique of the removal of the state nexus in international criminal law, see Burchard, Christoph, *Torture in the Jurisprudence of the Ad Hoc Tribunals*, who argues that it diminishes the stigma of torture as an international offence.

¹⁴⁰⁹ Article 7 (2) (e) of the Elements of Crimes, ICC.

7.2.4.2 Severity

The ICTY has consistently held that rape reaches the requisite level of gravity to constitute torture, considering the severe mental and physical suffering. In *Celebici* the Trial Chamber argued:

“...there can be no question that these rapes caused severe mental and physical pain and suffering to Ms. Antic. The effects of the rapes that she suffered at the hands of Hazim Delic, including the extreme pain of anal penetration and subsequent bleeding, the severe psychological distress evidenced by the victim while being raped under circumstance(s) where Mr. Delic was armed and threatening her life, and the general depression of the victim, evidenced by her constant crying, the feeling that she was going crazy and the fact that she was treated with tranquilizers, demonstrate most emphatically the severe pain and suffering that she endured”.¹⁴¹⁰

This was likewise held by the Appeals Chamber in the *Kunarac* case, which stated that “sexual violence necessarily gives rise to severe pain or suffering, whether physical or mental, and in this justifies its characterization as an act of torture”.¹⁴¹¹ The *ad hoc* tribunals have followed this understanding of torture in cases subsequent to the *Kunarac* decision.¹⁴¹² In the *Brdanin* decision the Trial Chamber found that rape *automatically* meets the severity threshold and additional evidence is not necessary to prove the level of severity. It declared: “[s]ome acts, like rape, appear by definition to meet the severity threshold...Severe pain or suffering, as required by the definition of the crime of torture, can be said to be established once rape has been proved, since the act of rape necessarily implies such pain or suffering”, also referring to decisions of the Inter-American and European Court of Human Rights.¹⁴¹³ The Tribunal thus advanced the approach that rape *may* constitute severe pain and suffering, to affirming that rape obviously meets the severity threshold.

Interesting to note is the decision of the Pre-Trial Chamber of the ICC in the confirmation of charges against Jean-Pierre Bemba in 2009.¹⁴¹⁴ The Prosecution

¹⁴¹⁰ *Prosecutor v. Delalic et al*, (Celebici Camp), Judgment of 16 November 1998, para. 964.

¹⁴¹¹ *Prosecutor v. Kunarac*, Judgment of 12 June 2002, para. 150.

¹⁴¹² *Prosecutor v. Miroslav Kvocka*, IT-98-30/1-T, Judgment of 2 November 2001, para. 141, *The Prosecutor v. Laurent Semanza*, Case No. ICTR-97-20-T, Judgment of 15 May 2003, para. 343.

¹⁴¹³ *Prosecutor v. Radoslav Brdanin*, Case No. IY-99-36-T, Judgment of 1 September 2004, para. 485.

¹⁴¹⁴ *The Prosecutor v. Jean-Pierre Bemba Gombo*, No.: ICC-01/05-01/08, 15 June 2009, Decision Pursuant to Article 61 (7) (a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo.

had presented charges on rape, torture and outrages on personal dignity as cumulative charges based on the same conduct. The Chamber confirmed the rape charges but dismissed the charges on torture and outrages upon personal dignity, explaining that the “essence” of torture is fully subsumed by the charge of rape. The Chamber reasoned that “[t]he specific material elements of the act of torture, namely severe pain and suffering and control by the perpetrator over the person, are also the inherent specific material elements of the act of rape...”.¹⁴¹⁵ It therefore held that torture as a crime against humanity in the Rome Statute does not require any additional material element not already contained in the rape charge. All rape thus automatically constitutes torture. However, it should be noted that torture as a crime against humanity in the Statute does not require a particular purpose, so it does not entail an automatic finding of this element, e.g. gender discrimination.

7.2.4.3 Purpose

The purposes of the UN Convention against Torture have also been adopted by the *ad hoc* tribunals. In the *Akayesu* case the ICTR stated: “like torture, rape is used for such purposes as intimidation, degradation, humiliation, discrimination, punishment, control or destruction of a person. Like torture, rape is a violation of personal dignity, and rape in fact constitutes torture”, in this way drawing an analogy between the purposive elements of rape and torture.¹⁴¹⁶ Of interest from the standpoint of the *mens rea* element of the crime of rape, one of the defendants in the *Kunarac* case, Vukovic, claimed that the rapes of which he was charged had been carried out for sexual gratification rather than with discriminatory intent. Such acts by definition would thereby be excluded from constituting torture, since it did not constitute one of the listed purposes in the UN Convention against Torture. The Trial Chamber concluded:

“...all that matters in this context is his awareness of an attack against the Muslim civilian population of which his victim was a member and, for the purpose of torture, that he intended to discriminate between the group of which he is a member and the group of

¹⁴¹⁵ *The Prosecutor v. Jean-Pierre Bemba Gombo*, para. 204. This has, however, been criticised by the “Women’s Initiatives for Gender Justice”, which in an *amicus curiae* brief argued that the Chamber failed to address the extent of harm suffered by those raped, since the various charges more accurately reflect the intention of the acts of rape. See *Amicus Curiae* Observations of the Women’s Initiatives for Gender Justice pursuant to Rule 103 of the Rules of Procedure and Evidence, 31 July 2009.

¹⁴¹⁶ Discussed more in Chapter 9.2.1.1. See also *Prosecutor v. Furundzija*, Judgment of 10 December 1998, para. 162. The Trial Chamber is, however, divided on whether the purpose of humiliation is customary. See *Prosecutor v. Krnojelac*, IT-97-25, ICTY, Judgment of 15 March 2002, para. 186.

his victim. There is no requirement under international customary law that the conduct must be solely perpetrated for one of the prohibited purposes of torture, such as discrimination. The prohibited purpose need only be part of the motivation behind the conduct and need not be the predominant or sole purpose”.¹⁴¹⁷

The purpose of the torture therefore constituted discrimination of the Muslim population. On appeal, Vukovic yet again raised the issue of sexual gratification as a motive. The Appeals Chamber responded: “if one prohibited purpose is fulfilled by the conduct, the fact that such conduct was also intended to achieve a non-listed purpose (even one of a sexual nature) is immaterial”.¹⁴¹⁸ It further ruled:

“The Appeals Chamber holds that, even if the perpetrator’s motivation is entirely sexual, it does not follow that the perpetrator does not have the intent to commit an act of torture or that his conduct does not cause such severe pain or suffering, whether physical or mental, since such pain or suffering is a likely and logical consequence of his conduct. In view of the definition, it is important to establish whether a perpetrator intended to act in a way which, in the normal course of events, would cause severe pain or suffering, whether physical or mental, to his victims.”¹⁴¹⁹

This acknowledged that rape could partly be motivated by sexual intentions, but the torture still needed to be committed for an additional purpose as laid down in the UN Convention against Torture. The reason for this is developed in the *Celebici* case, where the Trial Chamber stressed that a distinction must be made between a prohibited purpose and one that was purely private: “the rationale behind this distinction is that the prohibition on torture is not concerned with private conduct, which is ordinarily sanctioned under national law”.¹⁴²⁰ The approach that the prohibited purpose did not have to be “the predominating or sole purpose” has been followed in subsequent cases, such as *Kvočka* and *Semanza*.¹⁴²¹

¹⁴¹⁷ *Prosecutor v. Kunarac, Kovac and Vukovic*, Judgment of 22 February 2001, para. 816. Emphasis added.

¹⁴¹⁸ *Prosecutor v. Kunarac, Kovac and Vukovic*, Appeal Judgment of 12 June 2002, para. 155.

¹⁴¹⁹ *Ibid*, para. 153.

¹⁴²⁰ *Prosecutor v. Delalic et al, (Celebici Camp)*, Judgment of 16 November 1998, para. 471.

¹⁴²¹ *Prosecutor v. Miroslav Kvočka*, ICTY, Judgment of 2 November 2001, para. 153, *The Prosecutor v. Laurent Semanza*, ICTR, Judgment 15 May 2003, para. 343.

It is thus important to distinguish between “motive” and “intent” when analysing the purpose behind the presumed torture. It must be borne in mind that “[t]he motive to commit an act is not paramount legally to the intent with which an act is performed”,¹⁴²² indicating that it is not of relevance what drove the perpetrator, e.g. lust or stress, but rather which *aim* he was pursuing. For instance, lust and genocidal intent can be experienced simultaneously, and the former does not preclude the specific intent. As Noëlle Quenivet argues, the confusion between these terms when determining the *mens rea* element in sexual offences cases can lead to devastating results.¹⁴²³ Evaluating motive in the form of intent could then diminish the protection against e.g. the prohibition against torture.

In the *Celibici* case, the prohibited purposes were deemed to be multiple in connection with the rape. This included the intent to obtain information of the whereabouts of the victim’s husband, with consequent punishment for not supplying that information, as well as punishment for the deeds of her husband.¹⁴²⁴ Additionally, it served the purpose of intimidating the victim as well as other inmates in the detention camp. Interestingly, the Chamber also concluded that discrimination was another purpose behind the torture.¹⁴²⁵ In delineating the harm suffered by one of the female detainees, the Tribunal was of the opinion that “the violence suffered by Ms. Cecez in the form of rape, was inflicted upon her by Delic because she is a woman...[and] this represents a form of discrimination which constitutes a prohibited purpose for the offence of torture”.¹⁴²⁶ This established that women are violated in ways different from men and are sought out because of their gender. If such a presumption is accepted, it should also apply to rape committed in peacetime because no distinction can be drawn from the standpoint of discrimination.¹⁴²⁷

Could it be contended that rape automatically falls under the purpose of discrimination, since the clear majority of victims of rape belong to one group, i.e. women, and that sexual violence is committed to subordinate that particular group? It is most likely that this is not the case. A question was raised in the

¹⁴²² Viseur Sellers, Patricia & Okuizumi, Kaoru, *Prosecuting International Crimes: An Inside View: Intentional Prosecution of Sexual Assaults*, 7 Transnational Law and Contemporary Problems, 61, (1997), p. 61.

¹⁴²³ Quenivet, Noëlle, *Sexual Offences in Armed Conflicts*, p. 72

¹⁴²⁴ *Prosecutor v. Delalic et al, (Celebici Camp)*, Judgment of 16 November 1998, para. 941.

¹⁴²⁵ *Ibid*, para. 941.

¹⁴²⁶ *Ibid*, para. 941.

¹⁴²⁷ The question of rape as a form of gender discrimination will be furthered discussed in Chapter 7.4.

Kunarac case whether the accused could be prosecuted for several crimes, founded on the same conduct, i.e. cumulative charges. The point concerned whether the act of rape could be charged as torture in addition to the crime of rape, or if it should be subsumed solely under one article. The Trial Chamber held that cumulative charges for the same act could be brought if the various charges were possessed of specific elements that differed. In comparing the elements of rape against torture, the Tribunal's view was that a materially distinct element of torture was the severe infliction of pain or suffering aimed at obtaining information or a confession, or for the purposes of punishing, intimidating, coercing or discriminating against the victim or a third person.¹⁴²⁸ Instead, the Tribunal held that the complainants were selected as rape victims and the "sole reason for this treatment...was their Muslim ethnicity".¹⁴²⁹ The ICTR held a similar view in the *Semanza* case, which found that the encouragement of a crowd by the accused to rape women because of their Tutsi ethnicity led to the infliction of pain and suffering for a discriminatory purpose.¹⁴³⁰ Such reasoning implies that rape does not automatically entail torture for one of the listed purposes, such as discrimination, but that a specific objective of the inflicted torture must be proved in each case. Furthermore, in concluding that a discriminatory purpose was inherent to the rape of women would automatically exclude male rape from such a purposive element based solely upon gender. It has been more common for the Trial Chambers in cases on rape to find discrimination based on ethnicity as a purpose.

Another interesting aspect is that while it was emphasised in the *Kunarac* case that the identity of the perpetrator was immaterial, it seems that public officials committing torture are easily ascribed one of the purposive elements. The Tribunal in the *Celebici* case resolved: "[i]t is difficult to envisage circumstances in which rape, by, or at the instigation of a public official, or with the consent or acquiescence of an official, could be considered as occurring for a purpose that does not, in some way, involve punishment, coercion, discrimination or

¹⁴²⁸ *Prosecutor v. Kunarac, Kovac and Vukovic*, Judgment of 22 February 2001, para. 557. See criticism of this in Dixon, Rosalind, *Rape as a Crime in International Humanitarian Law: Where to from Here?*, EJIL, Vol. 13 No. 3, (2002), p. 700.

¹⁴²⁹ *Prosecutor v. Kunarac, Kovac and Vukovic*, Judgment of 22 February 2001, para. 577. See, also, para. 816: "...the accused obviously intended to discriminate against the group of which his victim was a member, i.e. the Muslims, and against his victim in particular".

¹⁴³⁰ *The Prosecutor v. Laurent Semanza*, Judgment of 15 May 2003, para. 545: "The Chamber finds that the rape of Victim A constitutes torture because the assailant raped her because she was a Tutsi, which is a discriminatory purpose. In particular, the Chamber notes that the perpetrator acted intentionally and with this prohibited purpose because he acknowledged the Accused's discriminatory instructions to rape Tutsi women as part of their broader work of killing Tutsis."

intimidation. In the view of this Trial Chamber this is inherent in situations of armed conflict”.¹⁴³¹ It further stated: “[o]nly in exceptional cases should it therefore be possible to conclude that the infliction of severe pain or suffering by a public official would not constitute torture...on the ground that he acted for purely private reasons”.¹⁴³² From this one gains the impression that the role of the perpetrator is in fact more important than the actual purpose of the rape. In cases where there has been an official policy of systematic rape, such as in Rwanda and Former Yugoslavia, it seems that the policy is sufficient to ascribe non-sexual motivations to all instances of rape.

Torture in the Rome Statute of the ICC is defined in two separate manners for war crimes and crimes against humanity. The distinction is that the latter does not require a specific purpose, whereas war crimes demand that the perpetrator inflicts severe pain for purposes such as “obtaining information or a confession, punishment, intimidation or coercion or for any reason based on discrimination of any kind”.¹⁴³³ As for the purposive element regarding torture as a crime against humanity, it is even emphasised that “...it is understood that no specific purpose need be proved for this crime”.¹⁴³⁴ The distinction between the two crimes rests on the assumption that torture in the associated circumstances of crimes against humanity does not pertain particularly to acts of public officials, and it is thus not necessary to demonstrate a specific intent. In addition, the purpose requirement was retained in war crimes to distinguish it from inhuman treatment.¹⁴³⁵ The definition of torture within the context of crimes against humanity hereby differs from the *ad hoc* tribunals, which still retain the purposive element such as in the UN Convention against Torture. As such, it recognises that intent to cause a victim severe physical or mental pain is in itself a serious crime that does not require a specific additional purpose. The lack of a purposive requirement in the ICC definition has worried certain critics who

¹⁴³¹ *Prosecutor v. Delalic et al, (Celebici Camp)*, Judgment of 16 November 1998, para. 495.

¹⁴³² *Ibid*, para. 471, quoting J. Herman Burgess and Hans Danelius, *A Handbook on the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, Martinus Nijhoff, Dordrecht, (1988), p. 119.

¹⁴³³ See Article 7 (1) (f) on crimes against humanity and 8 (2) (c) (i) on war crimes as torture in the Elements of Crimes.

¹⁴³⁴ Article 7 (1) (f), The Elements of Crimes.

¹⁴³⁵ Politi, Mauro, *Elements of Crimes*, in *The Rome Statute of the International Criminal Court: A Commentary* eds. A. Cassese, Gaeta and John R.W.D. Jones, Volume II, Oxford University Press, (2002), p. 470.

argue that e.g. not all rape offences constitute torture.¹⁴³⁶ Without a specific purpose, sexual violence for purely personal reasons will also be included.

The definition of torture is thus undergoing fundamental changes through innovative interpretations of the main elements. The state nexus and the purposive elements have been approached in novel manners through international criminal law, which may in part influence the interpretation by human rights bodies. Francoise Hampson of the UN Sub-Commission on the Promotion and Protection of Human Rights, argues that the definitions advanced by the ICTY and ICTR will have an impact on similar concepts in international human rights law, e.g. torture.¹⁴³⁷ The UN Committee against Torture has stated that the UN Convention against Torture does not limit the international responsibility that states or individuals may incur under rules of customary international law or other treaties.¹⁴³⁸ The rule that is the most protective of the individual naturally constitutes the obligation for the state. The question is whether custom has developed beyond the definition found in the Convention. We can only speculate as to the possible synergy effect between the two areas of law. Given the nature of human rights law as imposing duties on states, it is unlikely that the state nexus will be removed. However, the wide interpretation of the required purposes of torture and the increased propensity to find rape to constitute gender discrimination may well develop in the same direction. Evident is that both areas are increasingly infused with a gender-based approach.

While the ICTY in its jurisprudence proclaims that the main difference between the scope of protection in international criminal law/IHL and human rights law lies in the state nexus requirement, the case law of the two regional human rights courts also speaks of a reduced emphasis on the state actor as direct perpetrators, while simultaneously enlarging the realm of state responsibility. As surveyed earlier in the chapter on state responsibility, the state nexus requirement has developed from a necessity of proving a direct involvement by the state to finding passivity sufficient. UN Special Rapporteur on Torture, Manfred Nowak, has acknowledged that rape in the private sphere is subsumed in the definition of torture under certain circumstances, where state acquiescence can be proved in failing to prevent or punish the crime.¹⁴³⁹ This maintains the requirement of a state nexus, which is the premise of all international human rights law, but affirms that the due diligence standard is also to be applied in relation to the UN Convention against Torture. States thus have extensive

¹⁴³⁶ See e.g. Burchard, Christoph, *Torture in the Jurisprudence of the Ad Hoc Tribunals*, p. 176.

¹⁴³⁷ UN Doc. E/CN.4/Sub.2/2004/12, 20 July 2004.

¹⁴³⁸ General Comment No. 2, CAT, para. 15.

¹⁴³⁹ UN Doc. A/HRC/7/3.

obligations to prohibit rape in accordance with treaty law and customary international law since rape may constitute a form of torture. This includes obligations to enact domestic criminal laws prohibiting rape.

The broadened approach to torture has not been well received by all. Christoph Burchard e.g. argues that the acceptance of these rights will decrease the broader and more liberal the definition becomes, i.e. if more incidents are labelled torture the legal seriousness will be lost.¹⁴⁴⁰ However, in order for international human rights to remain relevant and functional, it is important to continuously develop and expand the protection for the individual. Particularly the rights of women may otherwise be disregarded.

7.3 Rape as a Violation of the Right to Privacy

The right to privacy is protected in all major international and regional human rights treaties.¹⁴⁴¹ It is essentially rooted in the idea of individual dignity and worth and is understood to protect notions of individual existence (e.g. a person's identity and integrity) and autonomy. Autonomy consists in the human being's striving to achieve self-realisation by means that do not obstruct the liberty of others, which includes a right to one's own body.¹⁴⁴² With the broadened understanding of privacy to encompass the freedom to develop self-expression, the entitlement to privacy has come to determine the limits of personal autonomy.¹⁴⁴³ In general, a certain division can be noted in the approach to autonomy depending on the customs and established practice of the legal tradition. The European heritage has been conceptualised as being more Kantian with a focus on protection, with personal autonomy a goal in terms of protecting personal integrity. Meanwhile, the common law tradition arguably places a larger focus on self-determination in accordance with Mill and views autonomy primarily as a matter of a negative freedom right.¹⁴⁴⁴ Accordingly, state officials

¹⁴⁴⁰ Burchard, Christoph, *Torture in the Jurisprudence of the Ad Hoc Tribunals*, p. 175.

¹⁴⁴¹ Article 12, UDHR, Article 17, ICCPR, Article 8 ECHR, Article 11 American Convention. Not the African Charter on Human Rights.

¹⁴⁴² Nowak, Manfred, *UN Covenant on Civil and Political Rights, CCPR Commentary*, pp. 388-389.

¹⁴⁴³ Brants, Chrisje, *The State and the Nation's Bedrooms: The Fundamental Right of Sexual Autonomy*, in *Personal Autonomy, the Private Sphere and Criminal Law*, ed. Peter Alldrige, Chrisje Brants, Hart Publishing (2001), p. 120.

¹⁴⁴⁴ Raes, Koen, *Legal Moralism or Paternalism? Tolerance or Indifference? Egalitarian Justice and the Ethics of Equal Concern*, in *Personal Autonomy, the Private Sphere and Criminal Law*, ed. Peter Alldrige, Chrisje Brants, Hart Publishing, (2001), p. 26. The European legal culture thus places a greater emphasis on inter-dependence than independence.

have generally neither wished to become “voyeurs of activity behind the bedroom door, nor meddlers in “normal sexual relations””.¹⁴⁴⁵

The competing interests of the right to privacy were e.g. evident in Sweden when a legal reform of the provisions on sexual violence was conducted in the 1960s, aiming to further strengthen the protection of the individual’s interest in sexual self-determination.¹⁴⁴⁶ All forms of sexual assault would thereby be included, regardless of the context, whether the participants were in a relationship or married. The reform met with reluctance from certain parties in Parliament who maintained that the reform constituted an invasion of the privacy of family life and that the new provisions would open up possibilities for fabricated claims by acrimonious partners, e.g. during divorce proceedings.¹⁴⁴⁷

In international human rights law both aspects of privacy are present. Traditionally, the focus has been on the negative aspect, restricting interference by the state but the expansion of the principle of due diligence and positive obligations for states has extended the scope. On the one hand, it is essential to protect the private lives of citizens by respecting and preventing invasions of the private sphere. On the other hand, under the due diligence standard, states are obliged to regulate and restrict behaviour between private individuals that is judged harmful, such as sexual violence.¹⁴⁴⁸ The right is not absolute and can be set aside because of other overriding interests. It is limited by such concerns as public morality and the prevention of crime. Often public morality and criminalisation are inextricably linked. Furthermore, the regulations primarily protect against *arbitrary* interference.¹⁴⁴⁹ Criminal laws that regulate sexual conduct are not on the whole considered to be arbitrary if they are justified. The mounting claims of a right to personal autonomy have had a substantial influence and effect on substantive criminal law, challenging notions of social morality.¹⁴⁵⁰ The use of criminal law to regulate and enforce “private” moral choices has as a result been questioned, e.g. prohibiting homosexual relations and sexual preferences such as sadomasochism.

¹⁴⁴⁵ Rhode, Deborah, *Justice and Gender: Sex Discrimination and the Law*, p. 250.

¹⁴⁴⁶ Prop. 1962:10 Förslag till Brottsbalk.

¹⁴⁴⁷ Motion 1962:650.

¹⁴⁴⁸ Brants, Chrisje, *The State and the Nation’s Bedrooms: The Fundamental Right of Sexual Autonomy*, p. 117. CCPR General Comment No. 16, Article 17, para.1.

¹⁴⁴⁹ See e.g. the language in Article 12, UDHR, Article 17 ICCPR, Article 8 (2) ECHR, Article 11 (2) American Convention.

¹⁴⁵⁰ Alldridge, Peter and Brants, Chrisje, *Introduction, in Personal Autonomy, the Private Sphere and Criminal Law*, ed. Peter Alldridge, Chrisje Brants, Hart Publishing, (2001), p. 6.

The sexual life of individuals has been interpreted by treaty bodies and regional courts as a matter of privacy, mainly in a number of cases on laws prohibiting sexual acts of homosexuals.¹⁴⁵¹ In those cases, sexuality has been discussed in the form of positive action, i.e. the right of the person to engage in sexual relations with another consenting individual. The interference has in these matters been the state's criminalisation of certain sexual conduct. Though society has become more permissive with regard to sexuality in consensual constellations, claims to protection against the *abuse* of sexuality have simultaneously called for a more extensive regulation and "intrusion" by the state in non-consensual sexual relations. Criminal laws prohibiting rape are intended to protect the sexual autonomy of the person from non-consensual sexual acts. The right to self-determination is in this sense protective. A limited number of cases have also concentrated on this negative aspect of sexuality – that is, respecting the determination *not* to engage in sex. Sexual autonomy, similar to the right to privacy, in general is therefore understood to entail two aspects: the right to choose to have sex and the right to refuse.¹⁴⁵²

In the case of *X and Y v. Netherlands*, the rape of the plaintiff and the subsequent inaction by the state to provide redress as a result of legislative deficiencies was a violation under Article 8 of the ECHR, conferring on the person entitlement to respect for private and family life. The European Court found that the concept of private life covered "the physical and moral integrity of the person, including his or her sexual life".¹⁴⁵³ The lack of a possibility to prosecute in such cases of sexual assault meant the state had failed to provide effective protection of the complainant's sexual privacy. The difficulty the Court faced in evaluating the Dutch criminal law prohibiting rape was to risk an unacceptable state interference in the right to the individual's sexual life, by regulating conduct that actually fell within the field of accepted privacy. The applicant argued the point in the following manner:

"On the one hand, it follows from Article 8 of the Convention that the recognition of what is acknowledged by the authorities on principle as the citizens' inalienable private sphere means that actions which come within the individual's personal sex life should not be a matter for the State or its bodies. On the other hand, the Convention implies that in a democratic society restrictions must be placed in principle on the tendency of individuals

¹⁴⁵¹ See e.g. *Dudgeon v. United Kingdom*, ECtHR, *Toonen v. Australia*, Comm. No. 488/1992, UN Doc CCPR/C/50/D/488/1992, (1994), HRC.

¹⁴⁵² See e.g. Schulhofer, Stephen, *Unwanted Sex*.

¹⁴⁵³ *X and Y v. The Netherlands*, ECtHR, para. 22. The Case was first before the European Commission on Human Rights and subsequently referred to and adjudicated by the Court, hence references to both the Commission and the Court in the text.

to express themselves in respect of other persons. The freedom of the individual must not restrict that of others. Legislation serves to protect freedom of will from encroachments by third parties.”¹⁴⁵⁴

The government of the Netherlands responded thus:

“Provisions forbidding in absolute terms sexual relations with certain categories of individuals who, for reasons of lack of maturity, mental disability or state of dependence, are insufficiently able to self-determination in the field of sexual relations with others, will - in so far as the law is respected - deprive these categories of individuals of all sexual contact, which might be at variance with their right to a private life under Article 8 (1) of the Convention.”¹⁴⁵⁵

The government, through its statement, wished to emphasise that criminalising all sexual conduct with a person belonging to any of the mentioned vulnerable groups, who in most jurisdictions were considered in lacking the ability to consent to sexual relations, would in effect constitute an invasion of privacy. Even though such regulations provided protection to such groups in absolute terms, such laws would simultaneously encroach upon their rights. The Court, however, held that the right to privacy did not solely aim to protect the individual against arbitrary interference by the public authorities, compelling the state to abstain from interference, but that “there may be positive obligations inherent in an effective respect for private or family life. These obligations may involve the adoption of measures designed to secure respect for private life even in the sphere of the relations of individuals between themselves”.¹⁴⁵⁶ In this case, the law did not aim to automatically criminalise all sexual relations with those belonging to a vulnerable group, but to allow for the possibility of complaint and prosecution in the event of sexual violence.

Few other cases thoroughly discuss sexual violence as a transgression of the right to privacy. The European Court found the inadequate legislation prohibiting rape as a violation by the state in protecting the right to privacy in Article 8 of the ECHR in the case of *M.C. v. Bulgaria*, since the victim’s sexual life and dignity were breached. The Court emphasised that while states have a wide “margin of appreciation” in determining the means of protecting individuals against the harmful acts of others, effective deterrence against such grave acts as rape where “essential aspects of private life are at stake”, requires effective

¹⁴⁵⁴ *X and Y v. The Netherlands*, Series B : Pleadings, Oral Arguments and Documents , at 75. See in Clapham, Andrew, *Human Rights in the Private Sphere*, p. 221.

¹⁴⁵⁵ *X and Y v. The Netherlands*, Series B, at 51.

¹⁴⁵⁶ *X and Y v. The Netherlands*, para. 23.

criminal law provisions.¹⁴⁵⁷ The Inter-American Court in *Mejia Egocheaga v. Peru* also found that an individual's sexual life was included in the concept of private life, as in Article 11 of the American Convention on Human Rights. It held that sexual abuse "implies a deliberate outrage to their dignity. In this respect, it becomes a question that is included in the concept of 'private life'."¹⁴⁵⁸ The UN Human Rights Committee has further registered that legal systems where the sexual history of a woman is taken into consideration in deciding her legal rights, including protection against rape, is an example of where the right of women to privacy, as protected under Article 17 in the ICCPR, is denied on unequal terms with men.¹⁴⁵⁹ The construction of a state's criminal law on rape can thereby fail in preventing sexual violence or to provide effective remedies and thus lead to an invasion of the individual's privacy.

Interesting to note is the European Court's differentiation in the analysis of Articles 3 and 8 in relation to sexual violence. Why did the court not find a violation of Article 3 in *X and Y v. the Netherlands*, as opposed to that in *M.C. v. Bulgaria*? This is not directly apparent, since both cases concerned lacunas in criminal laws prohibiting rape. The European Commission's reasoning concerning rape as a violation of Articles 3 and 8 of the Convention firstly argued that the government of the Netherlands could not be held responsible for treatment that possibly fell under Article 3. It specified:

"...the Commission found it necessary in the present case to distinguish the issue under Article 3 clearly from the issues under Article 8. In the latter, it has held that the failure by the Netherlands legislator to include a particular category of especially vulnerable persons in an otherwise comprehensive system of criminal protection of the sexual integrity of vulnerable persons constituted a violation of the Convention. However, sexual abuse and inhuman and degrading treatment - even though they may overlap in individual cases - are by no means congruent concepts. The 'gap' in the law relating to the protection of sexual integrity of vulnerable persons cannot therefore be assimilated to a 'gap' in the protection of persons against inhuman or degrading treatment.

"In the absence of a close and direct link between the above mentioned failure by the Netherlands legislator with regard to the protection of the sexual integrity of vulnerable persons on the one hand and the field of protection covered by Article 3 of the Convention

¹⁴⁵⁷ *M.C. v. Bulgaria*, para. 150.

¹⁴⁵⁸ *Mejia Egocheaga v. Peru*, Analysis 3a.

¹⁴⁵⁹ General Comment No. 28, UN.Doc.CCPR/C/21/2/Rev.1/Add.10 (2000), HRC, para. 20.

on the other, the Commission concludes....that Article 3 has not been violated in the present case”.¹⁴⁶⁰

The Commission simply asserted that sexual abuse did not as a matter of course entail a violation of Article 3, but did not specify in which situations it might do so. In both instances the applicants had suffered rape by a private individual, but were unable to take their cases to court because of procedural rules and a restrictive definition of rape in the criminal law provisions. Arguably, there needs to be a ‘close and direct link’ between the failure of the legislator regarding the protection of the sexual integrity of vulnerable persons and the scope of protection in Article 3. This would mean that the link to Article 8 is less strict. Andrew Clapham takes the view that the Commission’s argumentation suggests that “the finding of a violation relates not to the actual physical violation inflicted on the victim but to the omission of the legislator. The omission in this case related to a failure to protect private and family life (Article 8) rather than a failure to prevent torture and inhuman or degrading treatment (Article 3)”.¹⁴⁶¹ However, this simply explains that the violation in question is an act of omission and that the state ought to have responded with due diligence. It does not explain why the omission can only be related to Article 8 and not to Article 3. Clapham further contends that this can be ascertained through the ‘but for’ test. Though the rape itself might constitute an act within the ambit of Article 3, it could not be concluded that *but for* the omission of the government within the province of Article 3, the attack would not have happened.¹⁴⁶² Of importance is whether there was a high probability that the private violation could have been prevented by state action. Yet again, this only clarifies the concept of state responsibility in relation to rights in general, not the particular rights in question. A “but for” test has also been rejected by the Court e.g. in *E. and others v. The United Kingdom*. A possible explanation is simply that the case of *M.C. v. Bulgaria* represented a progressive development from the earlier case of *X and Y v. the Netherlands*, since the European Court in its early case law was reluctant to find state obligations for non-state actors in relation to the prohibition of torture. Thus, albeit not developed as fully as the understanding of rape as torture in case law and doctrine, a close link exists between the protection of sexual identity and integrity and states’ obligations to guarantee the right to privacy of individuals.

¹⁴⁶⁰ *X and Y v. the Netherlands*, Report of the Commission, adopted on 5 July 1983, p. 29.

¹⁴⁶¹ Clapham, Andrew, *Human Rights in the Private Sphere*, p. 199.

¹⁴⁶² *Ibid*, p. 196.

7.4 Rape as a Violation of the Non-Discrimination Principle

Sexual violence can be analysed from a dual standpoint as regards the principle of non-discrimination. Sexual violence *per se* can be seen as a manifestation of discrimination in that women suffer disproportionately as a group. Laws and practices concerning the crime of rape may also either advertently reflect gender stereotypes or *in effect* treat either men or women in a subordinate manner. By requiring a display of physical resistance by the victim, or a certain measure of force, the burden of proof is arguably disproportionately high for victims, which primarily consist of women. Furthermore, the definition of rape in certain jurisdictions excludes the male victim, e.g. by restricting it to a certain *actus reus* that does not pertain to male victimisation. Ranging from early and explicit examples including rape as “carnal knowledge against her will,” to rape described as penetration of the vagina, such victims are not recognised.

7.4.1 The Principle of Equality and Non-Discrimination

The principle of equality is at the heart of international human rights law and is seen as one of the most important principles.¹⁴⁶³ The nature of discrimination is understood as an offence against human dignity, which most often targets the most vulnerable groups in society.¹⁴⁶⁴ However, there is no universal definition of non-discrimination albeit certain commonalities in the interpretation of various regulations have developed. The right to equality is foremost found in the Universal Declaration of Human Rights which proclaims that “All human beings are born free and equal in dignity and rights.”¹⁴⁶⁵ The principle is additionally found in a variety of human rights instruments, including the ICCPR, ICESCR, CERD, CEDAW as well as regional human rights treaties.¹⁴⁶⁶

¹⁴⁶³ Vandenhoule, Wouter, *Non-Discrimination and Equality in the View of the UN Human Rights Treaty Bodies, Intersentia*, (2005), p. 1.

¹⁴⁶⁴ Non-Discrimination: A Human Right - Proceedings, Seminar marking the entry into force of Protocol No. 12 to the European Convention on Human Rights, Strasbourg, 11 October 2005, Council of Europe, p. 5.

¹⁴⁶⁵ Article 1, UDHR.

¹⁴⁶⁶ Articles 2 (non-discrimination) and 3 (equality) of the ICESCR, Articles 2 (non-discrimination), 3 (equality) and 26 (equality before the law and non-discrimination as to the equal protection of the law) of the ICCPR, Article 14 of the ECHR (non-discrimination), Article 2 (non-discrimination), 3 (equality) of the African Charter and Articles 1 (non-discrimination) and 24 (equality, non-discrimination) of the American Convention on Human Rights. It is further found in the Preamble of the UN Charter, which establishes the conviction of the peoples of the UN, to “reaffirm faith in fundamental human rights, in dignity and worth of the human person, in the equal rights of men and women”. Paragraph 2, United Nations Charter, 26 June 1945. All member states to the UN are thereby obliged to respect the principle of gender-equality.

The concepts of equality and non-discrimination are entwined, in that discrimination often is understood as the negative aspect of the right to equality.¹⁴⁶⁷ They are generally held to be indivisible terms, non-discrimination serving as a complement to equality by prohibiting unjust inequalities.¹⁴⁶⁸ Several treaties contain provisions on both equality and non-discrimination, e.g. the ICCPR.¹⁴⁶⁹ Meanwhile, the UN Human Rights Committee in General Comment No. 18 on non-discrimination approaches both principles under the heading of non-discrimination, declaring: “non-discrimination, together with equality before the law and equal protection of the law without discrimination, constitutes a basic and general principle relating to the protection of human rights.”¹⁴⁷⁰ Other treaties contain one regulation that pertains to both equality and non-discrimination, e.g. the American Convention on Human Rights.¹⁴⁷¹ According to CESCR, the concepts are “integrally related and mutually reinforcing.”¹⁴⁷² In the Explanatory Report to Protocol 12 of the ECHR, which concerns non-discrimination it is stated:

“While the equality principle does not appear explicitly in the text...it should be noted that the non-discrimination and equality principles are closely intertwined. For example, the principle of equality requires that equal situations are treated equally and unequal situations differently. Failure to do so will amount to discrimination unless an objective and reasonable justification exists.”¹⁴⁷³

Equality and non-discrimination will therefore be approached as two aspects of a single matter.

¹⁴⁶⁷ Arnardóttir, Oddný Mjöll, *Equality and Non-Discrimination under the European Convention on Human Rights*, Martinus Nijhoff, (2003), p. 7. As such, non-discrimination prohibits making distinctions between individuals without reasonable and objective criteria, whereas equality may also require additional, substantive measures to reach the goal. See Edwards, Alice, *Violence against Women as Sex Discrimination: Judging the Jurisprudence of the United Nations Human Rights Treaty Bodies*, p. 31.

¹⁴⁶⁸ Non-Discrimination, Council of Europe, Strasbourg, 11 October 2005, p. 5. The CEDAW Committee has stated that the elimination of discrimination and the promotion of equality are “two different but equally important goals in the quest for women’s empowerment”. See UN Doc. Supplement No. 38 (A/57/38), CEDAW Committee, 27th Session, (Belgium), para. 146.

¹⁴⁶⁹ See Articles 2,3 and 26 of the ICCPR.

¹⁴⁷⁰ CCPR General Comment No. 18, Non-discrimination U.N Doc.HRI/GEN/1/Rev.1, para.1.

¹⁴⁷¹ Article 24 of the American Convention on Human Rights.

¹⁴⁷² General Comment No. 16: The Equal Right of Men and Women, UN Doc. E/C.12/2005/4, para. 3.

¹⁴⁷³ Protocol No. 12 to the Convention for the Protection of Human Rights and Fundamental Freedoms, Explanatory Report, ETS No. 177, para. 15.

7.4.2 Purpose or Effect of Discrimination

Since no universal definition of discrimination exists, the core components of the main treaty regulations and interpretations thereof will be discussed. A disparity can be noted in convention regulations and literature in the understanding of the concept of equality, particularly when it comes to gender, and which standard of review to employ.

In general, according to the classic liberal approach to non-discrimination, sex equality is equated with equal treatment, i.e. the recognition of differences between men and women is unacceptable.¹⁴⁷⁴ Non-discrimination in its traditional form thus entails the prohibition of a distinction based on gender and should guarantee equal opportunities. It thereby disregards that men and women may have different starting points. A broader concept of non-discrimination entails the examination of standards and practices that appear neutral but may affect women as a group in a negative manner.¹⁴⁷⁵ Frequently, the law is constructed by the most privileged groups in society.¹⁴⁷⁶ While the principle of non-discrimination would seem to imply that all groups must be treated in the same manner, it may in fact therefore require a differential treatment to accomplish equality. The alternative approach to formal equality is therefore substantive equality. This viewpoint recognises the inherent differences between the sexes. Viewing the differences as inherent may, however, marginalise women as a group since, as Catherine MacKinnon argues, the ‘difference’ may actually stem from an underlying power imbalance and is therefore ‘created’ rather than an innate quality.¹⁴⁷⁷ Rather, according to theories on power imbalance, the current sexual inequality stems from our social structures, which have created differences in gender roles based on sex. As mentioned previously, it is argued that this imbalance is the root-cause of a wide spectrum of inequality evident in the prevalence of sexual harassment, rape and pornography.¹⁴⁷⁸ Equality in this manner “is not freedom to be treated without regard to sex but freedom from systematic subordination because of sex.”¹⁴⁷⁹

¹⁴⁷⁴ Edwards, Alice, *Violence against Women as Sex Discrimination: Judging the Jurisprudence of the United Nations Human Rights Treaty Bodies*, 18 Tex. J. Women & L. 1, (2008), p. 10.

¹⁴⁷⁵ Access to Justice for Women Victims of Violence in the Americas, Inter-American Commission on Human Rights, OAE/Ser.L/V/II, doc. 68, 20 January 2007, paras. 73-75.

¹⁴⁷⁶ *Ibid*, para. 97.

¹⁴⁷⁷ MacKinnon, Catherine, *Toward a Feminist Theory of the State*, p. 218.

¹⁴⁷⁸ Wright, Shelley, *Human Rights and Women’s Rights*, in *Human Rights in the Twenty-First Century: A Global Challenge*, ed. Mahoney, Kathleen & Mahoney, p. 80.

¹⁴⁷⁹ Charlesworth, Chinkin, Wright, *Feminist Approaches to International Law*, p. 632.

Holtmaat has noticed a change in the approach by the CEDAW Committee in analysing gender stereotypes and discrimination, in shifting from viewing stereotypes as a problem of mentality to categorising it as a source of *structural discrimination*.¹⁴⁸⁰ Systemic inequality is deemed to occur as a result of “dominant societal values”, which has often reflected a male, heterosexual perspective.¹⁴⁸¹ The Committee finds structural discrimination as arising from “traditional attitudes by which women are regarded as subordinate to men or as having stereotyped roles”.¹⁴⁸² Discrimination is viewed as interconnected in various areas e.g. in labour, family law and violence against women. Laws criminalising rape may arguably maintain such a systematic discrimination, which means that a body of law or system is built on a gender-biased basis.

Two treaties provide a definition specifically of discrimination on the basis of sex. In Article 1 of CEDAW discrimination of women is defined as:

“any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field”.

The African Protocol on Women in a similar manner provides:

“any distinction, exclusion or restriction or any differential treatment based on sex and whose objectives or effects compromise or destroy the recognition, enjoyment or the exercise by women, regardless of their marital status, of human rights and fundamental freedoms in all spheres of life.”¹⁴⁸³

Discrimination may consequently take various forms: direct discrimination or an adverse effect, i.e. indirect discrimination, since the provisions mention

¹⁴⁸⁰ Holtmaat, Rikki, *Preventing Violence against Women: The Due Diligence Standard with Respect to the Obligation to Banish Gender Stereotypes on the Grounds of Article 5 (a) of the CEDAW Convention*, p. 78.

¹⁴⁸¹ Vandenhoule, Wouter, *Non-Discrimination and Equality in the View of the UN Human Rights Treaty Bodies*, p. 36.

¹⁴⁸² General Recommendation, No. 19, Violence against Women, (1992), para. 11.

¹⁴⁸³ Article 1, African Protocol on Women.

measures that have either the *purpose or effect* of discrimination.¹⁴⁸⁴ Direct discrimination occurs when a party adopts a rule or practice which singles out a group for discriminatory treatment. An adverse effect, on the other hand, is relevant in situations where discrimination does occur despite an adopted rule or standard being apparently neutral. Laws may have a discriminatory impact despite appearing neutral. This is frequently the result of institutional and structural biases.¹⁴⁸⁵ The CEDAW Committee has described indirect discrimination as occurring:

“when laws, policies and programmes are based on seemingly gender-neutral criteria which in their actual effect have a detrimental impact on women. Gender-neutral laws, policies and programmes unintentionally may perpetuate the consequences of past discrimination. They may be inadvertently modelled on male lifestyles and thus fail to take into account aspects of women’s life experiences which may differ from those of men. These differences may exist because of stereotypical expectations, attitudes and behaviour directed towards women which are based on the biological differences between women and men. They may also exist because of the generally existing subordination of women by men.”¹⁴⁸⁶

This is particularly pertinent in situations where laws on the prohibition of rape have a gender-neutral wording but do in fact affect individuals differently depending on their gender.

Though the ICCPR does not contain a definition of the term discrimination in its Article 26, the UN Human Rights Committee in General Comment No. 18 has sought comparisons with the formulation of CEDAW and CERD, defining it as:

¹⁴⁸⁴ CEDAW has e.g. stated that discrimination against women is a “...multifaceted phenomenon that entails indirect and unintentional as well as direct and intentional discrimination”. See UN Doc. A/57/38 (Part II), para. 279. See also Fraser, Catherine, *Creating Access to Justice Through Judicial Education: Correcting the Blindness*, First South Asian Regional Judicial Colloquium, New Delhi, 1-3 Nov. 2002, Wright, Shelley, *Human Rights and Women’s Rights*, p. 79. Wouter Vandenhoutte denotes these forms of discrimination as *De Jure* or *De Facto* Discrimination, see *Non-Discrimination and Equality in the View of the UN Human Rights Treaty Bodies*, p. 34. The former refers to discrimination in laws or policies whereas the latter refers to discrimination in practice. As for equality, *de jure* equality refers to equal treatment of similarly situated individuals and *de facto* equality to equality of results.

¹⁴⁸⁵ See e.g. Vandenhoutte, Wouter, *Non-Discrimination and Equality in the View of the UN Human Rights Treaty Bodies*, p. 35.

¹⁴⁸⁶ General Recommendation No. 25, on Article 4, para. 1, On temporary measures, UN Doc. HRI/GEN/1/Rev.7, (2004), CEDAW note 1.

“any distinction, exclusion, restriction or preference which is based on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status, and which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise by all persons, on an equal footing, of all rights and freedoms.”¹⁴⁸⁷

The regulation has also been given a similar interpretation as the CEDAW provision.¹⁴⁸⁸ Intent is not required for an act or law to be discriminatory.¹⁴⁸⁹ Indirect discrimination exists when a rule or a decision exclusively or disproportionately affect persons of a specific group in a detrimental manner.¹⁴⁹⁰ The UN Human Rights Committee notes that not all differences in treatment are discriminatory, since “the enjoyment of rights and freedoms on an equal footing...does not mean identical treatment in every instance”.¹⁴⁹¹ Such differentiations have to be based on reasonable and objective criteria. The Committee e.g. in the *Althammer v. Austria* case regarding household benefits held that a violation may result from

“the discriminatory effect of a rule or measure that is neutral at face value or without intent to discriminate. However, such indirect discrimination can only be said to be based on the grounds enumerated....if the detrimental effects of a rule or decision exclusively or disproportionately affect persons [of such groups]. Furthermore, rules or decisions with such an impact do not amount to discrimination if they are based on objective and reasonable grounds.”¹⁴⁹²

The regional human rights courts and bodies have developed their own methodology through case law in determining the existence of discrimination. The Inter-American Commission has stated that “identifying discriminatory treatment requires a showing of a difference in treatment between persons in a

¹⁴⁸⁷ CCPR General Comment No. 18: Non-Discrimination, para. 7.

¹⁴⁸⁸ See *Derksen and Bakker v. the Netherlands*, Comm. No. 976/2001, Views of 1 April 2004, HRC. Discrimination with respect to children born out of wedlock.

¹⁴⁸⁹ See e.g. *Josef Frank Adam v. The Czech Republic*, Comm. No. 586/1994, UN Doc. CCPR/C/57/D/586/1994 (1996), HRC, para. 12.7: “...the intent of the legislature is not dispositive in determining a breach of article 26 of the Covenant, but rather the consequences of the enacted legislation. Whatever the motivation or intent of the legislature, a law may still contravene article 26 of the Covenant if its effects are discriminatory”.

¹⁴⁹⁰ *Althammer et al. v. Austria*, Comm. No. 998/2001, UN. Doc. CCPR/C/78/D/998/2001, (2003), HRC. para. 10.2.

¹⁴⁹¹ CCPR General Comment No. 18, para. 8.

¹⁴⁹² *Althammer et al. v. Austria*, para. 10.2.

sufficiently analogous or comparable situation”.¹⁴⁹³ However, a difference in treatment may be appropriate where the distinction is based on “reasonable and objective criteria”.¹⁴⁹⁴ If it concerns unequal treatment based on gender, the differentiation must be “compelling or of great import or weight.”¹⁴⁹⁵ The European Court of Human Rights has also developed a specific methodology in addressing claims of discrimination under Article 14 of the European Convention on Human Rights, which also takes indirect discrimination into consideration.¹⁴⁹⁶ In *Hugh Jordan v. The United Kingdom*, the Court stated that “[w]here a general policy or measure has disproportionately prejudicial effects on a particular group, it is not excluded that this may be considered as discriminatory notwithstanding that it is not specifically aimed or directed at that group”.¹⁴⁹⁷ On gender discrimination, the European Court has stated that “the advancement of the equality of the sexes is today a major goal in the member States of the Council of Europe. This means that very weighty reasons would

¹⁴⁹³ Annual Report 1999, Considerations Regarding the Compatibility of Affirmative Action Measures Designed to Promote the Political Participation of Women with the Principles of Equality and Non-Discrimination, IACHR Chapter VI, III (B). See also Proposed Amendments to the Naturalization Provisions of the Constitution of Costa Rica, Advisory opinion OC-4/84, 19 January 1984, IACtHR, where the Inter-American Court stated the following on discrimination: “...(while the) notion of equality (prohibits) characteriz(ing) a group as inferior and treat(ing) it with hostility or otherwise subject(ing) it to discrimination in the enjoyment of rights which are accorded to others not so classified...there may well exist certain factual inequalities that might legitimately give rise to inequalities in legal treatment that do not violate principles of justice”.

¹⁴⁹⁴ Ibid.

¹⁴⁹⁵ Access to Justice for Women Victims of Violence in the Americas, Inter-American Commission on Human Rights, OAE/Ser.L/V/II, doc. 68, 20 January 2007, para. 85. For example, in the case of *Maria Eugenia Morales de Sierra*, the Inter-American Commission held that the difference in treatment based on sex is highly suspect and the State must provide very weighty reasons to justify them.

¹⁴⁹⁶ The methodology as established in the Belgian Linguistics Case is the following: first the Court decides whether the complaint of discrimination falls within the sphere of one of the rights of the Convention. Secondly, the Court reviews whether there has been a violation of the substantive provisions. Thirdly, the applicant must prove that there has been a difference in treatment in relation to the provision. Lastly, the State may demonstrate that the difference is justified. Such a difference in treatment is discriminatory if it has no objective or reasonable justification. Such a lacking justification exists if there is no “legitimate aim” or if the means used are disproportionate to the legitimate aim. See e.g. *Case Relating to Certain Aspects of the Laws on the Use of Languages in Education in Belgium v. Belgium* (Application Nos. 1474/62; 1677/62; 1691/62; 1769/63; 1994/63; 2126/64), ECtHR, Judgment of 23 July 1968.

¹⁴⁹⁷ *Hugh Jordan v. The United Kingdom*, (Application No. 24746/94), ECtHR, Judgment of 4 May 2001, para. 154.

have to be advanced before a difference of treatment on the ground of sex could be regarded as compatible with the Convention”.¹⁴⁹⁸

In *Opuz v. Turkey* of 2009, the Court evaluated domestic violence in light of the prohibition of discrimination. In a progressive manner, the Court affirmed the need to take into account international law provisions, stating that “being made up of a set of rules that are accepted by the vast majority of States, the common international or domestic standards of European States reflect a reality that the Court cannot disregard when it is called upon to clarify the scope of a Convention provision that more conventional means of interpretation have not enabled it to establish with a sufficient degree of certainty”.¹⁴⁹⁹ It consequently referred to CEDAW, the Belém do Pará Convention, case law from the Inter-American Commission and UN resolutions.¹⁵⁰⁰ In this case, the Court did not find the legislation inadequate but rather the general attitude of local authorities, including the manner in which women were treated at police stations when reporting domestic violence as well as judicial passivity in providing effective protection to victims.¹⁵⁰¹ It found that the “unresponsiveness of the judicial system and impunity enjoyed by the aggressors”, albeit unintentional, mainly affected women and therefore amounted to discrimination.¹⁵⁰²

In conclusion, various forms of discrimination are regulated through human rights law treaties, pertaining both to direct and indirect forms of discrimination. This consequently necessitates an evaluation of laws prohibiting rape both on the basis of its language and the effect of the provision. Victims of rape are mainly women, raising the question whether states lack in their efforts to eradicate this discriminatory practice. Is the passivity of states or their ineffective measures discriminating?

7.4.3 State Obligations

General human rights obligations to respect and protect naturally also pertain to the principle of non-discrimination. Respect entails that states must refrain from enacting discriminatory laws and practices.¹⁵⁰³ Not only must states refrain from exercising discriminatory policies but they also have an obligation to protect their citizens from such discrimination, whether by public agents or non-state

¹⁴⁹⁸ *Abdulaziz, Cabales and Balkandali v. The United Kingdom*, (Application Nos. 9214/80, 9573/81, 9474/81), ECtHR, Judgment of 28 May 1985, para. 78.

¹⁴⁹⁹ *Opuz v. Turkey*, ECtHR, para. 184.

¹⁵⁰⁰ *Ibid*, paras. 186-190.

¹⁵⁰¹ *Ibid*, para. 192.

¹⁵⁰² *Ibid*, para. 200.

¹⁵⁰³ General Recommendation No. 23, (1997), CEDAW, paras. 41 & 47.

actors.¹⁵⁰⁴ Specific obligations for states to eliminate sex discrimination are listed in Article 2 of CEDAW which mentions that states must: 1) take all appropriate measures to eliminate discrimination against women by any person, organisation or enterprise and 2) take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices which constitute discrimination against women. According to Article 2 (g), states are furthermore obliged to repeal all national penal provisions which constitute discrimination against women. General Recommendation No. 19 calls on states to ensure that laws on rape provide adequate protection to all women.¹⁵⁰⁵ Recommendation No. 19 even mentions IHL, affirming “the right to equal protection according to humanitarian norms in times of international or internal armed conflict”.¹⁵⁰⁶

Similarly, the Inter-American Women’s Convention places duties on states to amend or repeal laws that sustain the persistence and tolerance of violence against women, which is considered discriminatory.¹⁵⁰⁷ The Protocol to the African Charter on Women’s rights provides that states must, among other measures, “enact and effectively implement appropriate legislative and regulatory measures, including those prohibiting and curbing all forms of discrimination...which endanger the...general well-being of women”.¹⁵⁰⁸ Included in Article 26 of the ICCPR is the equal protection of the law, which entails both positive and negative aspects. The legislature must both refrain from enacting laws that contain a discriminatory element but also explicitly prohibit discrimination through the adoption of specific laws.¹⁵⁰⁹ Clear obligations therefore exist on states to adopt legislation that is non-discriminatory through its wording and effect.

During the drafting of e.g. the non-discrimination regulation of the ICCPR, it was frequently emphasised that discrimination in private relations was a matter

¹⁵⁰⁴ See e.g. CCPR General Comment 28, Equality of Rights Between men and women (Article 3), UN Doc. CCPR/C/21/Rev.1/Add.10 (2000), para. 4. In para. 8 the HRC states: “The positive obligations on State Parties to ensure Covenant rights will only be fully discharged if individuals are protected by the State, not just against violations of Covenant rights by its agents, but also acts committed by private persons or entities that would impair the enjoyment of Covenant rights...”. See also CEDAW Article 2, *Case of the Girls Yean and Bosico*, (series C), No. 130, Judgment of 8 September 2005, IACtHR, *Maria da Penha v. Brazil*, Case 12.051, Report No. 54/01, 16 April, 2001.

¹⁵⁰⁵ General Recommendation No. 19, para. 24 (b).

¹⁵⁰⁶ Ibid, Article 7 (c).

¹⁵⁰⁷ Article 7(g) of Inter-American Women’s Convention.

¹⁵⁰⁸ Article 2 (b) of Protocol to the African Charter on Women.

¹⁵⁰⁹ Nowak, Manfred, *UN Covenant on Civil and Political Rights, CCPR Commentary*, p. 607.

of legitimate, personal decision-making, which is protected against state interference as a right to privacy.¹⁵¹⁰ The UN Human Rights Committee has noted that while the obligations do not have a direct horizontal effect, the positive duties entail that states must protect individuals against violations by private parties in relation to the non-discrimination principle.¹⁵¹¹ This corresponds to the general advancement of due diligence obligations in international human rights law.

7.4.4 Sexual Violence as a Form of Gender Discrimination

This section will discuss whether sexual violence *per se* can be seen as an expression of gender discrimination. As asserted by MacKinnon, rape and sexual assault by definition constitute sex discrimination, since women are not targeted individually or at random, “but on the basis of sex, because of their membership in a group defined by gender”.¹⁵¹² Not only are most victims women, but the existence of rape is arguably discriminatory in that also the *threat* of rape diminishes the autonomy of women by altering their lifestyles and restricting certain choices, e.g. the freedom of movement, in order to minimise the risk of being raped.¹⁵¹³ The Declaration on the Elimination of Violence against Women e.g. expresses that “opportunities for women to achieve legal, social, political and economic equality in society are limited, inter alia, by continuing and endemic violence”.¹⁵¹⁴ Violence leads to fear or a general disincentive to become involved in public matters and therefore restricts women’s autonomy beyond that of physical self-determination.¹⁵¹⁵ The advantage of formulating violence against

¹⁵¹⁰ Nowak, Manfred, *UN Covenant on Civil and Political Rights*, p. 632. See further discussion on this in Vandenhoule, Wouter, *Non-Discrimination and Equality in the View of the UN Human Rights Treaty Bodies*, p. 18, Scheinin, Martin, *Experiences of the Application of Article 26 of the International Covenant on Civil and Political Rights*, in *Non-Discrimination*, Council of Europe, Strasbourg, 11 October 2005, pp. 18-19.

¹⁵¹¹ CCPR General Comment No. 31, (2004), para. 8.

¹⁵¹² MacKinnon, Catherine, *Reflections on Sex Equality Under Law*, 100 Yale L.J., p. 1301. She argues: “Sexual violation symbolizes and actualizes women’s subordinate social status to men. It is both an indication and a practice of inequality between the sexes, specifically of the low status of women relative to men...Rape is an act of dominance over women that works systematically to maintain a gender-stratified society in which women occupy a disadvantaged status as the appropriate victims and targets of sexual aggression”. Ibid, p. 1302.

¹⁵¹³ Stellings, Brande, *The Public Harm of Private Violence: Rape, Sex Discrimination and Citizenship*, p. 188.

¹⁵¹⁴ Preamble of the Declaration on the Elimination of Violence against Women.

¹⁵¹⁵ General Recommendation No. 19 also mentions that violence against women may lead to low levels of political participation, lower levels of education, skills and work opportunities, in para. 1.

women as a form of discrimination is that it is recognised as a “group-based” harm. The violence in question is thus not viewed as individual criminal acts but part of a “systemic and political problem”, requiring a structural solution. It thereby minimises the public/private problem.¹⁵¹⁶

That inequality in the enjoyment of rights by women is “deeply embedded in tradition, history and culture” has been affirmed by various bodies of the UN.¹⁵¹⁷ Case law has affirmed that the condoning by the state of violence against women “perpetuate[s] the psychological, social, and historical roots and factors that sustain and encourage violence against women.”¹⁵¹⁸ Sexual violence as a measure of this inequality has also been well-accepted. Though men are also be subjected to certain acts deemed as typically gender-based, such as rape, it is generally held that violence against women is a specific category rooted in discrimination.¹⁵¹⁹ Since principally women are subjected to sexual violence, rape clearly contains a gender component. As UN Special Rapporteur on Violence against Women, Rhadika Coomaraswamy holds, women are particularly vulnerable to violence because of

“their female sexuality (resulting in inter alia rape...); because they are related to a man (domestic violence...) or because they belong to a social group, where violence against women becomes a means of humiliation directed at the group (rape in times of armed conflict or ethnic strife). Women are subjected to violence in the family (...marital rape...), to violence in the community (rape, sexual abuse, sexual harassment...) and violence by the State (women in detention and rape during times of armed conflict).”¹⁵²⁰

¹⁵¹⁶ Edwards, Alice, *Violence against Women as Sex Discrimination: Judging the Jurisprudence of the United Nations Human Rights Treaty Bodies*, pp. 50-51.

¹⁵¹⁷ CCPR General Comment No. 28, Equality of Rights Between Men and Women (Article 3), para. 5. See also UN Doc A/HRC/4/34, 17 January 2007, p. 8 and Preamble of CEDAW. In the last decade, sociocultural factors as explanations of sexual violence has increasingly gained acceptance. The Beijing Declaration points out that women are particularly vulnerable to sexual violence because of “sociocultural attitudes which are discriminatory and economic inequalities (which) reinforce women’s subordinate place in society”. See UN Doc. A/RES/S-23/3, 16 November 2000, para. 14.

¹⁵¹⁸ *Maria da Penha Fernandes v. Brazil*, IACHR, para. 58. See also *A.T. v. Hungary*, CEDAW, which found that the state’s lack in enacting effective legal and social services demonstrated the persistence of traditional gender stereotypes.

¹⁵¹⁹ For crimes to be motivated by gender, violent crimes must be: a) committed because of gender or on the basis of gender, b) due, at least in part, to animus based on the victim’s gender. See Jones, Owen, *Sex, Culture and the Biology of Rape: Toward Explanation and Prevention*, California Law Review 87:827, (1999), p. 921. See also UN Special Rapporteur on Torture, UN Doc. A/HRC/7/3, 15 January 2008, who defines gender-specific acts as acts informed by gender either through their form or purpose and which aims at correcting behaviour that transgresses gender roles, or aimed at asserting male domination over women, p. 7.

¹⁵²⁰ UN Doc. E/CN.4/1995/42, 22 November 1994, para. 48.

The UN Special Rapporteur has also emphasised that the violation of a woman's sexuality, such as in rape, is a "manifestation of the way in which masculine power and domination over women's bodies is established".¹⁵²¹ As such, violence is "part of a historical process and is not natural or born of biological determinism. The system of male dominance has historical roots and manifestations change over time".¹⁵²² The causes, nature and consequences of violence against women therefore differ in comparison to men as well as the systematic character of the abuse.

The acknowledgement of gender-based violence as a human rights violation in general, and more specifically as a matter of gender discrimination, was not comprehensively addressed within the UN system until the 1990s, despite CEDAW entering into force in 1979. At the World Conference to Review and Appraise the Achievements of the United Nations Decade for Women in Nairobi in 1985, gender-based violence was mentioned as an afterthought to economic and social issues.¹⁵²³ Recognition was instead first provided by the Economic and Social Council in resolution 1990/15 in reviewing the strategies of Nairobi, stating: "[v]iolence against women in the family and society is pervasive and cuts across lines of income, class and culture must be matched by urgent and effective steps to eliminate its incidence. Violence against women derives from their unequal status in society".¹⁵²⁴ In 1991 the Economic and Social Council adopted resolution 1991/18 with the title "Violence against Women in all its Forms", which not only urged member states to adopt and strengthen legislation prohibiting violence against women, but also recommended the development of an international instrument that would address these issues.¹⁵²⁵ This document later became the Declaration on the Elimination of Violence against Women.

As noted, violence against women is not specifically included in the definition of discrimination in CEDAW, nor mentioned elsewhere in the Convention. However, the CEDAW Committee has in later documents interpreted discrimination to encompass gender-based violence. General Recommendation No. 19, adopted in 1992 by the Committee and subsequently referred to in the views by Committee, affirms that gender-based violence is a form of discrimination "that seriously inhibits women's ability to enjoy rights and

¹⁵²¹ UN Doc. E/CN.4/2004/66, 26 December 2003, para. 35.

¹⁵²² *Ibid.*, para. 49.

¹⁵²³ UN Doc. E/CN.4/1995/42, 22 November 1994, para. 21.

¹⁵²⁴ Annex to Resolution 1990/15 of 24 May 1990, ECOSOC, para. 23.

¹⁵²⁵ Resolution 1991/18, Violence against Women in all its Forms, 30 May 1991, ECOSOC.

freedoms on a basis of equality with men”.¹⁵²⁶ It clarifies that the concept of discrimination in CEDAW includes such forms of violence and defines its gender-based characteristic as “violence that is directed against a woman because she is a woman or that affects women disproportionately”.¹⁵²⁷ This is an important clarification in that one can statistically prove discrimination by the disproportionate number of female victims of rape.

In the UN Declaration on the Elimination of Violence against Women that followed in 1994, it is further acknowledged that gender-based violence is a form of discrimination in that it restricts women’s ability to enjoy their rights and freedoms on the same basis as men.¹⁵²⁸ It is argued that sexual violence is a form of sex discrimination, based on the highly gendered nature of the crime, and that sexual violence is but one manifestation on the continuum of women’s unequal social conditions. Such violence is therefore the ultimate expression of the lack of equality between men and women. This is expressed in the preamble of the Declaration, which states:

“violence against women is a manifestation of the historically unequal power relations between men and women, which have led to a domination over and discrimination against women by men and to the prevention of women’s full advancement, and that violence against women is one of the crucial social mechanisms by which women are forced into a subordinate position compared to men”.¹⁵²⁹

The Declaration defines violence against women as

“any act of gender-based violence that results in, or is likely to result in, physical, sexual or psychological harm or suffering to women, including threats of such acts, coercion or arbitrary deprivation of liberty, whether occurring in public or in private life”.¹⁵³⁰

In Article 2 it is further specified that violence against women encompasses sexual violence occurring in the family, within the general community or is perpetrated or condoned by the state. The discriminatory aspect of violence against women was also recorded in *Ms. A.T v. Hungary* reviewed by the

¹⁵²⁶ General Recommendation No. 19, CEDAW, para. 1.

¹⁵²⁷ *Ibid*, para. 6.

¹⁵²⁸ UN Doc. A/RES/48/104, 23 February 1994, General Assembly Resolution 48/104.

¹⁵²⁹ Emphasis added.

¹⁵³⁰ Article 1 of UN Declaration on Elimination of Violence against Women.

CEDAW Committee, where it stated that domestic violence affects women in a disproportionate manner.¹⁵³¹

The Inter-American Women's Convention similarly states that "violence against women is an offense against women, is an offense against human dignity and a manifestation of the historically unequal power relations between women and men".¹⁵³² It is further acknowledged as a form of discrimination.¹⁵³³ Violence against women is here defined as "any act or conduct, based on gender, which causes death or physical, sexual or psychological harm or suffering to women, whether in the public or private sphere".¹⁵³⁴ The Inter-American Commission has on several occasions analysed cases of violence against women in the context of gender discrimination and affirmed the problematic nature of international law in creating a public versus private sphere.¹⁵³⁵

The UN Human Rights Committee has further acknowledged gender-based violence as a form of discrimination in its General Comment No. 28 on the equality between men and women pertaining to the ICCPR, obliging states to report on national laws and practices with regard to rape.¹⁵³⁶ Furthermore, the Council of Europe has acknowledged the discriminatory effect of violence against women, stating in a recommendation to member states that "...violence towards women is the result of an imbalance of power between men and women and is leading to serious discrimination against the female sex, both within society and within the family".¹⁵³⁷

¹⁵³¹ *Ms. A.T v. Hungary*, CEDAW. See more in Chapter 6.4.6.

¹⁵³² Preamble of the Inter-American Women's Convention.

¹⁵³³ *Ibid*, Article 6a.

¹⁵³⁴ *Ibid*, Article 1.

¹⁵³⁵ See e.g. *Maria Eugenia Morales de Sierra Case*, Report No 4/01, IACHR, Decision of 19 January 2001, IACHR, *Maria Da Penha Fernandes*. It has stated that in this dichotomy "the family is regarded as the geographic epicentre of domestic matters and a realm into which the State is not to intrude. The misguided reasoning is that the State should refrain from any interference in family matters out of respect for personal autonomy...The inequality of the sexes and the tolerance of oppression of women are largely perpetuated by the supposed neutrality of the law and public policy and the inaction of the State". Inter-American Commission on Human Rights, OAE/Ser.L/V/IL, Doc. 68, 20 January 2007, Access to Justice for Women Victims of Violence in the Americas, para. 60.

¹⁵³⁶ CCPR General Comment No. 28: Art. 3, para. 11. See also para. 24 discussing laws mitigating criminal responsibility for rapists where the victim marries the perpetrator, as a factor that may affect women's right to give free and full consent to marriage.

¹⁵³⁷ Rec(2002)5 of the Committee of Ministers on the Protection of Women Against Violence, adopted on 30 April 2002, Council of Europe.

Additionally, it is recognised by the UN Secretary-General that violence against women is not the result of “random, individual acts of misconduct” but is “deeply rooted in structural relationships of inequality between men and women”.¹⁵³⁸ The fact that violence against women is a universal phenomenon and pervasive in all cultures points to its roots in patriarchy.¹⁵³⁹ Accordingly, “violence against women is both a means by which women’s subordination is perpetuated and a consequence of their subordination”.¹⁵⁴⁰ That violence against women in general is a form of discrimination is thus now rather uncontroversial in the UN and regional human rights systems.¹⁵⁴¹

A parallel can also be drawn to the approach of rape as a form of torture, as discussed in a previous chapter. In order to fulfil the definition of torture, the act must be perpetrated for a specific, listed purpose, which includes discrimination. The UN Special Rapporteur on Torture has stated that the purpose element is always fulfilled if the acts can be shown to be gender-specific, e.g. aimed at perpetuating male domination over women, of which rape is provided as an example.¹⁵⁴² Also the ICTY, albeit as of yet in solely one case, has held that rape *per se* meets the purpose requirement of discrimination since it primarily and intentionally targets women. The Trial Chamber in the *Celebici* case referred to CEDAW and affirmed that rape may constitute discrimination since it is violence directed against a woman, because she is a woman.¹⁵⁴³ It also noted that rape in detention camps often was committed with the “purpose of seeking to intimidate not only the victim but also other inmates, by creating an atmosphere of fear and

¹⁵³⁸ In-depth study on all forms of violence against women. Report of the Secretary-General, UN Doc. A/61/122/Add.1, 6 July 2006, para. 23.

¹⁵³⁹ *Ibid.*, para. 69.

¹⁵⁴⁰ *Ibid.*, para. 72. The UN Commission on Human Rights has affirmed the discriminatory aspect of gender-based violence in Resolution 2003/45, stating: “all forms of violence against women occur within the context of *de jure* and *de facto* discrimination against women and the lower status accorded to women in society and are exacerbated by the obstacles women often face in seeking remedies from the State.” Commission on Human Rights resolution 2003/45, Elimination of violence against women. The World Health Organization has also argued that violence against women is both a consequence and a cause of gender inequality. WHO Multi-Country Study on Women’s Health and Domestic Violence against Women, 2005, p. ix.

¹⁵⁴¹ General Recommendation No. 19, CEDAW. See also In-depth study on all forms of violence against women, Report of the Secretary-General, UN Doc. A/61/122/Add.1, 6 July 2006, para. 22, Declaration on the Elimination of Violence against Women, General Assembly, UN Doc. A/RES/48/104.

¹⁵⁴² UN Doc. A/HRC/7/3, para. 30.

¹⁵⁴³ *Prosecutor v. Delalic et al. (Celebici Camp)*, Judgment of 16 November 1998, para. 493.

powerlessness”.¹⁵⁴⁴ The Trial Chamber in *Kunarac* also affirmed that rape was committed on the basis of ethnicity and gender.¹⁵⁴⁵ Such cases appear to base the finding of discrimination, not specifically on the discriminatory intent of the perpetrator, but by presuming that sexual violence against women in general is an act of discrimination. The UN Special Rapporteur on Contemporary Forms of Slavery further argues that “in many cases the discrimination prong of the definition of torture in the UN Convention against Torture provides an additional basis for prosecuting rape and sexual violence as torture.”¹⁵⁴⁶ This supposes that sexual violence is perpetrated as a measure to subordinate women, be it in peacetime or in armed conflict.

The jurisprudence of the ECtHR concerning sexual violence has specifically been criticised for not conceptualising such acts as gender discrimination in a satisfactory manner, thereby ignoring the systematic nature of rape and violence against women in general.¹⁵⁴⁷ In the few cases heard by the Court pertaining to state obligations to prohibit, the Court has not discussed the endemic nature of rape, nor the particular vulnerability of women. Although the Court progressively analysed the nature of rape in *M.C. v. Bulgaria* when defining the crime, the discriminatory aspect of sexual violence was not raised. Though feminist legal scholars have phrased the crime of rape in terms of discrimination for decades, national and regional courts have been reluctant to adopt this line of thinking. Why is this important? Viewing a crime that has its roots in the historical power imbalance between men and women in an individualistic manner arguably leaves the underlying causes unaddressed and the obstacles to eradicate sexual violence becomes more difficult to overcome for the state.¹⁵⁴⁸ It fails to understand its systemic nature and the remedies will consequently be fragmented and addressed only to the individual victim rather than as a wider

¹⁵⁴⁴ *Prosecutor v. Delalic et al, (Celebici Camp)*, Judgment of 16 November 1998, para. 941.

¹⁵⁴⁵ *Prosecutor v. Kunarac, Kovac and Vukovic*, Judgment of 22 February 2001, paras. 654, 711. The Appeals Chamber, however, solely notes ethnicity as a purpose, i.e. that the girls were Muslim. See *Prosecutor v. Kunarac, Kovac and Vukovic*, Judgment of 12 June 2002, para. 154.

¹⁵⁴⁶ Final Report submitted by Ms. Gay J. McDougall, Special Rapporteur, Contemporary Forms of Slavery: Systematic Rape, Sexual Slavery and Slavery-like Practices during Armed Conflict, UN Doc. E/CN.4/Sub.2/1998/13, 22 June 1998, para. 55.

¹⁵⁴⁷ Radacic, Ivana, *Rape Cases in the Jurisprudence of the European Court of Human Rights: Defining Rape and Determining the Scope of the State's Obligations*, pp. 365 & 375.

¹⁵⁴⁸ *Ibid.*, p. 375.

issue.¹⁵⁴⁹ Brande Stellings e.g. argues that the failure to accept that rape is a crime of sex and gender “overlooks the way it both represents and maintains a system of subordination”.¹⁵⁵⁰ Furthermore, the significance of accepting gender violence *per se* as a form of gender discrimination is that it does not require evidence that the state treats violence against women differently from violence against men.

The categorisation of rape as a result of inequality on the basis of sex is not uncontroversial since also male victims exist, a rather ignored category of victims and, arguably, sexual violence cannot thus as a matter of course be ascribed a gender component. The qualification of rape as a form of discrimination in treaty law and in literature seems to be relegated solely to the female victim. Is male rape thereby excluded from the notion of sex and gender discrimination? Is gender discrimination measured by statistics of acts of sexual violence? The definition of discrimination holds that a discriminatory component exists where a group is treated as inferior and not provided with the same rights. It is unlikely that such a finding can be made as to men as a group, though the practice of sexual violence against men in former Yugoslavia perhaps could contain such an aspect. However, even though victims of rape may primarily be women and a discriminatory aspect therefore mainly applies to women, many jurisdictions define rape in a non-neutral manner, not acknowledging the male victim. Such laws must clearly be considered discriminatory in that they exclude victims of a particular sex from seeking remedies. Defining sexual violence as sex discrimination is also controversial from the standpoint that, according to certain authors, gender alone may not be a significant or relevant factor in all cases of e.g. rape.¹⁵⁵¹ However, it must be asserted that gender is always a relevant factor in sexual violence.

In conclusion, much support exists for the view that rape, as a form of gender-based violence, *per se* can be seen as a form of discrimination of women in the human rights law context, thereby imposing obligations on states to take measures to eradicate such forms of violence.

¹⁵⁴⁹ Copelon, Rhonda, *International Human Rights Dimensions of Intimate Violence: Another Strand in the Dialectic of Feminist Lawmaking*, 11 Am. U.J. Gender Soc. Pol’y & L. 865, (2003), p. 869, Stellings, Brande, *The Public Harm of Private Violence: Rape, Sex Discrimination and Citizenship*, p. 188.

¹⁵⁵⁰ Stellings, Brande, *The Public Harm of Private Violence: Rape, Sex Discrimination and Citizenship*, 28 Harv. C.R.-C.L.L. Rev. 185, (1993), p. 188.

¹⁵⁵¹ Edwards, Alice, *Violence against Women as Sex Discrimination: Judging the Jurisprudence of the United Nations Human Rights Treaty Bodies*, p. 56.

7.4.5 The Definition of Rape as an Expression of Gender Discrimination

7.4.5.1 Gender Inequality and Access to Justice

Access to adequate and effective judicial remedies is seen as a principal aspect in protecting basic rights and freedoms and a precondition for states to fully comply with their obligations to act with due diligence in relation to violence against women.¹⁵⁵² Gender discrimination can create obstacles to access to justice for women, in that all persons shall be equal before the law and justice system.¹⁵⁵³ The traditional concept of access to justice served to provide an individual with access to and prompt redress before courts or legal aid for legal representation.¹⁵⁵⁴ Though the concept has fundamentally aimed to eradicate such obstacles as poverty and language limitations, which may restrict an individual's possibility of access to the legal system, doctrine on access to justice has arguably focused too much on access *to* justice rather than on the *quality* of justice.¹⁵⁵⁵ The concept consequently includes not only the possibility to bring a claim before a court, but also the right to have one's case heard in "accordance with substantive standards of fairness and justice".¹⁵⁵⁶ It thus reflects basic norms of the rule of law.¹⁵⁵⁷ A broader concept of access to justice also acknowledges such barriers to justice as gender biases in the law and/or in the justice system.

Gender inequality and discrimination have been acknowledged as obstacles to access to justice by e.g. the UN Special Rapporteur on Violence against Women.¹⁵⁵⁸ This includes the prejudices of the judicial, law-making and law-enforcing institutions.¹⁵⁵⁹ Barriers in the law may include stereotypes or

¹⁵⁵² Access to Justice for Women Victims of Violence in the Americas, Inter-American Commission on Human Rights, OAE/Ser.L/V/II, doc. 68, 20 January 2007, Executive Summary, para.4.

¹⁵⁵³ See Articles 2, 14 and 26 of the ICCPR, CCPR General Comment No. 18 on non-discrimination, paras. 1-3.

¹⁵⁵⁴ Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, Adopted by UN General Assembly Resolution 40/34 of 29 November 1985. It is now well-established that the promotion of access to justice contains both the component of *de jure* and *de facto* equality, i.e. not solely the formal existence of judicial remedies but a requirement that the remedies are effective.

¹⁵⁵⁵ Currie, Albert, *Riding the Third Wave: Rethinking Criminal Legal Aid Within an Access to Justice Framework*, Ottawa: Department of Justice, (2000).

¹⁵⁵⁶ Francioni, Francesco, *The Rights of Access to Justice under Customary International Law*, in *Access to Justice as a Human Right*, ed. Francesco Francioni, Oxford University Press, (2007), p. 1.

¹⁵⁵⁷ It can in part be inferred from standards on the right to a fair trial. See Art. 8 UDHR, Art. 2 and 14 ICCPR, Art. 6 and 13 ECHR, Art. 25 IACHR, Art. 7 African Charter. It is constructed as a procedural guarantee.

¹⁵⁵⁸ UN Doc. E/CN.4/2004/66, para. 57

¹⁵⁵⁹ *Ibid*, para. 57.

prejudices against women in both substantive and procedural laws.¹⁵⁶⁰ In fact, gender bias has been identified as one of the most significant obstacles of access to justice for women.¹⁵⁶¹ The UN General Assembly has urged member states to “review and evaluate their legislation and legal principles, procedures...relating to criminal matters...to determine if they have a negative impact on women”.¹⁵⁶² Problems that have been identified in relation to the processing of complaints on violence against women include the lack of training programs for public officials in the proper interpretation and application of the law, over-burdened law-enforcement agencies, scepticism of female victims and a lack of information for victims on how to seek redress.¹⁵⁶³ The result is that most cases of violence against women are never punished.¹⁵⁶⁴ An important parallel can be drawn to the above mentioned *Opuz v. Turkey* case, which affirmed the systematic nature of domestic violence. The ECtHR acknowledged the overwhelming majority of female victims and the inefficiency of the justice system in responding to such violence as constituting a form of discrimination.

7.4.5.2 Gender-Bias in the Law

A gender-bias in the law e.g. through relying on stereotypical gender roles, whether in the definition of a crime or in the procedural law, can also constitute discrimination. It is understood that stereotypes of the roles of men and women in the family or in society in general, which are reaffirmed in the law, sustain the inequality that exists in all societies.¹⁵⁶⁵ It creates impediments to the access to justice, whether through the definition of rape or through procedural laws. Restrictive definitions and evidentiary rules may prevent the effective enforcement of rape statutes and protection of women. The eradication of such gender roles is therefore part of the duty to ban systemic gender discrimination. The state must thus undertake a gender analysis in order to accurately assess why

¹⁵⁶⁰ Mahoney, Kathleen, *Access to Justice and Gender, First South Asian Regional Judicial Colloquium on Access to Justice*, p. 3.

¹⁵⁶¹ UN Doc. E/CN.4/2004/66, para. 57. See also Mahoney, Kathleen, *Access to Justice and Gender*, p. 16.

¹⁵⁶² Resolution adopted by the General Assembly, Crimes Prevention and Criminal Justice Measures to Eliminate Violence against Women, UN Doc. A/RES/52/86, 2 February 1998, para. 1. See also UN Resolution 2006/29, Crime Prevention and Criminal Justice Responses to Violence against Women and Girls, The Economic and Social Council.

¹⁵⁶³ Access to Justice for Women Victims of Violence in the Americas, Inter-American Commission on Human Rights, OAE/Ser.L/V/II, doc. 68, 20 January 2007, Executive Summary, paras. 8, 12-16.

¹⁵⁶⁴ See e.g. Access to Justice for Women Victims of Violence in the Americas, Inter-American Commission on Human Rights, OAE/Ser.L/V/II, doc. 68, para. 2, Resolution 1691 (2009), Council of Europe, Rape of Women, Including Marital Rape.

¹⁵⁶⁵ Article 5 (a) CEDAW, UN Doc. E/CN.4/1996/53, 6 February 1996, para. 27.

and under what circumstances specific forms of gender-based violence are committed. This must be reflected in the law regarding such crimes as rape. CEDAW explicitly calls on states to eradicate practices that are based on prejudices and stereotypes of women.¹⁵⁶⁶ It has e.g. criticised the Irish Constitution in a Concluding Comment for reflecting a stereotyped image of the roles of women in society “in the home and as mothers”.¹⁵⁶⁷

Impediments to the access to justice in the form of discriminatory laws is explicitly mentioned in the Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa. Access to justice and equal protection before the law is not understood simply as access to judicial and legal services e.g. through legal aid, but also ascertaining that “law enforcement organs at all levels are equipped to effectively interpret and enforce gender equality rights”¹⁵⁶⁸ and requires a “reform of existing discriminatory laws and practices in order to promote and protect the rights of women”.¹⁵⁶⁹ The Inter-American Commission in a report from 2007 on access to justice noted the following defects in laws as obstacles to access to justice:

“The first type of problem is one of language and content and is about defects, gaps, a lack of uniformity, and inherently discriminatory concepts that are detrimental to women and work to their disadvantage. Outdated laws remain in force, as do discriminatory provisions based on stereotypes of the role of women in society and values such as the victim’s honor, decency and chastity. Some countries still have laws that grant a rapist relief from punishment if he agrees to marry his victim.”¹⁵⁷⁰

¹⁵⁶⁶ Article 5 of CEDAW. Article 5 is a norm that stands on its own but in the practice of the CEDAW Committee it is apparent that it is also frequently used to review the content of other rules in the Convention. A direct link is e.g. made between the negative stereotyping of women and the prevalence of violence against women e.g. seen in General Recommendation No. 19.

¹⁵⁶⁷ Concluding Comments of CEDAW on Ireland, UN Docs. A/54/38, 25/06/99, paras. 193-194.

¹⁵⁶⁸ Article 8 (d) of Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa.

¹⁵⁶⁹ Ibid, Article 8 (f).

¹⁵⁷⁰ Access to Justice for Women Victims of Violence in the Americas, Inter-American Commission on Human Rights, OAE/Ser.L/V/II, doc. 68, Executive Summary, para. 15. Article 23 (3) of the ICCPR establishes the right to marry, provided that free and full consent is provided by the parties. The Human Rights Committee argues that laws which extinguish the rapist criminal responsibility if he marries the victim, or where this serves as a mitigating factor, undermines a woman’s free and full consent to marriage. Such provisions primarily exist in a number of countries in Latin America, but also e.g. Iraq. See CCPR General Comment No. 28, para. 24.

Both deficiencies in the law and the failure to properly apply the provisions are mentioned as obstacles to access to justice.¹⁵⁷¹ Most frequently, the types of laws mentioned as impediments for female victims of violence in gaining access to the legal system are procedural rules. In a report by the UN Special Rapporteur on Violence against Women, examples of systematic obstacles and discrimination in the judicial systems regarding rape include unreasonable evidentiary requirements, the rejection of a victim's uncorroborated testimony, allowing the victim's past sexual history as evidence, the focus on the victim's resistance and an emphasis on the overt use of force.¹⁵⁷² The UN Human Rights Committee in a General Comment has noted that practices that may violate the right to access to justice and right to a fair trial include legal systems where women are not allowed to give testimony on the same terms as men or where women are denied the presumption of innocence.¹⁵⁷³ An assumption of fault by law-enforcement officers and judges e.g. exists in viewing a woman's clothing or actions as a provocation to the violence in question. Furthermore, legal provisions that allow perpetrators of sexual crimes to avoid criminal sanctions upon agreeing to marry the victim also constitute evident obstacles to justice.¹⁵⁷⁴ Another issue of relevance, both to the principle of non-discrimination and access to justice, are penal codes where a woman can be subject to prosecution for the offences connected to the original complaint if she cannot prove the crime in question. This for instance occurs where a woman can be charged with adultery if she fails to prove that she was raped.¹⁵⁷⁵ Given the nature of rape as attacks primarily against women, such provisions coupled with impossible evidentiary requirements entail that women are effectively prevented from seeking redress through the justice system for fear of being charged themselves.

¹⁵⁷¹ Access to Justice for Women Victims of Violence in the Americas, Inter-American Commission on Human Rights, OAE/Ser.L/V/II, doc. 68, Executive Summary, para. 217.

¹⁵⁷² UN Doc. E/CN.4/1997/47, para. 28.

¹⁵⁷³ CCPR General Comment No. 28, para. 18. See also Report of the Secretary-General pursuant to Security Council resolution 1820, S/2009/362, 15 July 2009, para. 23 on the lack of access to justice, albeit discussed in the context of sexual violence in armed conflicts. The UN Secretary-General notes such problems as rape classified as crimes against modesty, links to sodomy or adultery crimes, the extinction of rape charges upon marriage. In Nepal, the statute of limitation for rape is 35 days. It is also noted that in the Sudan, the plurality of the legal system, of common law and Shari'a courts, leads to different interpretations of the Criminal Act.

¹⁵⁷⁴ See e.g. the Concluding observations by the UN Human Rights Committee on the matter; UN Doc. CCPR/CO/76/EGY, para. 9 (Egypt), UN Doc. CCPR/CO/72/GTM, para. 24 (Guatemala), UN Doc. CCPR/CO/71/VEN, para. 20 (Venezuela), UN Doc. CCPR/C/79/add. 113, paras. 12 and 14 (Morocco), UN Doc. CCPR/C/79/Add.97, paras. 11 and 15 (Tanzania), UN Doc. CCPR/C/79/Add.72, para. 15 (Peru), UN Doc. CCPR/C/79/add. 78, paras. 18-19 (Lebanon).

¹⁵⁷⁵ See e.g. Saudi Arabia, Dubai, Somalia. Male victims may also be charged with sodomy for male-male rape in e.g. Dubai.

However, beyond solely procedural obstacles, the Inter-American Commission has stated that “inadequate provisions and in some cases discriminatory content within some laws” constitute barriers to effective justice.¹⁵⁷⁶ Examples of this include: “definitions of rape that require the use of force and violence rather than a lack of consent; the treatment of rape as a crime against decency and not as a violation of a woman’s right to bodily integrity...”¹⁵⁷⁷ Marital rape exemptions and the selective failure to prosecute rape of prostitutes are likewise discriminatory practices.¹⁵⁷⁸ The Inter-American Commission has similarly recorded:

“In many criminal codes, values such as honor, social decency, virginity, chastity, and good morals prevail over values such as the mental and physical integrity of the woman and her sexual liberty, thereby impeding the due protection under the law of victims of such crimes, or compelling them to prove that they resisted in the case of the crime of rape, or subjecting them to interminable procedures that perpetuate victimization.”¹⁵⁷⁹

The result of restrictive definitions of crimes and procedural rules is that violence against women in many cases is not formally investigated, prosecuted or punished, leading to systematic impunity. A result is that female victims become disinclined to turn to the judicial system since the victims lack confidence in the system. The widespread impunity in turn perpetuates the cycle of violence against women.¹⁵⁸⁰

7.4.5.3 Gender-Bias in Language

What are then indications that a measure or practice is discriminatory e.g. through a gender-bias? Determining whether a law has a discriminatory effect is a difficult task. One manner is reviewing the language of the definition and its implications. Rikki Holtmaat argues that in order to evaluate whether a law is in fact based on gender stereotypes, it may be necessary to conduct in-depth studies

¹⁵⁷⁶ Access to Justice for Women Victims of Violence in the Americas, Inter-American Commission on Human Rights, OAE/Ser.L/V/II, doc. 68, 20 January, 2007, para. 221.

¹⁵⁷⁷ Ibid, para. 221.

¹⁵⁷⁸ Edwards, Alice, *Violence against Women as Sex Discrimination: Judging the Jurisprudence of the United Nations Human Rights Treaty Bodies*, p. 52.

¹⁵⁷⁹ Report of the Inter-American Commission on Human Rights on the Status of Women in the Americas, OEA/Ser.L/V/II.98, doc. 17, 13 October 1998, Section IV, Conclusions.

¹⁵⁸⁰ Access to Justice for Women Victims of Violence in the Americas, Inter-American Commission on Human Rights, OAE/Ser.L/V/II, doc. 68, Executive Summary, para. 6.

of the basic assumptions regarding gender and gender roles in the law.¹⁵⁸¹ It is clear that non-gender neutral legislation exists when a regulation is influenced by gender stereotypes. Examples include laws on sexual assault, which are built on the belief that women are not trustworthy and that men must be protected against false charges of rape. This gender-bias may manifest itself in doctrines of requiring “fresh” complaints, corroboration of witnesses or torn clothing, not placing value on the harm of the crime as experienced by women and using other stereotypes as norms.¹⁵⁸² However, regulations of sexual assault in many jurisdictions are phrased in gender-neutral language. Formal equal treatment may therefore not be sufficient but a critical review of the *effect* of the law must be conducted. Note has to be taken that despite neutral appearances, provisions may still be gendered. Non-neutral legislation e.g. occurs when the harm of rape is established from a male perspective.¹⁵⁸³ This may include requiring force or resistance when the harm in actuality consists of a violation of sexual autonomy.

According to Katherine Mahoney, the legislature and courts must consider the social context of sex inequality when defining and adjudicating sexual assault. Such a consideration will increase women’s access to justice, since it places the role of sexual assault in the context of inequality of the sexes.¹⁵⁸⁴ In e.g. Canada and the much discussed case of *R. v. Ewanchuk*, the Supreme Court re-evaluated the application of consent to sexual activity and determined it on the basis of a subjective test. The Court explained that the accused could not evince consent from the complainant’s silence or ambiguous conduct and if the complainant expressed non-consent, the accused had an obligation to take additional “reasonable steps” to ascertain consent.¹⁵⁸⁵ This interpretation of consent arguably adopts an equality approach. The traditional approach would presume consent to the point a woman resists, or find a basis for consent implied in the victim’s clothes, past sexual conduct or non-resistance. According to the Court, an equality-based approach instead examines whether steps were taken to assure consent, since a woman does not walk around in a state of constant consent until she says “no”. Even an apparently gender-neutral definition of rape

¹⁵⁸¹ Holtmaat, Rikki, *Preventing Violence against Women: The Due Diligence Standard with Respect to the Obligation to Banish Gender Stereotypes on the Grounds of Article 5 (a) of the CEDAW Convention*, p. 77.

¹⁵⁸² Fraser, Catherine, *Creating Access to Justice Through Judicial Education: Correcting the Blindness*, p. 5.

¹⁵⁸³ Mahoney, Kathleen, *Access to Justice and Gender*, p. 16, Berglund, Kerstin, *Gender and Harm*, pp. 15-16.

¹⁵⁸⁴ Mahoney, Kathleen, *Access to Justice and Gender*, p. 16

¹⁵⁸⁵ *R. v. Ewanchuk*, [1999] 1 S.C.R. 330, Supreme Court of Canada, para. 98-99.

that is consent-based can therefore have a discriminatory effect if not analysed in a gender-conscious manner.

Laws may also contain a gender discriminatory component when the *actus reus* is defined in such a technical manner as to exclude male victims. Neutrality of the rape definition is therefore not achieved solely by ensuring that the perpetrator and victim is described as either him/her but that the definition is expanded to include penetration not only of the vagina but also anus or mouth by penis, tongue or object.

Gender-neutral definitions of rape are, however, not welcomed by all. Neutrality has been described as “gender-disguise,” suggesting a fictional assumption that men and women are equally victimised.¹⁵⁸⁶ Is a gender-neutral approach discriminatory against women by not fully acknowledging the gendered component of sexual violence? Why would the inclusion of the male victim diminish the harm of the female victim? Should male rape be cast as another crime, e.g. non-consensual buggery, as previously in the United Kingdom? What is the initial reason for the preoccupation with the female victim of rape? Historically, women were particularly protected in the manner of property. Women have also predominantly been the victims of rape. Beyond this, vaginal rape has been viewed as a more serious violation. The Criminal Law Revision Committee of the United Kingdom e.g. in 1984 argued for retaining the definition of rape with a focus on penile-vaginal intercourse since it was considered “unique and grave”, partly because of the risk of pregnancy.¹⁵⁸⁷ Similarly, the Model Penal Code of the United States retained a gender-specific definition of rape on the grounds that

“[Although] the male who is forced to engage in intercourse is denied freedom of choice in much the same way as the female victim of rape...[the]...potential consequences of coercive intimacy does not seem so grave. For one thing there is no prospect of unwanted pregnancy. And however devalued virginity has become for the modern woman, it would be difficult to believe that its loss constitutes comparable injury to the male.”¹⁵⁸⁸

Feminist legal scholars have also argued that the recognition of male victimisation undermines sexual violence as a consequence of patriarchy and

¹⁵⁸⁶ Novotny, Patricia, *Rape Victims in the (Gender) Neutral Zone: The Assimilation or Resistance?*, 1 Seattle J. Soc. Just. 743, (2002-2003), p. 748.

¹⁵⁸⁷ Criminal Law Revision Committee, Sexual Offences, 15th report, United Kingdom, at para. 2.3, (1984).

¹⁵⁸⁸ Model Penal Code and Commentaries, § 213.1 cmt at p. 338, (1980).

ignores the gendered reality.¹⁵⁸⁹ Neutrality would consequently lead to a non-neutral *status quo* and discourage the analysis of the law in gender-specific terms.¹⁵⁹⁰ More relevantly, certain critics point to the danger of ignoring the gender-specific ways victims react to sexual violence, which must be reflected in a definition. Joan McGregor e.g. warns that gender-neutral statutes might retain male norms and that women will be disadvantaged: “for example, physical resistance might be a typical male reaction to attack, but not necessarily a typical female reaction. Men are socialised to fight, to respond physically, women are not and may respond by, for example, crying or ‘freezing’”. Subjecting women to the resistance requirement therefore disadvantages them”.¹⁵⁹¹ In this regard, we have two competing requirements as to non-discrimination and the neutrality of the rape definition; a call for gender-neutrality in order not to exclude the male victim versus the claim that neutrality leads to discrimination of the female victim.

The increased focus on the *harm* of various non-consensual acts and the trauma experienced by the victim rather than on the technical *actus reus*, has increased calls for neutrality. Since both genders may experience similar harm as a result of sexual violence, the definition must as a consequence be non-discriminatory. It must be borne in mind that a gender-neutral definition does not preclude the analysis of sexual violence from a gender viewpoint but merely acknowledges all victims in an equal manner. Gender can still be central to the understanding of the nature of sexual violence. It supports the understanding that rape is a matter of power and subordination and that the group mostly affected is women, while also recognising the male victim. The need for gender-neutrality in this formal manner has been acknowledged by e.g. the *ad hoc* tribunals and the ICC, which in varying ways have aimed to include both female and male victims and perpetrators.

7.4.5.4 Statistics as Evidence

Beyond the evaluation of language as discriminatory, statistics may also aid in proving the discriminatory effect of criminal laws on rape. As Anthony Ewing asserts, if detention and conviction rates in a state for crimes of violence against women are significantly lower than for crimes of violence against men, this is an

¹⁵⁸⁹ Novotny, Patricia, *Rape Victims in the (Gender) Neutral Zone: The Assimilation or Resistance?*, p. 748, MacKinnon, Catherine, *Women's Lives, Men's Laws*, pp. 20 & 262.

¹⁵⁹⁰ MacKinnon, Catherine, *Women's Lives, Men's Laws*, p. 20, 262, Boyle, Christine, *Sexual Assault and the Feminist Judge*, 1 Canadian J. Women & L. 93, (1985), p. 104.

¹⁵⁹¹ McGregor, Joan, *Is it Rape? On Acquaintance Rape and Taking Women's Consent Seriously*, p. 37.

indication of unequal protection of the law.¹⁵⁹² In fact, the Inter-American Commission has argued that in order to demonstrate an indirect discriminatory impact, empirical data must be presented to show that the neutral basis of laws has a disparate effect on some groups.¹⁵⁹³

The European Court of Human Rights has also in several cases held that the use of statistics is an important tool in providing evidence as to a difference in treatment between two groups in cases alleging a discriminatory effect of general measures or *de facto* situations.¹⁵⁹⁴ In *D.H. and Others v. the Czech Republic*, albeit a case concerning ethnic discrimination, the Court stated: “when it comes to assessing the impact of a measure or practice on an individual or group, statistics which appear on critical examination to be reliable and significant will be sufficient to constitute the *prima facie* evidence the applicant is required to produce. This does not, however, mean that indirect discrimination cannot be proved without statistical evidence”.¹⁵⁹⁵ Similarly, in *Hoogendijk v. The Netherlands* regarding a labour disability insurance scheme, the Court held: “Where an applicant is able to show, on the basis of undisputed official statistics, the existence of a *prima facie* indication that a specific rule - although formulated in a neutral manner - in fact affects a higher percentage of women than men, it is for the respondent Government to show that this is the result of objective factors unrelated to any discrimination on grounds of sex”.¹⁵⁹⁶ In fact, the UN Human Rights Committee has in a concluding observation noted that the disproportion between reported rapes and prosecutions in Iceland was a concern from the viewpoint of gender equality and discrimination, implying that the *effect* of the law and practice was discriminatory.¹⁵⁹⁷

As such, a regulation or practice that on its face is not discriminatory may in effect impact women in a more negative manner, which may reveal itself in statistics. Sexual violence *per se* is discriminatory in its existence since it affects women as a group in excessive numbers. However, in order to prove the existence of a human rights violation, the discriminatory effect must be linked to a state practice, measure or legislation. It is fathomable that restrictive criminal

¹⁵⁹² Ewing, Anthony P., *Establishing State Responsibility for Private Acts of Violence Against Women Under the American Convention on Human Rights*, p. 779.

¹⁵⁹³ Access to Justice for Women Victims of Violence in the Americas, Inter-American Commission on Human Rights, OAE/Ser.L/V/II, doc. 68, para. 91.

¹⁵⁹⁴ *Opuz v. Turkey*, ECtHR, para. 183.

¹⁵⁹⁵ *D.H. and Others v. the Czech Republic*, (Application No. 57325/00), Judgment of 13 November, 2007.

¹⁵⁹⁶ *Hoogendijk v. The Netherlands*, (Application No. 58461/00), Admissibility Decision of 6 January, 2005.

¹⁵⁹⁷ UN Doc. CCPR/CO/83/ISL, para. 11 (Iceland).

laws prohibiting rape can lead to a gender bias in the number of complaints and successful prosecutions, evident in statistics. However, the nature of sexual violence, often occurring in private without witnesses, leads to few prosecutions, which can be considered an objective factor unrelated to discrimination. Connecting elevated numbers of rape of female victims to laws and procedures, can thus prove difficult.

In conclusion, states must review their domestic laws on rape from the standpoint of non-discrimination. This includes ensuring gender-neutrality and the removal of gender-stereotypes, not only concerning the wording of the penal codes but also the effect of the laws. This may require a gender-impact study of the definition of rape. A great discrepancy between reported rapes and prosecutions may also indicate that the law has a discriminatory effect.

7.5 Universal Impact of the Regional Approach

For the purpose of analysing the universal applicability of the case law and interpretations developed by the regional human rights systems, it is interesting to note the extent to which regional bodies refer to universal conventions and documents in their reasoning, as well as the adoption by other bodies of such arguments.

Both the European and the Inter-American systems have expressly adopted a flexibility in relation to the interpretation of its human rights conventions parallel with the development of social norms. The European Court has established that “the Convention is a living instrument which...must be interpreted in the light of present-day conditions” and the Inter-American Court has also emphasised the importance of the evolution of the Declaration and American Convention on Human Rights.¹⁵⁹⁸ The Inter-American Court has stated that the evolutive interpretation is consequent with the general rules of the 1969 Vienna Convention on the Law of Treaties and “[b]oth this Court...and the European Court...have indicated that human rights treaties are living instruments, the interpretation of which must evolve over time in view of existing circumstances”.¹⁵⁹⁹

The regional human rights bodies frequently refer to the UDHR, and the European Convention even mentions the aim in enforcing the rights of the Declaration in its preamble. As such, the regional systems aim to ensure and

¹⁵⁹⁸ *Tyrer v. the United Kingdom*, ECtHR, Interpretation of the American Declaration of the Rights and Duties of Man Within the Framework of Article 64 of the American Convention on Human Rights, Advisory Opinion, IACtHR, OC-10/89, 14 July 1989, (Ser. A), No. 10, (1989), paras. 37-38.

¹⁵⁹⁹ *The Right to Information on Consular Assistance in the Framework of the Guarantees of the Due Process of Law*, Advisory Opinion, IACtHR, OC-16/99, 1 October 1999, (Ser. A), No. 16 (1999), para. 114.

develop also universal standards. In the case of *M.C. v. Bulgaria*, the Court makes note of General Recommendation No. 19 of the United Nations Committee on the Elimination of Discrimination against Women.¹⁶⁰⁰ Additionally, the case law of the *ad hoc* tribunals and the Rome Statute is analysed. In *Opuz v. Turkey*, CEDAW, General Recommendation No. 19 as well as case law from the Inter-American human rights system is discussed.¹⁶⁰¹

The American Convention on Human Rights in its Article 29 allows references to “other rights or guarantees that are inherent in the human personality or derived from representative democracy as a form of government”. The Inter-American Court has similarly referred to the decisions of the European Court in its judgments.¹⁶⁰² In the *Mejia v. Peru* case it refers to humanitarian law instruments and the statute of the ICTY. In *The Miguel Castro-Castro Prison v. Peru* case it refers to the European Court’s reasoning. In the decision of *Ana, Beatriz, and Celia González Pérez* the Commission discusses case law of the European Court of Human Rights as well as statements by the two UN Special Rapporteurs on Violence against Women and Torture. The African Charter similarly mandates the African Commission to “draw inspiration from international law on human and peoples’ rights”, explicitly mentioning the UN Charter, the UDHR and other instruments adopted by the UN.¹⁶⁰³ The African Commission has also made frequent references to the case law of the European and Inter-American Human Rights systems.¹⁶⁰⁴

¹⁶⁰⁰ *M.C. v. Bulgaria*, para. 108.

¹⁶⁰¹ See also *Nachova and Others v. Bulgaria*, (Application Nos. 43577/98 and 43579/98), Judgment of 6 July 2005, ECtHR. The European Court of Human Rights here reviewed the alleged discrimination against the Roma population subsequent to the death of two unarmed 21 year old Bulgarians of Romani descent who were shot by the police during an attempted arrest. The Court here analysed the relevant provision of the European Convention in light of the International Convention on the Elimination of all forms of Racial Discrimination and examines the decisions of the UN Committee against Torture as well as European Union Council Directives. Included are also various non-binding recommendations and codes of conduct. The use of the UN Convention against Torture has also been employed in other cases. *Soering v. the United Kingdom*, ECtHR.

¹⁶⁰² See e.g. Compulsory membership in an association prescribed by law for the practice of journalism, Advisory Opinion, IACtHR, OC-5/85 of 13 November 1985, p. 14, *Caballero Delgado and Santana Case* (Preliminary Objections), 17 IACtHR, (series C), Reparations Judgment of 29 January 1997, para. 60, *Gangaram Panday v. Suriname*, (series C), No. 16, IACtHR, Judgment of 21 January 1994, para. 39.

¹⁶⁰³ Article 60 of the African Charter.

¹⁶⁰⁴ See e.g. *Curtis Francis Doebbler v. Sudan*, Comm. No. 236/2000, Sixteenth Activity report 2002-2003, Annex VII and *The Social and Economic Rights Action Center and the Center for Economic and Social Rights v. Nigeria*, Comm. No. 155/96, 2001, African Commission on Human and Peoples' Rights.

There is therefore room for meaningful cross-referencing between the regional systems as well as the UN system on similar matters and modern interpretations of the scope of rights. The case law of the courts therefore has bearing beyond solely the state in the case at hand or other member states in the system. This comparative exercise is natural since similar issues are often raised in the various systems which lends itself to legal comparisons in the analysis. As Dinah Shelton points out, this cross-referencing and cross-fertilisation between the regional human rights systems can help develop a consistent international human rights law.¹⁶⁰⁵ Louise Arbour, the UN High Commissioner for Human Rights in an address to the European Court of Human Rights in 2008 in fact argued for the increased coherence in human rights law:

“a real risk of unnecessary fragmentation of the law, with different interpretative bodies taking either inconsistent, or worst, flatly contradictory views of the law, without proper acknowledgment of differing views, and proper analysis in support of the stated better position. In the field of human rights, these effects can be particularly damaging, especially when differing views are taken of the scope of the same State’s obligations.”¹⁶⁰⁶

Naturally, in similar matters the likelihood of states abiding by their treaty obligations are enhanced if their scope and practical implications are comparable. This in turn creates a greater protection for the individual. However, the particular context of the region, be it religion and culture may impose on such direct comparisons.

Much of the discussion on states’ obligations has focused on the analysis of the European Court of Human Rights, for the simple reason that the limited case law on matters concerning sexual violence has chiefly arisen from this court and to a certain extent, the Inter-American Court and Commission of Human Rights. Important to note is that the judgments of the ECtHR has effect both on the national level but also among the members of the Council of Europe. As articulated by Article 46 of the European Convention, the judgments are binding for the state concerned. A state, which has been found in breach of the convention, must report which measures it envisages and a time-table for conducting this change. The Council of Europe’s Committee of Ministers supervises the adoption of individual measures taken by the state, such as

¹⁶⁰⁵ Shelton, Dinah, *Regional Protection of Human Rights*, Oxford University Press, (2008), p. 148.

¹⁶⁰⁶ Address by Louise Arbour, United Nations High Commissioner for Human Rights at the Opening of the Judicial Year 2008 of the European Court of Human Rights, Strasbourg, 25 January 2008.

payment of awards but also general measures, such as legislative or other changes aimed at preventing similar violations. The law criminalising rape was e.g. amended by the Netherlands subsequent to the decision of *X and Y v. The Netherlands*, allowing the possibility for a victim who is mentally disabled to lodge a complaint through his/her legal representative.¹⁶⁰⁷

However, the judgments also have effect beyond solely the state that has been in violation of the Convention. In order not to also prompt complaints by individuals in similar matters, an implicit obligation exists also for other states to also reform their legislation. Furthermore, pursuant to Article 32 of the European Convention, the purpose of the Court is to interpret and develop the rules of the Convention, i.e. the case law reflects the current state of interpretation of states' obligations in respect of the treaty. In a Recommendation of 2004 by the Committee of Ministers of the Council of Europe, it is emphasised that though the Convention only admonishes states to abide by the judgments in cases to which they are a party, states must take further measures of compatibility. Accordingly: "further efforts should be made by member states to give full effect to the Convention, in particular through a continuous adaptation of national standards in accordance with those of the Convention, in light of the case-law of the Court".¹⁶⁰⁸ As the Committee points out: "by adopting a law verified as being in conformity with the Convention, the state reduces the risk that a violation of the Convention has its origins in that law and that the Court will find such a violation." Similarly, "the evolving case-law of the Court may indeed have repercussions for a law which was initially compatible with the Convention or which had not been the subject of a compatibility check prior to adoption".¹⁶⁰⁹ States must therefore systematically verify the compatibility of both draft laws and existing laws as well as administrative practices with the Convention, as interpreted through case law. Similarly, the Inter-American Court monitors the compliance with its decisions and informs the OAS General Assembly of any failure to do so.¹⁶¹⁰

What is the impact of the ECtHR's legal reasoning on other international and regional courts/tribunals/treaty bodies or human rights law in general? It has been noted in a study on the impact of international law on the domestic level

¹⁶⁰⁷ See General measures adopted to prevent new violations of the European Convention on Human Rights, updated May 2006, p. 186. See also the CoE website for updates: www.coe.int.

¹⁶⁰⁸ Recommendation Rec(2004)5, Committee of Ministers, Council of Europe, adopted on 12 May 2004.

¹⁶⁰⁹ Ibid, paras. 5 and 7.

¹⁶¹⁰ Rodríguez-Pinzón, Diego, *Basic Facts of the Individual Complaint Procedure of the Inter-American Human Rights System*, International Human Rights Monitoring Mechanisms, Martinus Nijhoff Publishers, 2nd ed. eds. Alfredsson, Grimheden, Ramcharan, Zayas, (2009), p. 623.

that many countries that are not party to the European Convention cite case law from the Court as frequently as jurisprudence from UN treaty bodies. This is deemed to be a result of the great volume of interpretive cases from the Court as well as the fact that the views of the UN treaty bodies may be more difficult to apply domestically, since the general comments often are too general and their decisions and views in individual cases contain limited legal reasoning.¹⁶¹¹ Antonio Cassese points out that since the European Court of Human Rights frequently elucidates principles common to all 48 member states of the Council of Europe, it provides an indication of general principles common to a large number of states with varying legal systems, both common law and civil law. As such, it represents an “interesting sample of legal systems from the comparative law viewpoint” as opposed to e.g. the Inter-American human rights system where the large majority of states belong to the civil law system.¹⁶¹² It can therefore provide a valuable indication when aiming to affirm general principles common to most legal systems. It must, however, be noted that even though the member states represent a diversity of religious and moral considerations as well as legal systems, the case law still represents a European approach to human rights law which may be distinct from other areas of the world.

As will be viewed, both the ICTY and the ICTR have frequently referenced the jurisprudence and argumentation of the ECtHR, in particular concerning issues pertinent to this topic, e.g. the scope and application of the torture definition and confirming rape as a form of torture. The Strasbourg case law was referenced in order to establish the existence of a customary law definition of torture.¹⁶¹³ With regard to rape, it has been raised as a means to demonstrate a customary norm as to its general prohibition.¹⁶¹⁴ What are the methodological reasons why the jurisprudence of the ECtHR has been afforded such importance by the *ad hoc* tribunals in comparison to other bodies of international law? The

¹⁶¹¹ Report of the Seventh Conference, New Delhi, (2002), The International Law Association, p. 544.

¹⁶¹² Cassese, Antonio, *The Influence of the European Court of Human Rights on International Criminal Tribunals - Some Methodological Remarks*, p. 25. Though precedent is not as determinative a source in international law as in most domestic jurisdictions, because of the relative scarcity in sources, the impact of the case law from the international tribunals is already tremendous and will continue to affect the work of such international organs as the ICC, human rights courts but also domestic courts and legislators. The jurisprudence has not only, as often stated, put the issue of sexual violence at the forefront of the agenda in international law, but it has also served as an important link in expanding the legal personality of the individual, mimicking the expansion of the role and duties of the state in international human rights law.

¹⁶¹³ *Prosecutor v. Furundzija*, Judgment of 10 December 1998, para. 160, *Prosecutor v. Kunarac, Kovac and Vukovic*, Judgment of 22 February 2001, para. 478.

¹⁶¹⁴ *Prosecutor v. Furundzija*, Judgment of 10 December 1998, paras. 163 & 170.

interests protected by the tribunals and human rights courts are similar, and build on the protection of human dignity, which has been afforded strong protection by tribunals in both areas of law. Though it is frequently argued that human rights provisions tend to lack the specificity required by criminal law provisions, in certain areas human rights courts have developed such elements through their case law. Cassese points to the imprecision of the crimes set out in the statutes of the *ad hoc* tribunals and the need for the international judges to concretise the provisions.¹⁶¹⁵

It must be borne in mind that the formulations of the ECtHR and other human rights courts are mere supplements in clarifying customary rules or general principles and the, at times, all-embracing approach by the tribunals, does raise questions as to the appropriateness of using such reference. As viewed in the discussion on e.g. the definition of torture, the differences between international criminal law and human rights law that at times exist, must also be kept in mind. Naturally, as the substance of international criminal law develops and concepts are defined, the need to reference human rights courts may diminish in the future and mention will merely be made of e.g. customary law or general principles.

The impact of the UN supervisory bodies' concluding observations and views are mixed. Albeit the importance of such views are generally held as substantial in interpreting the normative framework of the respective treaty, the impact on national courts and the development of human rights jurisprudence has not been as substantial as the case law of regional human rights courts.¹⁶¹⁶ Foremost, the decision of the UN Human Rights Committee and other treaty bodies are not binding in the same sense as judgments from the regional human rights courts. However, in a study on the effect of such views on the domestic level, a heightened recognition of the decisions and general comments has been noted. National courts have increasingly begun to refer to such documents on an increasing number of occasions, including by states whom the views have not

¹⁶¹⁵ Cassese, Antonio, *The Influence of the European Court of Human Rights on International Criminal Tribunals - Some Methodological Remarks*, pp. 26 & 49. As Antonio Cassese summarises the impact of the jurisprudence of the European Court on the development of international criminal law, the case law "has proven to be a rich source of concepts, notions, legal constructions and extremely useful interpretations for the international criminal law courts". The impact has not solely been to clarify the terminology and concepts of international criminal law but has naturally strengthened the respect for human rights law, via international criminal law, and further demonstrated the commonalities between the two areas of law.

¹⁶¹⁶ Steiner, Henry, *Individual Claims in a World of Massive Violations: What Role for the Human Rights Committee?*, in *The Future of UN Human Rights Treaty Monitoring*, eds. Philip Alston and James Crawford, Cambridge University Press, (2000), p. 38. As pointed out by Steiner, in countries parties to a regional human rights system, the limited citation of views of UN treaty bodies is not surprising, given the substantial amount of case law, that is also binding, in these systems. Report of the Seventh Conference, New Delhi, (2002), The International Law Association, p. 514.

concerned.¹⁶¹⁷ Certain authors have also begun to argue for the binding nature of the work of the UN human rights treaty bodies, as “subsequent practice” within the meaning of Article 31 of the VCLT, i.e. as interpretation of the scope of obligations for states parties.¹⁶¹⁸ Thus, though the discussions on obligations for states concerning provisions of regional or UN treaties solely bind state parties to the convention, a general trend can be seen in increased cross-referencing between human rights systems and even international criminal law. Views and case law may also oblige other states than the offending party. Thus, the reach of human rights provisions and interpretations thereof is widening in scope.

7.6 The *Ius Cogens* Character of the Prohibition of Rape

After reviewing specific human rights provisions which contain a prohibition of rape, the following chapter will review the consequences of denoting certain human rights as peremptory norms. This aims to establish whether the prohibition of rape constitutes such a norm, thereby leading to additional obligations for states to implement domestic penal provisions on the offence.

Certain norms in international law are considered to be of such a fundamental value as to enjoy a higher status within public international law. Such *ius cogens* rules are binding on all nations and do not allow derogation under any circumstances. The rules can only be modified by a subsequent norm of the same character in international law.¹⁶¹⁹ The literal translation of *ius cogens* is “compelling law” and the norms have been described as the “pinnacle” of international law.¹⁶²⁰ What distinguishes such rules is their indelibility and that

¹⁶¹⁷ Steiner, Henry, *Individual Claims in a World of Massive Violations: What Role for the Human Rights Committee?*, pp. 524, 540 & 544.

¹⁶¹⁸ Scheinin, Martin, *Human Rights Treaties and the Vienna Convention on the Law of Treaties: Conflict or Harmony?*, in *The Status of International Treaties on Human Rights*, Venice Commission, Council of Europe, September 2006, p. 52.

¹⁶¹⁹ Article 53 of the Vienna Convention on the Law of Treaties of 1969. See also Shaw, Malcolm, *International Law*, (2003), p. 117.

¹⁶²⁰ Hannikainen, Lauri, *Peremptory Norms (Jus Cogens) in International Law, Historical Development, Criteria, Present Status*, p. 4. Hannikainen describes peremptory norms as protecting overriding interests and values of the international community of states. Byers, Michael, *Conceptualising the Relationship between Jus Cogens and Erga Omnes Rules*, p. 222, Adams, Dean, *The Prohibition of Widespread Rape as Jus Cogens*, p. 361. The advancement of rules of a higher order within a body of law is often traced back to the Roman law distinction between *jus strictum* and *jus dispositivum*. See UN Doc. A/CN.4/L.682, para. 361, as well as having been influenced by natural law principles. Brownlie, Ian, *Principles of Public International Law*, Oxford University Press, (1990), p. 488. Certain scholars point to the same development as customary international law in general, whereas others equate the norms with general principles of international law. Bassiouni, Cherif, *International Crimes: Jus Cogens and Obligatio Erga Omnes*, p. 68.

they thereby supersede any treaty or custom to the contrary. They can be said to contain a certain constitutional element in international law since states are circumscribed in the subject-matter of their legislative power, acts and transactions.¹⁶²¹

The consequences of *ius cogens* norms are confirmed in Article 53 of the Vienna Convention on the Law of Treaties of 1969, which provides that a treaty will be void “[i]f, at the time of its conclusion, it conflicts with a peremptory norm of general international law” and can only be modified by a subsequent norm in general international law of the same character.¹⁶²² The ILC Draft Articles on State Responsibility also support the existence of peremptory norms, concluding that such rules have been recognised in international practice and in jurisprudence from international and national courts.¹⁶²³ It is emphasised in the work of the ILC that unlike the domestic legal systems with constitutions as the core, international law is horizontal and does not contain a general order of precedence between rules.¹⁶²⁴ However, it is asserted that this does not preclude that an order of precedence can be applied in a particular case to solve a conflict, where *ius cogens* and *erga omnes* obligations can be considered as such an “informal hierarchy”.¹⁶²⁵ In distinguishing *ius cogens* norms from other rules, the UN Special Rapporteur of the International Law Commission, Fitzmaurice provides:

“The rules of international law in this context fall broadly into two classes - those which are mandatory and imperative in all circumstances (*jus cogens*) and those (*jus dispositivum*) which merely furnish a rule for application in the absence of any other agreed regime, or, more correctly, those the variation or modification of which under an agreed regime is permissible, provided the position and rights of third States are not affected.”¹⁶²⁶

¹⁶²¹ Broomhall, Bruce, *International Justice & The International Criminal Court*, Oxford University Press, (2003), p. 42. See also Byers, Michael, *Conceptualising the Relationship between Jus Cogens and Erga Omnes Rules*, p. 212, Orakhelashvili, Alexander, *Peremptory Norms in International Law*, Oxford University Press, (2006), p. 10.

¹⁶²² The terms “peremptory norms” and *ius cogens* norms are used interchangeably.

¹⁶²³ Draft Articles on State Responsibility with Commentaries, p. 112 (Article 40). Though the issue of a hierarchy of norms is controversial, since all rights are interdependent and of equal importance, the Commentary finds a basis for *ius cogens* in the concept of *erga omnes* obligations and the fact that peremptory norms are included in the Vienna Convention on the Law of Treaties.

¹⁶²⁴ UN Doc. A/CN.4/L.682, para. 324.

¹⁶²⁵ Ibid, paras. 325 & 327.

¹⁶²⁶ Yearbook of the International Law Commission, 1958, vol. II, UN Doc. A/CN.4/SER.A/1958/Add.1, p. 40.

While the concept of peremptory norms has met with scepticism, it is recognised in international practice as well as in the jurisprudence of both international and national courts and legal doctrine.¹⁶²⁷ Despite the general acceptance of the existence of *ius cogens* norms in such fora, approaches to the principle are notorious for lacking in uniformity, both concerning the formation of the norms as well as their content. As Ferdinandusse holds, it is unclear how a norm is elevated to or demoted from a *ius cogens* status, what the consequences are thereof and which norms that fit into the category.¹⁶²⁸ No procedure to identify the norms is mentioned in the VCLT.

Though the lines between customary international law and *ius cogens* norms tend to overlap, the latter norms are superior to customary law. Whereas customary international law originates from state practice based on *opinio iuris*, *ius cogens* norms find their basis in maintaining an international *ordre public*.¹⁶²⁹ According to Malcolm Shaw, rules of a *ius cogens* character are simply created first through the establishment of the proposition as a rule of general international law and secondly through the acceptance of that rule as a peremptory norm by the international law community of states as a whole.¹⁶³⁰ A universal acceptance of the rule as *ius cogens* therefore has to exist, which means that the rules have to be based on custom or treaties.¹⁶³¹ Considerations to be taken into account include whether the norm exists in a wide number of legal instruments, whether states have implemented the proscriptions in national law and the extent to which international and national prosecutions have occurred.¹⁶³²

¹⁶²⁷ UN Doc. A/CN.4/L.682, para. 363. Some concerns have been raised that *ius cogens* norms could be used to justify non-performance of treaty obligations. See para. 368. Concerns are also raised over the fact that rights should not be placed in a hierarchy.

¹⁶²⁸ Ferdinandusse, Ward N., *Direct Application of International Criminal Law in National Courts*, p. 163.

¹⁶²⁹ Yearbook of the International Law Commission, 1976, vol. II, UN Doc. A/CN.4/SER.A/1953/Add.1, p. 155

¹⁶³⁰ Shaw, Malcolm, *International Law*, Cambridge University Press, (2003), p. 118. See also e.g. Bassiouni, who argues that the legal basis is 1) *opinio iuris*, 2) the language in preambles or other treaty provisions which indicates the norms higher status in international law, 3) the large number of states which have ratified treaties including the crimes and 4) international investigations and prosecutions of perpetrators of the crimes. Bassiouni, Cherif, *International Crimes: Jus Cogens and Obligatio Erga Omnes*, p. 68.

¹⁶³¹ Disagreement exists over the fact whether it is sufficient that a large majority of states support the norm, see the discussion in Hannikainen, Lauri, *Peremptory Norms (Jus Cogens) in International Law*, pp. 208-209, Shaw, Malcolm, *International Law*, Cambridge University Press, (2003), p. 118.

¹⁶³² Bassiouni, Cherif, *International Crimes: Jus Cogens and Obligatio Erga Omnes*, p. 70.

Several scholars emphasise the non-derogable nature of human rights which are considered peremptory, pointing to a common core of rights listed as non-derogable in major human rights treaties.¹⁶³³ This has, however, been criticised for focusing on the intention of the parties to a treaty rather than the nature of the norms.¹⁶³⁴ The ILC has simply stated that it leaves the full content of the rule to be worked out in state practice and in the jurisprudence of international tribunals.¹⁶³⁵

What is then the consequence of acknowledging a particular norm as *ius cogens* and does it entail a particular obligation for the state beyond the absolute prohibition to engage in conduct that violates the norm? This is rather ambiguous. The ILC Draft Articles on State Responsibility oblige states to cooperate to bring an end, through lawful means, to serious breaches of peremptory norms and not recognise as lawful the situation created by a serious breach nor render aid or assistance in maintaining the situation.¹⁶³⁶ In declaring the prohibition of torture an *ius cogens* principle, the ICTY in *Furundzija* stated:

“Because of the importance of the values it protects, [the prohibition against torture] has evolved into a peremptory norm or *jus cogens*, that is, a norm that enjoys a higher rank in the international hierarchy than treaty law and even ‘ordinary’ customary rules. The most conspicuous consequence of this higher rank is that the principle at issue cannot be derogated from by States through international treaties or local or special customs or even general customary rules not endowed with the same normative force.”¹⁶³⁷

The ICTY also argued that the *ius cogens* nature of the prohibition of torture has effects on both “the inter-state and individual levels”. At the inter-state level it serves to “de-legitimise any legislative, administrative or judicial act authorising torture”.¹⁶³⁸ Hannikainen also proposes that the function of such

¹⁶³³ Van Boven, Theo, *Distinguishing Criteria of Human Rights*, in *The International Dimensions of Human Rights*, eds. Karel Vasak and Alston, Vol. 1, Greenwood Press, (1982), p. 43. See, however, Meron, Theodor, *On a Hierarchy of International Human Rights*, 80 Am. J. Int’l L. 1, (1986), p. 16. Meron argues that the international community has not established a uniform list of non-derogable rights nor are such rights ranked ahead of derogable rights.

¹⁶³⁴ Orakhelashvili, Alexander, *Peremptory Norms in International Law*, p. 58.

¹⁶³⁵ UN Doc. A/CN.4/L.682, para. 376.

¹⁶³⁶ Article 41 of ILC Draft Articles on State Responsibility. See also Hannikainen, Lauri, *Peremptory Norms (Jus Cogens) in International Law, Historical Development, Criteria, Present Status*, p. 313, Ferdinandusse, Ward N., *Direct Application of International Criminal Law in National Courts*, p. 182.

¹⁶³⁷ *Prosecutor v. Furundzija*, Judgment of 10 December 1998, para. 153.

¹⁶³⁸ *Ibid*, para. 155.

norms is to limit the right to conclude agreements.¹⁶³⁹ On the question whether states have more limited freedom in the manner in which they choose to implement a right if *ius cogens*, Ferdinandusse finds that such arguments are primarily aspirational and not supported by practice.¹⁶⁴⁰ Reservations against such norms will, however, be deemed inadmissible.¹⁶⁴¹ Furthermore, regardless of national authorisation by legislative or judicial bodies that violate the norm, individuals are also bound by the principle.¹⁶⁴²

Importantly, *ius cogens* norms require the enactment of domestic penal provisions prohibiting the conduct.¹⁶⁴³ It is unclear whether a *ius cogens* norm additionally entails an obligation for states to prosecute and punish perpetrators of such violations. The ICTY in the *Furundzija* case importantly noted that a consequence of holding a norm as *ius cogens* is that it grants the international community possibilities in applying the principle of *aut dedere, aut judicare*, indicating that every State is “entitled to investigate, prosecute and punish or extradite individuals...who are present in a territory under its jurisdiction”.¹⁶⁴⁴

¹⁶³⁹ Hannikainen, Lauri, *Peremptory Norms (Jus Cogens) in International Law, Historical Development, Criteria, Present Status*, p. 1.

¹⁶⁴⁰ Ferdinandusse, Ward N., *Direct Application of International Criminal Law in National Courts*, p. 171.

¹⁶⁴¹ Cassese, Antonio, *International Law*, Oxford University Press, (2005), p. 207. Additional consequences include an impact on state immunities, treaties of extradition etc. See also VLCT Article 53.

¹⁶⁴² *Prosecutor v. Furundzija*, Judgment of 10 December 1998, para. 155.

¹⁶⁴³ Cassese, Antonio, *International Law*, p. 219.

¹⁶⁴⁴ *Prosecutor v. Furundzija*, Judgment of 10 December 1998, para. 156. The issue also raises an interesting discussion on state responsibility versus individual criminal responsibility. Initially, the International Law Commission distinguished between international crimes and international delicts in its draft articles on state responsibility. In its Article 19, it defined international crimes as “an internationally wrongful act which results from the breach by a State of an international obligation so essential for the protection of fundamental interests of the international community that its breach is recognised as a crime by that community as a whole”. Article 19 of Draft Articles on State Responsibility adopted on First Reading by the Commission (1996). It encompassed such acts as aggression, genocide and slavery. The distinction would according to these rules be the legal interests of the international community. The concept of international crimes of states was generally acknowledged as a result of the creation and acceptance of the *ius cogens* regime. Although the idea of state responsibility for international crimes was linked to *ius cogens*, the Commission did not hold every breach of *ius cogens* as an international crime. YbILC, 1976, vol. II, part. 2, UN Doc. A/CN.4/SER.A/1976/Add.1 (part 2), p. 120.

Broad support among also scholars exist for the proposition that *ius cogens* norms give rise to an obligation for states to either punish or extradite, which in turn can lead to support for the application of universal jurisdiction.¹⁶⁴⁵ Bassiouni even supports “the proposition that an independent theory of universal jurisdiction exists with respect to *ius cogens* international crimes”.¹⁶⁴⁶¹⁶⁴⁷ On the domestic level, Lord Wilkinson of the British House of Lords in the *Pinochet* case discussed the issue of the application of immunity for the crime of torture and stated that “the *jus cogens* nature of the international crime of torture justifies states in taking universal jurisdiction over torture wherever

The notion of state responsibility rather than individual responsibility for international crimes met with strong opposition within the UN and doctrine, which led to the deletion of Article 19. However, the concept has to a certain extent carried on through the *ius cogens* and *erga omnes* regimes, and *ius cogens* has in fact been held as the successor to the concept of state crimes. See Orakhelashvili, Alexander, *Peremptory Norms in International Law*, p. 276-281. The duality of responsibility was e.g. discussed by the Inter-American Court in the opinion on Promulgation and Enforcement of Laws, which held that the promulgation of laws contrary to the American Convention could give rise to international state responsibility. If the enforcement of such laws led to crimes against peace, war crimes or crimes against humanity, it could simultaneously give rise to individual criminal responsibility. See *International Responsibility for the Promulgation and Enforcement of Laws in Violation of the Convention* (Arts. 1 and 2 of the American Convention on Human Rights), Advisory Opinion OC-14/94, 9 December 1994, Inter-Am. Ct. H.R. (Ser. A) No. 14 (1994). Albeit it is accepted on a general level that the responsibility of the individual does not exhaust the responsibility of states, it may do so concerning the criminal aspects of responsibility. The Nuremburg trial, which established the concept of individual criminal responsibility in international law, emphasised that crimes are committed individuals and not abstract entities. *Trial of the Major War Criminals before the International Military Tribunal, Nürnberg, 14 November 1945 - 1 October 1946*, published at Nürnberg, Germany, 1947, p. 223.

¹⁶⁴⁵ De Than, Claire & Shorts, Edwin, *International Criminal Law and Human Rights*, Sweet & Maxwell, (2003), p. 10, Ferdinandusse, Ward N., *Direct Application of International Criminal Law in National Courts*, p. 183, Adams, Dean, *The Prohibition of Widespread Rape as Jus Cogens*, p. 386, Parker, Karen, *Jus Cogens: Compelling the Law of Human Rights*, 12 Hastings Int'l & Comp. L. Rev. 411, (1989), p. 455, Bassiouni, Cherif, *Universal Jurisdiction for International Crimes: Historical Perspectives and Contemporary Practice*, p. 104.

¹⁶⁴⁶ Bassiouni, Cherif, *Universal Jurisdiction for International Crimes: Historical Perspectives and Contemporary Practice*, p. 104. Certain states also ascribe effects such as a duty to prosecute. Ferdinandusse, Ward N., *Direct Application of International Criminal Law in National Courts*, p. 185.

¹⁶⁴⁷ Ferdinandusse, Ward N., *Direct Application of International Criminal Law in National Courts*, p. 185.

committed”.¹⁶⁴⁸ The classification of a norm as *ius cogens* would then create consequences far beyond its constitutional aspects in circumventing the states’ abilities to consent to norms. It would arguably also open up for universal prosecutions.

Ius cogens norms are usually understood to have developed mainly through customary international law.¹⁶⁴⁹ However, since they are considered superior to “regular” customary norms, it appears to preclude legal exceptions in the form of e.g. persistent objectors.¹⁶⁵⁰ One of the primary purposes of declaring a right as being part of *ius cogens* would then be to overcome persistent objectors to a norm of customary international law. However, as Dinah Shelton points out, there are rarely persistent objectors since those norms that are considered *ius cogens* are also clearly accepted as customary international law and thus have incurred few objections.¹⁶⁵¹

Denoting a rule as *ius cogens* furthermore holds symbolic value. As held by the ICTY, the *ius cogens* nature of torture

“articulates the notion that the prohibition has now become one of the most fundamental standards of the international community. Furthermore, this prohibition is designed to produce a deterrent effect, in that it signals to all members of the international community and the individuals over whom they wield authority that the prohibition of torture is an absolute value form which nobody must deviate.”¹⁶⁵²

¹⁶⁴⁸ *Regina v. Bow Street Metropolitan Stipendiary Magistrate, ex parte Pinochet Ugarte* (No. 3), 24 March 1999, House of Lords, 119 ILR, p. 136. Lord Wilkinson. Proponents exist for the understanding that *ius cogens* norms simultaneously constitute obligations *erga omnes*. De Than, Claire & Shorts, Edwin, *International Criminal Law and Human Rights*, p. 10. Furthermore, according to some sources, the peremptory character of an international norm would trump a conflicting rule of immunity. However, case law exists to refute this point of view. See *Al-Adsani v. the United Kingdom*, (Application No. 35763/97), ECtHR, Judgment of 21 November 2001. The Court allowed the granting of immunity in civil suits, as opposed to criminal cases. Al-Adsani, a British/Kuwaiti citizen had been tortured in Kuwait. Since there were no possibilities for domestic remedies in Kuwait, he initiated civil proceedings in the UK for compensation. An immunity act, however, shielded the Kuwaiti government from civil suits. Al-Adsani therefore turned the ECtHR alleging that the UK, by granting immunity, failed to secure him the enjoyment of his rights. The Court found that, unlike criminal law, there was no basis for not acknowledging immunity from civil suits where acts of torture are alleged.

¹⁶⁴⁹ Article 53 of the Vienna Convention on the Law of Treaties requires that the rules are “accepted and recognized by the international community of States as a whole”.

¹⁶⁵⁰ Byers, Michael, *Conceptualising the Relationship between Jus Cogens and Erga Omnes Rules*, p. 217.

¹⁶⁵¹ Shelton, Dinah, *International Law and Relative Normativity*, p. 158.

¹⁶⁵² *Prosecutor v. Furundzija*, Judgment of 10 December 1998, para. 154.

The concept of *ius cogens* has been invoked restrictively in practice by international judicial bodies and in declarations and treaties by the UN.¹⁶⁵³ The ICJ has made reference to it but in rather elusive language¹⁶⁵⁴ and it has been mentioned in case law by the ICTY.¹⁶⁵⁵ The European Court of Justice has held that *ius cogens* norms place limits on the principle that UN Security Council resolutions have binding effect.¹⁶⁵⁶ The principle has even been described as “intellectually indefensible - at best useless and at worst harmful in the practical conduct of international relations”.¹⁶⁵⁷ Though the existence of peremptory norms is viewed with scepticism by many scholars due to their rather abstract nature and unclear function,¹⁶⁵⁸ it is attracting an increasing acceptance in doctrine and in practice by international and domestic adjudicatory bodies. Antonio Cassese argues that the norms should not be underrated in the “guiding and channelling” of the conduct of states. It both bars states from behaving in a certain manner and induces them to fashion their conduct consistently with the norms, and *ius cogens* can thereby be seen as working as a “world public order”.¹⁶⁵⁹

In fact, states quite frequently refer to a norm as *ius cogens* in their national legal system, which in itself may be of relevance, even though often no specific effect is ascribed. Certain national legal systems have held that identifying a norm as *ius cogens* may give it national validity regardless of domestic

¹⁶⁵³ *Prosecutor v. Furundzija*, Judgment of 10 December 1998, p. 209.

¹⁶⁵⁴ See e.g. ICJ, *Case Concerning United States Diplomatic and Consular Staff in Tehran*, para 41, *Case Concerning Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. The United States)*, paras. 190-191.

¹⁶⁵⁵ *Prosecutor v. Furundzija*, Judgment of 10 December 1998, para. 154, *Prosecutor v. Kupreskic*, Case No. IT-95-16, ICTY Trial Chamber II, Judgment of 14 January 2000, para. 520, stating: “most norms of international humanitarian law, in particular those prohibiting war crimes, crimes against humanity and genocide, are also peremptory norms of international law or *jus cogens*, i.e. of a non-derogable and overriding character”.

¹⁶⁵⁶ *Ahmed Ali Yusuf v. Council of the European Union and Commission of the European Communities*, Case No. T-306/01, Judgment 21 September, 2005, paras. 277 and 280, *Kadi v. Council and Commission*, Case No. T-315-01, para. 226.

¹⁶⁵⁷ Weisburd, Mark, *The Emptiness of the Concept of Jus Cogens, as Illustrated by the War in Bosnia-Herzegovina*, 17 Mich. J. Int'l L. 1 1995-1996, p. 1.

¹⁶⁵⁸ Ibid. See, also, D'Amato, Anthony, *It's a Bird, It's a Plane, It's Ius Cogens*, Connecticut Journal of Intl. Law, Vol. 6, Fall 1990, Nr. 1.

¹⁶⁵⁹ Cassese, Antonio, *International Law*, Oxford University Press, (2005), p. 210. However, this cannot be stated categorically since the acceptance of the prohibition of e.g. torture has done little to quell the widespread state-sponsored violation of the principle. See e.g. Nagan, Winston & Atkins, Lucie, *The International Law of Torture: From Universal Proscription to Effective Application and Enforcement*, 14 Harv. Hum. Rts J. 87 (2001), p. 88.

regulations, alternatively, give the norms superiority over national rules, e.g. concerning immunity and prescription.¹⁶⁶⁰ However, such a prominent role for *ius cogens* rules has been rejected by most states, though it may be acknowledged that the norms have a privileged position in general.¹⁶⁶¹ Various domestic courts have explicitly ruled that the status of a norm as *ius cogens* does not lead to any specific consequences at the national level. For example, the House of Lords in Pinochet III argued that although the crime of torture is of a *ius cogens* nature, this status did not cure the fact that there was a lack of domestic implementing legislation, noting that *ius cogens* is “not a rule of jurisdiction”.¹⁶⁶² Both international and domestic sources thus indicate an ambivalent approach to the question.

7.6.1 Which Rights are Peremptory Norms?

There is no authoritative list of peremptory norms and they are notoriously difficult to identify, though a few core values are uncontroversial. In fact, in its Draft Articles on the Law of Treaties in 1966, the ILC concluded that “there is no simple criterion by which to identify a general rule of international law as having the character of *jus cogens*”.¹⁶⁶³ It is often emphasised that these norms prevent threats related to the security, peace or essential values of society as a whole and are of particular importance for the international community to redress.¹⁶⁶⁴ The norms consequently safeguard the interests of the international community rather than those of particular states.¹⁶⁶⁵ The International Law Commission has proposed that *ius cogens* norms consist of the prohibition of aggression, slavery, genocide, racial discrimination and apartheid, torture, basic rules of international humanitarian law applicable in armed conflict and the right to self-determination.¹⁶⁶⁶ Ian Brownlie also points to the principle of racial non-

¹⁶⁶⁰ See e.g. Federal Constitution of the Swiss Confederation, 18 April 1999, Article 194 (2). Discussion in de Wet, Erika, *The Prohibition of Torture as an International Norm of Jus Cogens and its Implications for National and Customary Law*, 15 Eur. J. Int'l L. 97, (Feb. 2004).

¹⁶⁶¹ Ferdinandusse, Ward N., *Direct Application of International Criminal Law in National Courts*, pp. 164-165. See the US Court of Appeals, 9th Circuit, *US v. Matta-Ballesteros*, 1 Dec. 1995, 71 F.3d 754, note 5. The notion of *ius cogens* has e.g. been included in the Swiss Constitution. Federal Constitution of the Swiss Confederation, 18 April, 1999, Article 194 (2).

¹⁶⁶² *R. v. Bow Street Metropolitan Stipendiary Magistrate & Others, ex parte Pinochet Ugarte*, (no. 3), House of Lords, UK, 24 March 1999, 1 A.C. 147, p. 175.

¹⁶⁶³ Watts, Arthur, *The International Law Commission, 1949-1998, Vol. 2: The Treaties*, Oxford University Press, (1999), p. 741.

¹⁶⁶⁴ De Than, Claire & Shorts, Edwin, *International Criminal Law and Human Rights*, p. 10.

¹⁶⁶⁵ Orakhelashvili, Alexander, *Peremptory Norms in International Law*, p. 272.

¹⁶⁶⁶ Draft Articles on State Responsibility, 2001, Commentary on Article 40, pp. 112-113.

discrimination, crimes against humanity and the principle of self-determination as *ius cogens*.¹⁶⁶⁷ Cherif Bassiouni lists seven categories of *ius cogens* norms: 1) piracy, 2) slavery, 3) war crimes, 4) crimes against humanity, 5) genocide, 6) apartheid, and 7) torture.¹⁶⁶⁸ Lauri Hannikainen notes five categories that have gained support as peremptory norms: 1) the prohibition of aggressive armed force, 2) self-determination of peoples, 3) respect for basic human rights including non-discrimination, the prohibition of slavery, torture, genocide and crimes against humanity, 4) respect for basic values which guarantee the order of the sea, air and space, and 5) basic norms of international armed conflicts.¹⁶⁶⁹ The Inter-American Court on Human Rights has further held that the right to life is part of the *ius cogens* regime,¹⁶⁷⁰ as well as the principle of equality before the law and non-discrimination since “the whole legal structure of national and international public order rests on it”.¹⁶⁷¹ The prohibition against torture has also

¹⁶⁶⁷ Brownlie, Ian, *Principles of Public International Law*, (2008), p. 511. See further discussions on the content of *ius cogens* in Tahvanainen, Annika, *Hierarchy of Norms in International and Human Rights Law*, Nordisk Tidskrift for Menneskerettigheter, vol. 24, nr. 3, (2006), p. 195, who lists the use of force, genocide, the prohibition of torture, the prohibition of discrimination, crimes against humanity, the prohibition of slavery, the right to self-determination and piracy, Byers, Michael, *Conceptualising the Relationship between Jus Cogens and Erga Omnes Rules*, p. 219, mentions the use of force, genocide, slavery, torture and apartheid. See further e.g. Adams, Dean, *The Prohibition of Widespread Rape as Jus Cogens*.

¹⁶⁶⁸ Bassiouni, Cherif, *Universal Jurisdiction for International Crimes: Historical Perspectives and Contemporary Practice*, p. 108. The crime of aggression to be included in the Rome Statute has also been raised as a possible *ius cogens* norm. De Than, Claire & Shorts, Edwin, *International Criminal Law and Human Rights*, p. 10.

¹⁶⁶⁹ Hannikainen, Lauri, *Peremptory Norms (Jus Cogens) in International Law, Historical Development, Criteria, Present Status*, p. 317.

¹⁶⁷⁰ *Victims of the Tugboat "13 de Marzo" v. Cuba*, Case 11.436, Report No. 47/96, OEA/Ser.L/V/II.95 Doc. 7 rev. at 127 (1997), IACtHR, para. 79.

¹⁶⁷¹ Juridical Condition and Rights of the Undocumented Migrants, Advisory Opinion, OC-18/03, IACtHR, para. 101.

evolved into an *ius cogens* status.¹⁶⁷² This was e.g. confirmed in the *Furundzija* case of the ICTY and in case law by the European Court of Human Rights.¹⁶⁷³

What is apparent is that there is an obvious link to norms of international human rights and international criminal law. As with international law in general, the rules of *ius cogens* are historically linked to and represent the legal culture of a specific era, such as the reaction to the slave trade and piracy. What with the development of international criminal law and the jurisprudence from the international tribunals, it is argued that the list of international crimes, including genocide, war crimes and crimes against humanity, have reached a *ius cogens* status.¹⁶⁷⁴ One can therefore see a clear parallel to the crimes contained in the Rome Statute of the ICC, embodying the international crimes.

7.6.2 A Gender-Sensitive Interpretation of *Ius Cogens*

The list of peremptory norms is arguably influenced by gender.¹⁶⁷⁵ Women may receive equal protection with respect to the harms that are recognised, but the harms women generally need protection from are not reflected in the contemporary norms of *ius cogens*. The prohibition of rape is already a component of *ius cogens* obligations, although it is debatable whether it has been recognised as an *ius cogens* norm in its own right. As viewed above in the cases of *Mejia* and *Aydin*, rape has been considered an act of torture by regional human rights courts and may be prosecuted as such. In the context of international criminal law, it is also a component of torture, the crime of genocide, war crimes and crimes against humanity. The argument that non-discrimination on the basis of sex also constitutes a *ius cogens* norm has been raised, given the significant

¹⁶⁷² Report of the UN Special Rapporteur on Systematic Rape, UN Doc. E/CN.4/Sub.2/1998/13, 2 June 1998, para. 53, Viseur Sellers, Patricia, *Sexual Violence and Peremptory Norms: The Legal Value of Rape*, 34 Case Western Reserve J. of Int'l L. 2002, p.293, General Comment No. 2, UNCAT, para. 1, de Wet, Erika, *The Prohibition of Torture as an International Norm of Jus Cogens and its Implications for National and Customary Law*, 15 Eur. J. Int'l L. 97, (Feb. 2004), Clapham, Andrew, *The Jus Cogens Prohibition of Torture and the Importance of Sovereign State Immunity*, in *Promoting Justice, Human Rights and Conflict Resolution Through International Law*, Martinus Nijhoff Publishers, Leiden, (2007).

¹⁶⁷³ *Prosecutor v. Furundzija*, Judgment of 10 December 1998, paras. 147-155. *Al-Adsani*, ECtHR, para. 61, stating that the Court accepts "that the prohibition of torture has achieved the status of a peremptory norm in international law...".

¹⁶⁷⁴ Askin, Kelly, *Prosecuting Wartime Rape and Other Gender-Related Crimes Under International Law: Extraordinary Advances, Enduring Obstacles*, p. 293.

¹⁶⁷⁵ Charlesworth, Hilary & Chinkin, Christine, *The Gender of Jus Cogens*, 15 HRQ 63, (1993), p. 70.

position that it holds in the body of human rights law.¹⁶⁷⁶ Ian Brownlie proposes that, in fact, gender discrimination belongs to “the least controversial” examples of *ius cogens*.¹⁶⁷⁷

As Patricia Viseur Sellers argues, the prohibition of rape in this sense is engaged in legal piggybacking since it enters by way of other crimes into the *ius cogens* family.¹⁶⁷⁸ There is increasing evidence that the crime has reached the level of *ius cogens* aside from the fact that it can be a constituent part of most accepted *ius cogens* norms. The jurisprudence of the ICTY, the ICTR coupled with the Rome Statute, UN resolutions, the increasing attention given to gender violence in international treaties and the recent recognition of gender crimes in regional human rights courts all provide compelling evidence that offences of sexual violence are now considered among the most serious international crimes.¹⁶⁷⁹ These are not solely indications that its prohibition has developed into a customary norm, confirmed e.g. by the ICRC Study on Customary Law, but also that it is so integral to the core of the universal legal conscience that it extends also beyond this. This development supports an assertion that at least the crime of rape, as opposed to all forms of sexual violence, has risen to the level of *ius cogens*.¹⁶⁸⁰

The UN Special Rapporteur on Violence against Women argues that *ius cogens* principles are particularly useful in the eradication of laws that discriminate against women, since they unarguably are created on the basis of international consensus. States are as a consequence bound by the principles

¹⁶⁷⁶ Eriksson, Maja Kirilova, *Reproductive Freedom In the Context of International Human Rights and Humanitarian Law*, p. 139, Brownlie, Ian, *Principles of Public International Law*, (1990), p. 513, Hannikainen, Lauri, *Peremptory Norms (Jus Cogens) in International Law, Historical Development, Criteria, Present Status*, p. 477.

¹⁶⁷⁷ Brownlie, Ian, *Principles of Public International Law*, (1990) p. 513.

¹⁶⁷⁸ Viseur Sellers, Patricia, *Sexual Violence and Peremptory Norms: The Legal Value of Rape*, p. 296.

¹⁶⁷⁹ McHenry, James R. III, *The Prosecution of Rape Under International Law: Justice That is Long Overdue*, Vanderbilt Journal of Transnational Law, Oct. 2002, p. 20. See further Viseur Sellers, Patricia, *Sexual Violence and Peremptory Norms: The Legal Value of Rape*, Sungi, Simeon, *Obligation Erga Omnes of Rape as a Ius Cogens Norm: Examining the Jurisprudence of the International Criminal Tribunal for the Former Yugoslavia, International Criminal Tribunal for Rwanda and the International Criminal Court*, Askin, Kelly, *Prosecuting Wartime Rape and Other Gender-Related Crimes Under International Law: Extraordinary Advances, Enduring Obstacles*, p. 294, Mitchell, David, *The Prohibition of Rape in International Humanitarian Law as a Norm of Jus Cogens: Clarifying the Doctrine*, 15 Duke J. Comp. & Int'l L. 219, (2005).

¹⁶⁸⁰ Askin, Kelly, *Prosecuting Wartime Rape and Other Gender-Related Crimes Under International Law: Extraordinary Advances, Enduring Obstacles*, p. 294.

regardless of express consent.¹⁶⁸¹ States must as a consequence enact domestic criminal laws prohibiting rape. Acknowledging the prohibition of rape or the non-discrimination principle as *ius cogens* is important for the purpose of binding states regardless of treaty obligations and objections but also in the possibility of solving conflicts between rights. Gender discrimination as a higher norm in the hierarchy of international law would thus trump conflicting cultural rights by denoting it an “overriding interest”. Apart from the practical consequences of designating rape as an *ius cogens* norm, it would also be important from a moral standpoint by elevating it as one of the most fundamental prohibitions in international law, which in turn may increase reporting and investigations on the domestic level.

In conclusion, substantial support exists for the fact that the crime of rape has reached the level of a peremptory norm, be it as an element of international crimes such as torture, war crimes, crimes against humanity, genocide or the principle of non-discrimination, or as increasingly argued, in its own right. The specific consequences of categorising the crime as a *ius cogens* norm are unclear apart from the rules detailed in the Vienna Convention on the Law of Treaties, i.e. that they supersede any treaty norms and are binding on all states. It may also be connected to the notion of universal jurisdiction and an obligation to prosecute, as will be discussed below. Most relevantly, it places obligations on states to criminalise the offence regardless if a state is a member to a relevant treaty.

An interesting question is whether, when a norm is deemed peremptory, a specific definition of the right or prohibition is necessary. Does the regime solely oblige states in relation to the crime without specifying a particular definition? The crime of rape, as a part of the majority of recognised *ius cogens* norms, has been defined both in the context of international human rights law and international criminal law. This similarly applies to the prohibition of torture. The ILC in its Draft Articles on State Responsibility asserts that the definition for torture as a peremptory norm is based on the UN Convention against Torture.¹⁶⁸² This definition requires an intentional infliction of severe mental or physical pain or suffering and a state nexus. The *Kunarac* case implied that the crime of torture in the context of international criminal law requires no such state nexus. This would lead to a *ius cogens* rule with different applications depending on in which context the crime is committed, i.e. torture as an international crime as opposed to torture occurring outside of these circumstances. The *ius cogens* regime in consequence raises the question of harmonisation. However, little indication exists yet that states will be obliged to adopt a particular definition of

¹⁶⁸¹ UN Doc. E/CN.4/2003/75, para. 67.

¹⁶⁸² Draft Articles on State Responsibility, 2001, Commentary on Article 40, p. 113.

norms of *ius cogens*. Thus, though states are directed to criminalise the crime of rape as a consequence of its *ius cogens* status, it is not likely that this pertains to specific elements of the offence.

7.7 Summary of State Obligations on the Prohibition and Definition of Rape

In reviewing human rights treaties, jurisprudence from regional human rights courts and soft law documents, one can draw the conclusion that despite the general wording of norms in such documents, and the scarcity of case law on the matter, states' flexibility is increasingly circumscribed regarding both substantive law provisions and procedural rules pertaining to the prohibition of rape and the definition of the offence. Though states have considerable discretion when implementing rights domestically, this is narrowing regarding the criminalisation of sexual violence.

By discussing rape in terms of torture and other severe forms of human rights violations, the grave nature of the offence is acknowledged and the inevitability of the crime is challenged. Though few human rights treaties explicitly refer to the prohibition of rape, this has been found as implicit in several existing human rights norms. Obligations for states to prohibit rape have developed through a dynamic and evolutive method of interpretation, classifying rape as a form of torture, an invasion of the right to privacy and gender discrimination. Viewing rape as a form of torture has the added benefit of denoting the prohibition as a *ius cogens* norm, as well as leading to extensive obligations to criminalise the violation. Interpreting rape as a form of gender discrimination recognises the systematic and pervasive nature of the offence, as well as identifies the harm against the collective, i.e. women. Placing the prohibition of rape solely under the *chapeau* of other rights can, however, be criticised from the viewpoint that the prohibition of rape should be recognised in its own right as a human rights norm. A similar discussion can be noted in the international criminal law regime. It remains to be seen whether "sexual rights" as a concept will be further developed.

Various obligations have materialised and can be summarised as follows: an obligation to criminalise all forms of non-consensual sex, to remove requirements of evidence of resistance by the victim of rape, to provide criminal law remedies that must not be initiated solely on the request of the victim, to acknowledge all individuals as potential victims as well as to provide medical examination of the rape victim. However, certain duties have developed through the work of regional courts and are therefore not universal in reach. As noted, the impact of cases by such bodies may, however, extend beyond solely the state concerned or even member states to the treaty. Other human rights or international criminal law bodies and states may take heed of such

developments. It also informs the development of customary international law norms.

There is great support for the notion that the prohibition of rape has developed on the customary level as a human rights violation, the *opinio iuris* apparent in such documents as the UN Declaration on the Elimination of Violence against Women, the Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women, the Vienna Declaration on Human Rights, the African Protocol on Women, the Beijing Platform for Action as well as interpretations of treaties by regional human rights courts and UN treaty bodies denouncing sexual violence. The same cannot be said of the definition of rape, considering the rather limited sources on the matter. However, this question will be further examined in the next chapter on international humanitarian law and international criminal law. Reviewing also these areas of law might indicate a trend of certain elements of the definition as emerging customary international law.

Part IV - An International Humanitarian Law and International Criminal Law Perspective

8. International Humanitarian Law

8.1 Introduction: International Humanitarian Law and Enforcement through International Criminal Law

In this chapter, the development of international humanitarian law will be briefly outlined, including its early codification, the promulgation of the 1949 Geneva Conventions as well as the historical background of the inception of international criminal law and principles developed at the Nuremberg trials,¹⁶⁸³ all relevant for the acknowledgement of the prohibition of rape in times of armed conflict. The provisions of IHL are rarely interpreted in international or regional tribunals/courts since no such mechanisms were envisioned in e.g. the 1949 Geneva Conventions.¹⁶⁸⁴ The Conventions rather presume national implementation and development. This chapter will thus primarily review regulations rather than case law pertaining to the prohibition of sexual violence. Whereas IHL has few enforcement mechanisms, it has, however, been interpreted in the context of international criminal law, a body of law based on both international human rights law and IHL. The focus will therefore lie on the next chapter, detailing jurisprudence concerning rape from the *ad hoc* tribunals of the ICTY and ICTR as well as the regulations of the permanent International Criminal Court. The international criminal law tribunals frequently refer to the 1949 Geneva Conventions. It must, however, be borne in mind that while international criminal law shares common roots with international humanitarian law, particularly regarding war crimes, it has been noted that care must be taken before transposing IHL standards directly to international criminal law since the latter body of law has distinct principles of interpretation.¹⁶⁸⁵ IHL and

¹⁶⁸³ Albeit the Nuremberg trials and their legacy can be seen as expressions of international criminal law, it will be explored in the section on IHL for chronological reasons.

¹⁶⁸⁴ Wagner, Natalie, *The Development of the Grave Breaches Regime and of Individual Criminal Responsibility by the International Criminal Tribunal for the Former Yugoslavia*, IRRC, June 2003, Vol. 85, no 850. p. 356.

¹⁶⁸⁵ Cryer, Friman, Robinson & Wilmschurst, *An Introduction to International Criminal Law and Procedure*, p. 11.

international criminal law are thus treated as two separate regimes with specific concerns.

IHL in general has not developed at the same pace concerning women's rights as human rights law. Reasons for this may include the fact that IHL is still largely drawn from the same traditional sources such as treaties and customary law and has until recently not been subject to interpretation by adjudicatory bodies. International human rights law, on the other hand, is continuously evolving through the mechanism of soft law documents, which has the flexibility to be progressive and draw inspiration from societal changes in a manner that treaty law rarely does.¹⁶⁸⁶ Efforts have, however, been made to advance and clarify the scope of IHL, also in relation to violence against women, e.g. through the ICRC Study on Customary Law and the case law of the *ad hoc* tribunals.

8.2 Characteristics of International Humanitarian Law

International humanitarian law consists of rules of international law which are designed to regulate the protection of persons in armed conflicts who are not or are no longer participating in hostilities.¹⁶⁸⁷ It also restricts the means and methods of armed conflict.¹⁶⁸⁸ Domestic military codes regulating conflict, based on anticipated reciprocal treatment by the opponent preceded the present conventions regulating humanitarian law.¹⁶⁸⁹ International humanitarian law currently consists of a wide range of international treaties, of which the most important instruments are the four Geneva Conventions for the protection of victims of war of 1949, as well as the two Additional Protocols.¹⁶⁹⁰ The Geneva Conventions have gained universal ratification and most, if not all, provisions are

¹⁶⁸⁶ Gardam, Judith & Jarvis, Michelle, *Women, Armed Conflict and International Law*, p. 175.

¹⁶⁸⁷ Greenwood, Christopher, *Definition of the Term "Humanitarian Law"*, The Handbook of International Humanitarian Law, Second ed., ed. Dieter Fleck, Oxford University Press, (2008), p. 11. A distinction is made in international law between *ius ad bellum* (regulating whether a state may use force, as set out in the UN Charter), and *ius in bello*, which concerns the restrictions on warfare, regardless of how the state or group entered into the conflict.

¹⁶⁸⁸ Commentary to the 1949 Conventions, General Provisions, Art 2, para. 1: "Any difference arising between two States and leading to the intervention of members of the armed forces is an armed conflict within the meaning of Art. 2, even if one of the parties denies the existence of a state of war. It makes no difference how long the conflict lasts, or how much slaughter takes place." It hence solely covers armed conflicts and not internal tensions or disturbances. IHL applies immediately when a conflict has begun.

¹⁶⁸⁹ Newton, Michael, *Comparative Complementarity: Domestic Jurisdiction Consistent with the Rome Statute of the International Criminal Court*, 167 Mil. L. Rev. 20, (2001), p. 33.

¹⁶⁹⁰ I will only discuss Additional Protocol I and II. A third protocol was promulgated in 2005 on the additional emblem of the ICRC.

regarded as customary international law.¹⁶⁹¹ This will be further discussed in the section on the ICRC Study on Customary Law. Most rules of IHL also have a *ius cogens* character and are considered intransgressible.¹⁶⁹²

Necessity and proportionality are important principles in IHL, meaning that a belligerent may only apply the amount of force necessary to defeat the enemy and for the achievement of its goals.¹⁶⁹³ Similarly, the distinction principle obliges states to distinguish between combatants and military objectives as a category opposed to civilians, solely allowing attacks against the former.¹⁶⁹⁴ The rules thus aim to strike a balance between military necessity and humanity.¹⁶⁹⁵ Military necessity is consequently circumvented by moral and legal considerations.¹⁶⁹⁶ IHL applies to both international and non-international armed conflicts, however, bringing to the fore different instruments depending on the armed conflict.¹⁶⁹⁷ The enforcement of IHL relies on the individual states' domestic justice systems, since no specific international adjudicatory bodies exist for this purpose. However, international bodies, such as the ICTY and

¹⁶⁹¹ Greenwood, Christopher, *Historical Development and Legal Basis*, The Handbook of International Humanitarian Law, pp. 27-28. For the member states of the Geneva Conventions, see the ICRC, State Parties to the Following International Humanitarian Law and Other Related Treaties as of 11 Dec. 2009.

¹⁶⁹² ILC, Commentary, Draft Articles on Responsibility of States for internationally wrongful acts, report on the work of its 53rd session, 23 April - 1 June and 2 July - 10 August 2001, General Assembly, Official records, fifty-fifth session, Supplement no. 10, (A/56/10), p. 284, *The Prosecutor v. Zoran Kupreskic and others*, Judgment of 14 January, 2000, para. 520. *Legality of the Threat of Use of Nuclear Weapons*, ICJ, para. 79.

¹⁶⁹³ Green, Leslie, *The Contemporary Law of Armed Conflict*, Manchester University Press, (2000), p. 348. As Marco Sassòli notes, many contemporary conflicts do not have an aim that is compatible with IHL; for example ethnic cleansing, looting and rape. A party may not even attempt to win but rather perpetuate a conflict. The necessity of acts in such circumstances is hence difficult to evaluate. See Sassòli, Marco, *The Implementation of International Humanitarian Law: Current and Inherent Challenges*, Yearbook of International Humanitarian Law, Vol. 10, Dec. 2007, p. 59.

¹⁶⁹⁴ See Additional Protocol I, Art. 48-55. See also discussion by Greenwood, Christopher, *Historical Development and Legal Basis*, pp. 35-37.

¹⁶⁹⁵ See e.g. Best, Geoffrey, *War & Law Since 1945*, Oxford University Press (1994), p. 115, Green, Leslie, *The Contemporary Law of Armed Conflict*, Manchester University Press, (2000), p. 348, Rogers, A.P.V., *Law on the Battlefield*, Manchester University Press, (2004), p. 3, Jinks, Derek, *Protective Parity and the Laws of War*, p. 1494.

¹⁶⁹⁶ Green, Leslie, *The Contemporary Law of Armed Conflict*, p. 348.

¹⁶⁹⁷ International armed conflicts are those in which at least two states are involved. A greater protection is provided to individuals in such conflicts, the regulations which exist in the four Geneva Conventions and Additional Protocol I. Non-international armed conflicts are restricted to the territory of a single state and are regulated in Additional Protocol II and Common Article 3 of the Geneva Conventions.

ICTR have also served to enforce certain provisions of IHL.¹⁶⁹⁸ Though international humanitarian law, similar to international human rights law, contains obligations owed by states to individuals, state practice and jurisprudence have not offered *rights* to individuals corresponding to these duties of states.¹⁶⁹⁹

8.3 Early Codification of the Prohibition of Rape in International Humanitarian Law

Before humanitarian law was codified rape was prohibited by the customs of war. An example of a codification of customary norms is the work of Italian lawyer, Lucas de Penna, who urged that wartime rape be punished as severely as rape committed in peacetime.¹⁷⁰⁰ The protection of women in war also existed in several early texts, e.g. the Belli Treatise of 1563, which held that the crime of rape during wartime was punished by death.¹⁷⁰¹ Hugo Grotius in the 1600s argued that sexual violence committed both during peace and wartime must be punished.¹⁷⁰² Specific regulations on the protection of women were also included in bilateral and multilateral treaties from the 16th century onwards, e.g. the Treaty of Amity and Commerce between the United States and Prussia in 1785, which held that “[i]f war should arise between the two contracting parties...all women and children...shall not be molested in their persons”.¹⁷⁰³

Various states began to include such provisions in domestic military codes. One of the first codifications was the Lieber Code of 1863, compiling the customary laws of war into US Army regulations. Though the Lieber Code was promulgated for domestic purposes, it developed into a basis for customary law and was used as the main source for the creation of the 1907 Hague Convention.¹⁷⁰⁴ Rape was seen as one of the most serious offences and Article 44 declared: “All wanton violence committed against persons in the invaded

¹⁶⁹⁸ Werle, Gerhard & Jessberger, Florian, *Principles of International Criminal Law*, p. 279.

¹⁶⁹⁹ Fleck, Dieter, *The Handbook of International Humanitarian Law*, p. xiii.

¹⁷⁰⁰ Askin, Kelly, *Prosecuting Wartime Rape and Other Gender-Related Crimes Under International Law: Extraordinary Advances, Enduring Obstacles*, p. 299.

¹⁷⁰¹ Pierion Belli, *de re militari et belli tractatus* (Herbert Nutting Trans. 1949), (1563). See in Askin, Kelly, *War Crimes against Women; Prosecution in International War Crimes Tribunals*, p. 26.

¹⁷⁰² Askin, Kelly, *Prosecuting Wartime Rape and Other Gender-Related Crimes Under International Law: Extraordinary Advances, Enduring Obstacles*, p. 299.

¹⁷⁰³ Treaty on Amity and Commerce, July 9-Sept. 10, 1785, US - Prussia, Article 23.

¹⁷⁰⁴ Doswald-Beck, Louise & Vité, Sylvain, *International Humanitarian Law and Human Rights Law*, IRRC, No. 293, March- April 1993, pp. 94-119.

country, all destruction of property not commanded by the authorized officer, all robbery, all pillage or sacking, even after taking a place by main force, *all rape*, wounding, maiming, or killing of such inhabitants, are prohibited under the penal of death, or such other severe punishment as may seem adequate for the gravity of the offence”.¹⁷⁰⁵ As Patricia Viseur Sellers notes, the regulations spoke of a rise in the notion of personhood, evident in e.g. Article 37 of the Lieber Code, which stated: “The United States acknowledges and protects, in hostile countries occupied by them, religion and morality, strictly private property; the persons of the inhabitants, especially those of women...”.¹⁷⁰⁶

Several other domestic documents also contained regulations on the protection of female honour. The Oxford Manual, created by the Institute of International Law in 1880 to serve as a model for domestic laws, affirmed: “[h]uman life, female honour, religious beliefs, and forms of worship must be respected. Interference with family life is to be avoided”.¹⁷⁰⁷ The Declaration of Brussels from 1874, aiming to codify international laws of war, also aimed to protect women’s right to honour: “the honour and rights of the family...should be respected”.¹⁷⁰⁸

The 1899 and 1907 Hague Conventions were the first to embody comprehensive normative principles regulating warfare on the basis of humanity. The regulations mainly govern methods of warfare and arms build-up and the only regulation regarding sexual violence is a reference to the need to respect “family honour and rights”, which has been interpreted to implicitly prohibit rape.¹⁷⁰⁹ Major steps to further develop the codification of IHL did not occur until the end of the Second World War, which saw both the international prosecution of individuals and the adoption of the 1949 Geneva Conventions.

8.4 The International Military Tribunals at Nuremberg and of the Far East: The Birth of International Criminal Law

Most of the major wars of the 20th century contain documentation of rape being used as a tool of conquest and domination.¹⁷¹⁰ Similarly during the Second World War, sexual violence was used as a weapon of war, evidence of which

¹⁷⁰⁵ Emphasis added.

¹⁷⁰⁶ Viseur Sellers, Patricia, *The Cultural Value of Sexual Violence*, 93 Am. Soc’y Int’l L. Proc. 312 (1999), p. 317.

¹⁷⁰⁷ Bassiouni, Cherif, *Crimes against Humanity in International Criminal Law*, p. 347.

¹⁷⁰⁸ Ibid, p. 347.

¹⁷⁰⁹ Article 46, 1907 Hague Convention.

¹⁷¹⁰ Erb, Nicole, *Gender-Based Crimes Under the Draft Statute for the Permanent International Criminal Court*, 29 Colum. Hum. Rts. L. Rev. 401, (1998), p. 401.

was brought to international attention during the Nuremberg trials. The war, which saw millions of people intentionally exterminated, tortured and sexually assaulted, shocked the international community and the illusion of a functioning world order of state protection was lost. When the war ended, the Allies, drawing on basic principles of morality, natural law and international law, held trials prosecuting the highest ranked perpetrators of the atrocities. For the first time, individuals were held to be morally responsible on an international level, piercing the veil of state sovereignty and, in a manner, assuming the role of domestic justice system in prosecuting individuals. The new concept of international individual criminal responsibility was motivated by the need to eradicate impunity for the most serious crimes, since large-scale atrocities rarely are punished domestically owing to the common involvement by the state machinery. Accordingly, “individuals have international duties which transcend the national obligations of obedience imposed by the individual State”.¹⁷¹¹

The International Military Tribunals at Nuremberg (IMT) and of the Far East (IMTFE) held trials prosecuting crimes against peace, war crimes and crimes against humanity. However, the IMT Charter, which formed the basis for the prosecution of 22 Nazi leaders at Nuremberg, did not include any form of sexual violence. Arguably, rape was implicitly seen as a form of torture when included as evidence of the various crimes. However, the tribunal failed to expressly prosecute such assaults, despite the widely documented occurrences of rape during the war.¹⁷¹² Though rape allegations were brought before the court through testimony, these were handled in a reluctant manner, e.g. by the French prosecutor at the trials who refused to describe the sexual offences in detail.¹⁷¹³ The Court Proceeding transcripts are rampant with evidence of various forms of sexual violence, including sexual mutilation such as cutting off the breasts of the

¹⁷¹¹ Trial of the German Major War Criminals: Proceedings of the International Military Tribunal Sitting at Nuremberg (IMT Docs.), vol. 1, p. 223.

¹⁷¹² Askin, Kelly, *Prosecuting Wartime Rape and Other Gender-Related Crimes Under International Law: Extraordinary Advances*, p. 301. According to Mary Ann Tetreault, the Allies were inhibited to fully prosecute these crimes partly due to the mass-rapes committed by Russian troops in Berlin. See Tetreault, Mary Ann, *Justice For All: Wartime Rape and Women's Human Rights*, 3 Global Governance 197, 203, (1997), p. 198.

¹⁷¹³ IMT Docs., Vol. VI, p. 407. During the Nuremberg trials, though there was widespread evidence of the use of rape as a weapon of war, the prosecutor submitted a dossier regarding such violence and asked for forgiveness “if I avoid citing the atrocious details”.

victims.¹⁷¹⁴ Women were raped in front of neighbours and relatives.¹⁷¹⁵ Brothels were also established.¹⁷¹⁶

Subsequent Nuremberg trials were held of the lower ranked war criminals under the auspices of Control Council Law No. 10. Rape was explicitly listed as a crime against humanity but was only mentioned in passing in the judgments.¹⁷¹⁷ The transcripts of the Tokyo trials also contain extensive testimonies of sexual violence.¹⁷¹⁸ The rape of Nanking is e.g. described in the following manner:

“Individual soldiers and small groups of two or three roamed over the city murdering, raping, looting, and burning. There was no discipline whatsoever...There were many of cases of rape. Death was a frequent penalty for the slightest resistance on the part of a victim or the members of her family who sought to protect her. Even girls of tender years and old women were raped in large numbers throughout the city, and many cases of abnormal and sadistic behaviour in connection with these rapings occurred. Many women were killed after the act and their bodies mutilated. Approximately 20,000 cases of rape occurred within the city during the first month of the occupation.”¹⁷¹⁹

In the trials held in Tokyo against 28 Japanese Axis war criminals, the indictment included allegations of gender-related crimes despite the lack of enumeration of the crime in the Tokyo Charter. The prosecutions of Generals

¹⁷¹⁴ See e.g. IMT Docs., Vol. VI: pp. 404-407, Vol. VII: p. 455 (“After violating her the Germans cut her throat, stabbed her through both breasts, and sadistically bored them out.”) p. 457 (“The Germans had cut off her breasts in the presence of these women...”), p. 457 (“In the town of Tkhvin in the Leningrad region, a 15-year old girl named H. Koledeskaya, who had been wounded by shell splinters, was taken to a hospital where there were wounded German soldiers. Despite her injuries the girl was raped by a group of German soldiers and died as a result of the assault.”), p. 467 (“Müller raped 32 Soviet women, of whom 6 were killed after having been raped. Among the women raped, several were 14- or 15-year old girls.”)

¹⁷¹⁵ Vol. VII, p. 456 (“Everywhere the lust-maddened German gangsters break into the houses, they rape the women and girls under the very eyes of their kinfolk and children, jeer at the women they have violated, and then brutally murder their victims.”)

¹⁷¹⁶ Vol. VII, p. 456 (“In the village of Berezovka, in the region of Smolensk, drunken German soldiers assaulted and carried off all the women and girls between the ages of 16 and 30. In the city of Smolensk the German Command opened a brothel for officers in one of the hotels into which hundreds of women and girls were driven; they were mercilessly dragged down the street by their arms and hair.”)

¹⁷¹⁷ Art. II (1) (C).

¹⁷¹⁸ See The Tokyo War Crimes Trial: The Complete Transcripts of the Proceedings of the International Military Tribunal for the Far East, 1946-1948 (IMTFE Docs.). See discussion in Askin, Kelly, *War Crimes against Women; Prosecution in International War Crimes Tribunals*, p. 62.

¹⁷¹⁹ IMTFE Docs, vol. 20, p. 49, 604.

Toyoda, Matsui and Hiroto for their actions in Nanking included charges of rape and sexual assault.¹⁷²⁰ Toyoda was charged with “...wilfully and unlawfully disregarding and failing to discharge his duties by ordering, directing, inciting, causing, permitting, ratifying and failing to prevent Japanese Naval personnel of units and organizations under his command, control and supervision to abuse, mistreat, torture, rape, kidnap and commit other atrocities”.¹⁷²¹ Rape and other forms of sexual violence were, however, classified as “inhumane treatment”, “ill-treatment” and “a failure to respect family honour and rights”.¹⁷²² Several generals as well as the Foreign Minister were held accountable for crimes including rape.¹⁷²³ Issues of non-consent or force were not raised during the hearings, nor were the *actus reus* elements of the crime. The definition of rape was thus not an issue.

The enforced prostitution of the comfort women were largely ignored and remained unrecognised until the establishment of the Women’s International War Crimes Tribunal by NGOs in Tokyo in 2000.¹⁷²⁴ The lack of codification of rape as an international crime and the disregard of the witness testimonies detailing sexual violence clearly demonstrated the standpoint that rape was not as serious as other violations committed during armed conflicts.

8.5 The 1949 Geneva Conventions and the 1977 Additional Protocols

IHL treaty law covers several aspects of warfare, both offering protection to victims of war and restricting legitimate methods of warfare. Subsequent to the Second World War and the dismay by the international community over the extensive degree of persecution of civilians, the original Geneva Conventions were found inadequate. The Conventions were therefore reformulated in 1949, also creating the fourth convention protecting civilians in times of war. The Conventions were supplemented with two Additional Protocols in 1977. The Conventions and their Additional Protocols constitute the foundation of

¹⁷²⁰ IMTFE Docs, Hiroto and Toyoda: p. 49, 788- 792, Matsui: p. 49, 814.

¹⁷²¹ *United States v. Soemu Toyoda*, Official Transcript of Record of Trial, p. 5006, cited in Cleiren, C.P.M & Tjissen, M.E.M, *Rape and Other Forms of Sexual Assault in the Armed Conflict in the Former Yugoslavia. Legal, Procedural, and Evidentiary Issues*, p. 481.

¹⁷²² IMTFE docs. See discussion in Bensouda, Fatou, *Gender and Sexual Violence Under the Rome Statute*, in *From Human Rights to International Criminal Law, Studies in Honour of an African Jurist, the Late Judge Laity Kama*, Brill, (2007), p. 403.

¹⁷²³ Ellis, Mark, *Breaking the Silence: Rape as an International Crime*, 38 Case W.Res. J. Int’l L. 225, p. 226.

¹⁷²⁴ The Women’s International War Crimes Tribunal on Japan’s Military Sexual Slavery, held in Tokyo 8-12 Dec. 2000. A Judgment was rendered on 4 Dec. 2001, which found all ten defendants indicted guilty.

international humanitarian law. Many provisions of the four conventions are also part of customary international law and therefore binding on all states, regardless of whether they are party to the treaties, evident in the ICRC Study on Customary Law.¹⁷²⁵ In the *Nuclear Weapons Case*, the ICJ emphasised that the fundamental rules of international humanitarian law “are to be observed by all states whether or not they have ratified the conventions that contain them, because they constitute intransgressible principles of international customary law”.¹⁷²⁶ All states have ratified the conventions but the additional protocols have not garnered an equal amount of ratifications.¹⁷²⁷ The promulgation of customary norms is thus especially important.

The Preliminary Remarks to the 1949 Geneva Conventions stress that the treaties are “inspired by respect for human personality and dignity” and aim to aid “all victims of war without discrimination”.¹⁷²⁸ IHL has constructed a regime of “protected persons”, including the sick and wounded, medical personnel, civilians, and prisoners of war.¹⁷²⁹ Because equality is a fundamental principle of IHL, women benefit from the general protections of the Geneva Conventions in the same manner as men, be it as civilians, combatants or those no longer part of the hostilities.¹⁷³⁰ Approximately forty provisions in the Conventions and Protocols also include the non-discrimination principle or special protection for women owing to the acknowledgment that women have particular needs.¹⁷³¹ The rules protect particular categories of women, e.g. pregnant women or mothers of young children, women in detention, but also contain general prohibitions on

¹⁷²⁵ ICRC Customary Law Study, p. 606, Askin, Kelly, *Prosecuting Wartime Rape and Other Gender-Related Crimes Under International Law: Extraordinary Advances*, p. 290.

¹⁷²⁶ *Legality of the Treat or Use of Nuclear Weapons*, ICJ Reports, (1996), 226, p. 257, para. 79.

¹⁷²⁷ See www.icrc.org.

¹⁷²⁸ Preliminary Remarks to the Geneva Conventions, International Red Cross, 12 August 1949.

¹⁷²⁹ Geneva Convention I concerns the wounded and sick, Geneva Convention II wounded, sick and shipwrecked at sea, Geneva Convention III prisoners of war, Geneva Convention IV civilians. Protected persons are defined in the following manner in Art. 4 of Geneva Convention IV: “Persons protected by the Convention are those who, at a given moment and in any manner whatsoever, find themselves, in case of a conflict or occupation, in the hands of a Party to the conflict or Occupying Power of which they are not nationals.”

¹⁷³⁰ See e.g. Art. 12, First Geneva Convention, Art. 12, Second Geneva Convention, Art. 16, Third Geneva Convention, Art. 27 Fourth Geneva Convention, Art. 74 Protocol I, Art. 4, Protocol II.

¹⁷³¹ Krill, Francoise, *The Protection of Women in International Humanitarian Law*, 249 IRRC, 337, Aug. 1995, p. 363.

sexual violence. Solely one article in the Fourth Geneva Convention and one in each of the Additional Protocols explicitly prohibit rape. No definition of the crime is, however, provided. Article 27 of the 4th Geneva Convention commands that “women shall be especially protected against any attack on their honour, in particular against rape, enforced prostitution, or any form of indecent assault”.¹⁷³² The Commentary to the Article further accentuates:

“Rape, enforced prostitution, i.e. the forcing of a woman into immorality by violence or threats, and any form of indecent assault...are and remain prohibited in all places and all circumstances, and women, whatever their nationality, race, religious beliefs, age, marital status or social condition have an absolute right to respect for their honour and their modesty, in short, for their dignity as women.”¹⁷³³

Similarly, Article 76 (I) of Protocol I mandates that “women shall be the object of special respect and shall be protected in particular against rape, forced prostitution and any other form of indecent assault”. The two Additional Protocols also prohibit “outrages upon personal dignity, in particular humiliating and degrading treatment, rape, enforced prostitution and any form of indecent assault”.¹⁷³⁴

The Commentary of the ICRC to the provisions in the Conventions heavily criticises the widespread sexual assault against women during the Second World War and the lack of subsequent prosecution. It categorically denounces sexual violence in the following terms: “These acts are and remain prohibited in all places and in all circumstances, and women, whatever their nationality, race, religious beliefs, age, marital status or social condition have an absolute right to respect for their honour and their modesty, in short, for their dignity as women.”¹⁷³⁵ The Commentary also notes the protection of women from being “forced into immorality by violence” and “family rights” in connection with sexual violence.¹⁷³⁶

The fact that the harm of sexual violence in this sense is described as the dishonour of women has received ample criticism for constituting an outdated

¹⁷³² Convention (IV) Relative to the Protection of Civilian Persons in Time of War. Geneva, 12 August 1949.

¹⁷³³ Commentary on the 4th Geneva Convention, Article 27.

¹⁷³⁴ Article 75 (b), Protocol I, Article 4 (2) (e) of Protocol II

¹⁷³⁵ Geneva Convention IV relative to the Protection of Civilian Persons in Time of War, Commentary, Art. 27, p. 206.

¹⁷³⁶ Ibid, p. 206.

understanding of rape.¹⁷³⁷ Though it recognises rape as a violation of the honour of a *woman*, as opposed to domestic codes focusing on the honour of e.g. her husband or family, it arguably fails to recognise the brutality of sexual violence and uses a value-laden term that implies that the harm is a violation of property. It similarly concerns itself primarily with the social value attached to women's chastity and imply virginity and chastity are preconditions in order to recognise the act as an offence.¹⁷³⁸ However, the ICRC Commentary to the regulation defines the concept of honour as "a moral and social quality. The right to respect for his honour is a right invested in man because he is endowed with a reason and a conscience", which is not dissimilar to our understanding of autonomy, frequently referred to in current jurisprudence when discussing the harm of sexual violence.¹⁷³⁹

The provision on grave breaches in the four Geneva Conventions and Additional Protocol I is of particular importance since the list of violations

¹⁷³⁷ Gardam, Judith, *Women, Human Rights and International Humanitarian Law*, 324 *International Review of the Red Cross*, 421-432, (1998), Niarchos, Catherine, *Women, War and Rape: Challenges Facing the International Tribunal for the Former Yugoslavia*, 17 *Human Rights Quarterly* 671-676, (1995), McDougall, Carrie, *The Sexual Violence Jurisprudence of the International Criminal Tribunal for the Former Yugoslavia and the International Criminal Tribunal for Rwanda, The Silence Has Been Broken but There's Still a Lot to Shout About*, in *The Challenge of Conflict: International Law Responds*, International Humanitarian Law Series, Martinus Nijhoff Publishers, (2006), p. 343. Certain feminist scholars argue that IHL in general reflects male norms and has failed to consider systematic gender inequalities, similar to the criticism of public international law in general. Judith Gardam and Michelle Jarvis write: "IHL takes a particular male perspective on armed conflict, as a norm against which to measure equality. In a world where women are not equals of men, and armed conflict impacts upon men and women in a fundamentally different way, a general category of rules that is not inclusive of the reality for women cannot respond to their situation." See Gardam and Jarvis, *Women, Armed Conflict and International Law* (2000), p. 93. Others, however, counter that the nature of IHL and limited aim leaves no room for a deeper social analysis of inherent inequalities required by feminist legal theory. Durham, Helen, *International Humanitarian Law and the Protection of Women*, in *Listening to the Silences: Women and War*, ed. Helen Durham and Tracey Gurd, Martinus Nijhoff Publishers, (2005), p. 97.

¹⁷³⁸ Lindsey, Charlotte, *The Impact of Armed Conflict on Women*, p. 32, Kalosieh, Adrienne, *Consent to Genocide? The ICTY's Improper Use of the Consent Paradigm to Prosecute Genocidal Rape in Foca*, p. 122., Dixon, Rosalind, *Rape as a Crime in International Humanitarian Law: Where to from Here?*, p. 702. The UN Special Rapporteur on Violence against Women argues that describing sexual violence in terms of dishonour detracts from viewing it as a crime of violence and links it to concepts of chastity, purity and virginity, i.e. a stereotypical understanding of femininity. It encourages a sense of shame for the victim as well as the perception by the community of the victim as "dirty" or "spoiled". See UN Doc. E/CN.4/1998/54, 26 January 1998, para. 4.

¹⁷³⁹ Geneva Convention IV relative to the Protection of Civilian Persons in Time of War, Commentary, Art.27, p. 202. One should bear in mind the that the language in the Conventions reflects their creation in 1949.

carries with it particularly far-reaching state obligations. The breaches are defined in the following manner:

“Grave breaches to which the preceding Article relates shall be those involving any of the following acts, if committed against persons properly protected by the present Convention: wilful killing, torture or inhuman treatment, including biological experiments, wilfully causing great suffering or serious injury to body or health...not justified by military necessity and carried out unlawfully and wantonly.”¹⁷⁴⁰

All state parties must enact laws that provide for individual criminal responsibility,¹⁷⁴¹ actively search for perpetrators and exercise jurisdiction over such individuals, alternatively hand them over to other states that will exercise such jurisdiction.¹⁷⁴² The grave breaches system is thus connected to the principle of *aut dedere aut judicare*, which applies regardless of where the crime was committed. The obligation may also be applied to states not party to the four Geneva Conventions in that it now reflects customary law, at least concerning international armed conflicts.¹⁷⁴³ It is therefore generally held that this provides a basis for universal jurisdiction.¹⁷⁴⁴

The list of grave breaches does not contain any reference to gender-based violations, which has aggrieved particularly women’s rights experts. Rhonda Copelon argues that “this failure to recognize rape as violence is critical to the traditionally lesser or ambiguous status of rape in humanitarian law”.¹⁷⁴⁵

¹⁷⁴⁰ Article 147, Geneva conv. IV.

¹⁷⁴¹ Article 49, GC I, Article 50 GC II, Article 129, GC III, Article 146 GC IV.

¹⁷⁴² Article 50 GC I, Article 51 GC II, Article 130 GC III, Article 147 GC IV, Articles 11 and 85 AP I. However, few countries have prosecuted grave breaches at the domestic level or extradited perpetrators. Article 146 of the Fourth Geneva Convention obliges parties to “search for persons alleged to have committed, or to have ordered to be committed...grave breaches” and to “bring such persons, regardless of their nationality, before its own courts”. See also Meron, Theodor, *International Criminalization of Internal Atrocities*, AJIL, Vol. 89, (1995), p. 555.

¹⁷⁴³ UN Doc. E/CN.4/Sub.2/1998/13, para. 86.

¹⁷⁴⁴ Green, Leslie, *The Contemporary Law of Armed Conflict*, Manchester University Press, (2000), p. 45. See also Lopes, Cátia & Quénivet, Noëlle, *Individuals as Subjects of International Humanitarian Law and Human Rights Law*, p. 228.

¹⁷⁴⁵ Copelon, Rhonda, *Surfacing Gender: Re-Engraving Crimes Against Women in Humanitarian Law*, 5 Hastings Women’s L.J. 243, (1994), p. 249. The failure lies in solely recognising rape as a violation of the woman’s honour. See also Durham, Helen, *International Humanitarian Law and the Protection of Women*, in *Listening to the Silences: Women and War*, eds. Helen Durham and Tracey Gurd, p. 98, Gardam and Jarvis, *Women, Armed Conflict and International Law*.

However, though rape is not explicitly mentioned, it has been concluded that sexual violence does fall within the regulation by way of interpretation.¹⁷⁴⁶ The language in the grave breaches provisions is intentionally broad and there is a consensus that the article should be interpreted liberally.¹⁷⁴⁷ Sexual crimes may be covered by provisions such as those prohibiting “torture”,¹⁷⁴⁸ “inhuman treatment”,¹⁷⁴⁹ “wilfully causing great suffering”,¹⁷⁵⁰ and “serious injury to body or health”.¹⁷⁵¹ The ICRC has in a 1992 aide-memoire stated that “the act of rape is an extremely serious violation of international humanitarian law” and that the grave breach of “wilfully causing great suffering or serious injury to body of health” includes rape.¹⁷⁵² These offences have been further interpreted through the jurisprudence of the *ad hoc* tribunals and the definition in the Elements of Crimes to include rape. The ICRC has moreover categorically stated that it “condemns sexual violence, in particular rape, in the conduct of armed conflict as a war crime, and under certain circumstances a crime against humanity, and urges the establishment and strengthening of mechanisms to investigate, bring to

¹⁷⁴⁶ ICRC Customary Study, p. 323 ff, Charlesworth, Hilary & Chinkin, Christine, *The Boundaries of International Law: A Feminist Analysis*, p. 316, Askin, Kelly, *Prosecuting Wartime Rape and Other Gender-Related Crimes Under International Law: Extraordinary Advances*, p. 311.

¹⁷⁴⁷ Askin, Kelly, *Prosecuting Wartime Rape and Other Gender-Related Crimes Under International Law: Extraordinary Advances*, p. 310.

¹⁷⁴⁸ The definition of torture is generally understood to draw inspiration from the UN Convention against Torture. However, as discussed previously, torture may carry certain different elements in the context of international criminal law and IHL. The Handbook of International Humanitarian Law, p. 695.

¹⁷⁴⁹ Inhuman treatment is understood as any treatment which substantially injures human dignity. Ibid, p. 695. Torture is distinguished from inhuman treatment by requiring a purpose, e.g. obtaining a confession of information. See Commentary on the Fourth Geneva Convention, Article 147, ed. Jean Pictet

¹⁷⁵⁰ The “wilful imposition of suffering” corresponds with the prohibition of torture and inhuman or degrading treatment and refers to both physical and psychological suffering. The Handbook of International Humanitarian Law, p. 696. However, it is understood that it includes acts that do not meet all the conditions set for the characterisation of torture.

¹⁷⁵¹ ICRC Customary Law Study, p. 323 ff. Askin, Kelly, *Prosecuting Wartime Rape and Other Gender-Related Crimes Under International Law: Extraordinary Advances*, p. 310, Bassiouni, Cherif, *Crimes against Humanity in International Criminal Law*, p. 353.

¹⁷⁵² International Committee of the Red Cross, Aide-Memoire, para. 2 , 3 December, 1992.

justice and punish those responsible”.¹⁷⁵³ The fact that rape is solely considered a grave violation when drawing an analogy to other crimes, such as torture, rather than in its own right, is also frequently criticised for not attaching the appropriate stigma to the crime.¹⁷⁵⁴

Common Article 3 to the four Geneva Conventions, the only protection in the Conventions applicable to non-international conflicts, has further been interpreted to include protection against sexual violence under the headings of a) violence to life and person, in particular cruel treatment and torture, and c) outrages upon personal dignity, in particular humiliating and degrading treatment.¹⁷⁵⁵ The jurisprudence of the *ad hoc* tribunals affirms that rape is prohibited by Common Article 3.¹⁷⁵⁶ The protections listed in Common Article 3 pertain to all parties to a conflict and is part of international customary law.¹⁷⁵⁷

The IHL rules have notoriously been ignored by many ratifying states. The rather extensive violations of IHL have been explained by the ICRC as not an inadequacy of the rules, but rather “a lack of willingness to respect them, to a lack of means to enforce them and to uncertainty as to their application in some circumstances”.¹⁷⁵⁸ The disregard for the rules was discussed at a conference in

¹⁷⁵³ ICRC, Statement before the Commission for Rights of Women, European Parliament, Brussels, 18 February 1993. See also ICRC update on the Aide-Memoire on rape committed during the armed conflict in ex-Yugoslavia, of 3 Dec. 1992: “As never before in its history, the ICRC has spoken out forcefully against systematic and serious abuses committed against the civilian population in Bosnia-Herzegovina, such as ...rape, internment, deportation...”. Also Resolutions of the 26th International Conference of the Red Cross and Red Crescent: Resolution 2, with regard to women: “expresses its outrage at practices of sexual violence in armed conflicts, in particular the use of rape as an instrument of terror, forced prostitution, and any other form of indecent assault.”

¹⁷⁵⁴ Bennoune, Karima, *Do We Need New International Law to Protect Women in Armed Conflict?*, p. 388.

¹⁷⁵⁵ ICRC Customary Law Study, p. 324. Bassiouni, Cherif, *Crimes against Humanity in International Criminal Law*. See, however, AP II, which also offers protection in non-international conflicts.

¹⁷⁵⁶ See e.g. *Prosecutor v. Miroslav Kvocka*, Judgment of 2 November 2001, footnote 409, p. 63. It also noted that rape is a crime against Art. 27, Fourth Geneva Convention, art. 76 (1) Additional Protocol I, and Art. 4 (2) (e) Additional Protocol II.

¹⁷⁵⁷ UN Doc. E/CN.4/1998/87, para. 74. See also *Prosecutor v. Tadic*, Judgment of 7 May 1997, para. 134: “Customary international law imposes criminal liability for serious violations of Common Article 3, as supplemented by other general principles and rules on the protection of victims of internal armed conflict, and for breaching certain fundamental principles and rules regarding means and methods of combat in civil strife”.

¹⁷⁵⁸ ICRC Customary Law Study, Introduction. Sassòli notes that there is a credibility gap between the law and reality. See Sassòli, Marco, *The Implementation of International Humanitarian Law: Current and Inherent Challenges*, p. 67.

1993, in order to evaluate the future of IHL. New treaty provisions were not seen as a solution, but in order to make the implementation of international humanitarian law more effective a study on customary rules would be conducted, further discussed below.¹⁷⁵⁹ The same arguments have been proposed regarding the protection of women's particular needs in armed conflicts, i.e. that the legal regime of IHL is adequate but needs better enforcement.¹⁷⁶⁰ The ICRC has e.g. stated that the "...tragic plight of women affected by armed conflict does not primarily result from a lack of humanitarian rules to protect them but rather from a failure to coherently interpret and implement existing rules".¹⁷⁶¹ This has been criticised by certain feminist authors who argue that the body of IHL is itself fundamentally flawed.¹⁷⁶²

Despite the lack of a definition of the crime, the condemnation of rape is of particular importance as regards the four Geneva Conventions, considering the status of customary international law and universal jurisdiction of the crimes deemed as grave breaches. The question has been raised whether the regulations of the 1949 Geneva Conventions are superfluous to the protection of women with the rise of international criminal law and the ICC. However, for victims in states not subject to the jurisdiction of the ICC or any potential *ad hoc* tribunal, the main recourse will be the possible adjudication in national courts, based on IHL regulations. Additionally, the ICC is founded on the principle of complementarity and thereby relies on the primary jurisdictions of states. The IHL regulations, as will be seen in the following chapters, have also substantially influenced the jurisprudence and statutes of the *ad hoc* tribunals and the ICC.

¹⁷⁵⁹ See Henckaerts, Jean-Marie, *Study on Customary International Humanitarian Law: A Contribution to the Understanding and Respect for the Rule of Law in Armed Conflict*, International Review of the Red Cross, Vol. 87, No. 857, March 2005, p. 176.

¹⁷⁶⁰ Gardam, Judith, *Women and Armed Conflict: The Response of International Humanitarian Law*, pp. 114-116. Certain enforcement mechanisms, such as the protecting powers and the International Humanitarian Fact-Finding Commission do not tend to function because of a lack of political will. International criminal law is viewed as having an important preventive effect concerning war crimes, since it emphasises that IHL is law and places responsibility on the individual. See Sassòli, Marco, *The Implementation of International Humanitarian Law: Current and Inherent Challenges*, *Yearbook of International Humanitarian Law*, Vol. 10, Dec. 2007, pp. 54-55.

¹⁷⁶¹ ICRC, Advancement of Women and Implementation of the Outcome of the Fourth World Conference on Women; Statement by the ICRC to the UN General Assembly, 53 UN GAOR, Third Committee, 15 October 1998.

¹⁷⁶² Gardam, Judith, *Women and Armed Conflict: The Response of International Humanitarian Law*, p. 118.

8.6 The ICRC Study on Customary International Humanitarian Law

The International Committee of the Red Cross in 2005 published a comprehensive study detailing current established customary international humanitarian law.¹⁷⁶³ The fundamental protections listed in the study are drawn from the traditional sources of customary law, i.e. state practice and *opinio iuris*.¹⁷⁶⁴ International human rights law is at times included to “support, strengthen and clarify analogous principles of international humanitarian law”.¹⁷⁶⁵ It should, however, be noted that the Study has received ample criticism for its methodology and the, at times, thin basis from which it has drawn conclusions as to customary law.¹⁷⁶⁶

The significance of rules being classified as customary is naturally that states are, apart from persistent objectors, bound by the regulations regardless of whether they have ratified treaties on the matter. Albeit the four Geneva Conventions have been universally ratified, the same is not true for the Additional Protocols. Additionally, international humanitarian treaty law does not regulate in sufficient detail the most common form of armed conflicts today; non-international armed conflicts. Custom is therefore purported to provide more specificity and substance to treaty regulations.¹⁷⁶⁷ Evincing customary international law is further considered important to the work of courts and international organisations who are frequently called upon to elaborate on the

¹⁷⁶³ Henckaerts, Jean-Marie and Doswald-Beck, Louise, *Customary International Humanitarian Law*, International Committee of the Red Cross, Cambridge University Press, (2005).

¹⁷⁶⁴ In reviewing state practice, the ICRC turned to battlefield behaviour, military manuals, national legislation and case law, instructions to armed and security forces, statements in international fora, international resolutions etc. Also widespread ratification of treaties was relevant in ascertaining such norms. The study did not determine the customary status of each treaty rule of IHL, rather it analysed specific issues and established which customary norms exist in relation to these. See Henckaerts, Jean-Marie, *Study on Customary International Humanitarian Law: A Contribution to the Understanding and Respect for the Rule of Law in Armed Conflict*, pp. 179-184. Concerning the collection of national practice, countries were selected on the basis of geographic representation as well as experience with armed conflict. See p. 185.

¹⁷⁶⁵ Henckaerts, Jean-Marie, *Study on Customary International Humanitarian Law: A Contribution to the Understanding and Respect for the Rule of Law in Armed Conflict*, p. 196.

¹⁷⁶⁶ The use of some of the materials has been criticised. See Scobbie, Iain, *The Approach to Customary International Law in the Study*, in *Perspectives on the ICRC Study on Customary International Humanitarian Law*, eds. Elizabeth Wilmshurst, Susan Carolyn Breau, Cambridge University Press, (2007), p. 25, Cryer, Robert, *Of Custom, Treaties, Scholars and the Gavel: The Influence of the International Criminal Tribunals on the ICRC Customary Law Study*.

¹⁷⁶⁷ Henckaerts, Jean-Marie, *Study on Customary International Humanitarian Law: A Contribution to the Understanding and Respect for the Rule of Law in Armed Conflict*, p. 178.

content of such, e.g. the *ad hoc* tribunals.¹⁷⁶⁸ In fact, the study has already had an impact on both international and national courts and tribunals.¹⁷⁶⁹

Most importantly, rape and other forms of sexual violence are prohibited as norms of customary international law.¹⁷⁷⁰ As support, the ICRC points to the prohibition of rape in the Lieber Code as well as Common Article 3 of the four Geneva Conventions. Though rape is not explicitly mentioned in the latter, it is held to be included under the prohibition of “violence to life and person”, which includes torture and cruel treatment, as well as “outrages upon personal dignity”.¹⁷⁷¹ The Study also finds support in the explicit mention of rape in Additional Protocol I and II, as well as the Fourth Geneva Convention. The jurisprudence from the ICTY and ICTR is noted, where rape may be considered an element of either war crimes or crimes against humanity. Further support is found in national legislation in many countries, classifying rape as a war crime, as well as the widespread condemnation of sexual violence by states and international organisations. The condemnation is also evident in national military manuals. The discussion of state practice with regard to sexual violence has, however, been seen as lacking, e.g. in the failure to mention the international outcry of the use of comfort women during the Second World War.¹⁷⁷² The Study notes that, with regard to human rights law, rape has primarily been prohibited under regulations on torture or cruel, inhuman and degrading treatment.

As for the definition of rape, the ICRC quotes the definitions developed by the ICTY and ICTR in the *Furundzija*, *Kunarac and Akayesu* cases.¹⁷⁷³ Despite the distinctly different approaches and reasoning in the three cases, the ICRC does not aim to formulate a definition but merely recapitulates existing jurisprudence. Here the Study could have gone further. It does, however, emphasise that the crime is non-discriminatory in its application, i.e. both men and women are victims. This is also evident in the definition in the Elements of Crimes of the

¹⁷⁶⁸ Introduction, ICRC Customary Law Study.

¹⁷⁶⁹ Cryer, Robert, *Of Custom, Treaties, Scholars and the Gavel: The Influence of the International Criminal Tribunals on the ICRC Customary Law Study*, *Journal of Conflict and Security Law* 11(2):239-263, (2006), p. 240, MacLaren, Malcolm & Schwendimann, Felix, *An Exercise in the Development of International Law: The New ICRC Study on Customary International Humanitarian Law*, *German Law Journal*, Vol. 06, No. 09, (2005), p. 1231.

¹⁷⁷⁰ ICRC Customary Law Study, Rule 93, p. 323.

¹⁷⁷¹ *Ibid*, p. 323.

¹⁷⁷² Breau, Susan, *Protected Persons and Objects*, in *Perspectives on the ICRC Study on Customary International Humanitarian Law*, eds. Elizabeth Wilmshurst, Susan Carolyn Breau, Cambridge University Press, (2007), p. 199.

¹⁷⁷³ ICRC Customary Law Study, p. 327.

ICC, which is intentionally gender-neutral, covering acts not solely between the opposite sexes. The fact that the Study refers to the Elements of Crimes without indicating that it is neither binding on the ICC nor state parties has also been subject to criticism.¹⁷⁷⁴

Also of interest is the prohibition on torture and cruel, inhuman and degrading treatment, which is emphasised as unequivocally part of the customary rules. Regarding the definition, the ICRC analyses both case law from the ICTY, including the *Kunarac* case, and the Elements of Crimes of the ICC.¹⁷⁷⁵ It notes the ICTY's understanding that the definition of torture does not contain the same elements under IHL as under international human rights law, most importantly regarding the lack of requiring a state nexus. Similarly, it points to the lack of "state official" element in the regulations to the ICC, drawing the conclusion that, in IHL and international criminal law, such a state nexus is not a prerequisite. The Study is thus important in confirming the customary status of the prohibition of rape, but does not further develop proposals as to customary elements of a definition of rape.

8.7 Intergovernmental Organisations and the Prohibition of Sexual Violence in Armed Conflicts

The UN Security Council has condemned the existence of sexual violence in armed conflicts in several resolutions.¹⁷⁷⁶ As Security Council resolutions, they are binding on all UN member states. Resolution 1325 of 2000 was the first resolution by the Security Council to specifically address the impact of war on women.¹⁷⁷⁷ It recognised that particularly women and children are affected by armed conflict and are increasingly targeted by combatants, reaffirming the need to implement fully international humanitarian and international human rights law. It also called on all parties to armed conflicts to take special measures to protect women against rape and other forms of sexual abuse. Resolution 1820 particularly noted the use of sexual violence as a tactic of war to "humiliate, dominate, instil fear in, disperse and/or forcibly relocate civilian members of a community or ethnic group..."¹⁷⁷⁸

¹⁷⁷⁴ Cryer, Robert, *Of Custom, Treaties, Scholars and the Gavel: The Influence of the International Criminal Tribunals on the ICRC Customary Law Study*, p. 250.

¹⁷⁷⁵ ICRC Customary Law Study, Rule 90, p. 316 ff.

¹⁷⁷⁶ SC Res. 1325 on Women, Peace and Security, UN.Doc. S/RES/1325, 31 October, 2000, SC Res. 1820 on Women, Peace and Security, UN Doc. S/RES/1820, 19 June, 2008, SC Res. 1888 on Women, Peace and Security, UN Doc. S/RES/1888, 30 September 2009.

¹⁷⁷⁷ UN Doc. S/RES/1325.

¹⁷⁷⁸ Preamble, para. 7.

Both Resolution 1325 and 1820 recognise that the protection of women is a matter of “the maintenance and promotion of international peace and security”.¹⁷⁷⁹ The latter resolution emphasises that sexual violence as a tactic of war can significantly exacerbate armed conflicts and impede international peace. It also affirms that rape can constitute a war crime, a crime against humanity or genocide. The resolutions call on states to establish effective systems for investigating and punishing perpetrators of sexual violence in the context of armed conflict.¹⁷⁸⁰ Resolution 1820 stresses that states bear the primary responsibility to respect and ensure the human rights of its citizens, as well as individuals on their territory. The resolution further calls for such measures by parties to the armed conflict as refraining from sexual abuse, but also enforcing appropriate military disciplinary measures, upholding principles of command responsibility, training troops on the prohibition of sexual violence, addressing myths that fuel sexual violence and evacuation of women and children under imminent threat of sexual violence.¹⁷⁸¹

UN Security Council Resolution 1888 of 2009, “Women and Peace and Security,” builds on previous resolutions and advances the call for an end to impunity regarding sexual violence against women in armed conflicts. It emphasises that ending impunity is essential “if a society in conflict or recovering from conflict is to come to terms with past abuses committed against civilians affected by armed conflict and to prevent such abuses”.¹⁷⁸² It obliges all parties to a conflict to take appropriate measures to protect civilians, ranging from the complete cessation of all forms of sexual violence to training troops and “debunking” myths that fuel sexual violence. As mentioned, states are also obliged to undertake legal and judicial reforms to bring perpetrators of sexual violence to justice.¹⁷⁸³

A problem is the gap between the policies and domestic implementation. For example, only 16 countries had as of September 2009 developed specific national action plans for the implementation of UN Security Council Resolution

¹⁷⁷⁹ Preamble, para.3, para. 11, respectively.

¹⁷⁸⁰ SC Res. 1325 on Women, Peace and Security, UN Doc. S/RES/1325, 31 Oct., 2000, SC Res. 1820 on Women, Peace and Security, UN Doc. S/RES/1820, 19 June 2008.

¹⁷⁸¹ Resolution 1820, para. 3.

¹⁷⁸² UN Security Council resolution 1888 of 2009.

¹⁷⁸³ It further aims to establish or renew peacekeeping mandates containing provisions on the prevention of, and response to, sexual violence. The resolution further encourages states to increase access to health care and legal assistance for victims, particularly in rural areas. It encourages “leaders at the national and local level, including traditional leaders where they exist and religious leaders, to play a more active role in sensitizing communities on sexual violence to avoid marginalization and stigmatization of victims, to assist with their social reintegration...”.

1325 (2000) on the impact of armed conflicts on women and children, i.e. nearly 10 years after its promulgation.¹⁷⁸⁴ This may in part be due to the absence of clear monitoring mechanisms for implementation. Strengthening the respect for the resolutions among the UN member states and encouraging domestic implementation is therefore the major challenge.

In a report on systematic rape during armed conflicts by the UN Commission on Human Rights, it is also underlined that it is important to establish an awareness of the seriousness of crimes of sexual and gender-based violence, also on the national level, to deal with these crimes in international or non-international armed conflicts. As such, “[s]tates need to have clear legislation prohibiting rape and other forms of sexual violence, and to provide adequate penalties commensurate to the gravity of such acts”.¹⁷⁸⁵ It is noted that it is not uncommon for there to be a general lack of will or inability to prosecute the perpetrators. An effective response should, according to the UN Special Rapporteur on the Situation of Systematic Rape, Sexual Slavery and Slavery-Like Practices during Armed Conflict, entail that acts of sexual violence are properly documented, the perpetrators brought to justice and the victims provided with effective redress.¹⁷⁸⁶

The Special Rapporteur in fact constructed a definition of rape in this context:

“‘Rape’ should be understood to be the insertion, under conditions of force, coercion or duress, of any object, including but not limited to a penis, into a victim’s vagina or anus; or the insertion, under conditions of force, coercion or duress, of a penis into the mouth of the victim. Rape is defined in gender-neutral terms, as both men and women are victims of rape.”¹⁷⁸⁷

The report further elaborates on the elements:

“...lack of consent or the lack of capacity to consent due, for example, to coercive circumstances or the victim’s age, can distinguish lawful sexual activity from unlawful sexual activity under municipal law. The manifestly coercive circumstances that exist in

¹⁷⁸⁴ Report of the Secretary-General, Women and Peace and Security, UN Doc. S/2009/465, 16 September 2009, para. 49. 10 member states had as of October 2008 developed national action plans. See Statement by Ms. Rachel Mayanja, Special Adviser on Gender issues and Advancement of Women at the Security Council Open Debate on Women, Peace and Security, New York, 29 October 2008, p. 2.

¹⁷⁸⁵ UN Doc. E/CN.4/Sub.2/2005/33, 11 July 2005, para. 40.

¹⁷⁸⁶ UN Doc. E/CN.4/Sub.2/1998/13, para. 8.

¹⁷⁸⁷ Final Report of the Special Rapporteur on the Situation of Systematic Rape, Sexual Slavery and Slavery-Like Practices during Armed Conflict, UN Doc. E/CN.4/Sub.2/1998/13, 22 June 1998, para. 24.

all armed conflict situations establish a presumption of non-consent and negate the need for the prosecution to establish a lack of consent as an element of the crime. In addition, consent is not an issue as a legal or factual matter when considering the command responsibility of superior officers who ordered or otherwise facilitated the commission of crimes such as rape in armed conflict situations. The issue of consent may, however, be raised as an affirmative defense...”.¹⁷⁸⁸

The unique characteristics of rape in armed conflicts are thus given emphasis, bearing in mind the inherent coercive circumstances. Force is consequently deemed more appropriate as an element than non-consent. Importantly, the gender-neutrality of the definition is stressed and the *actus reus* includes not only vaginal penetration, but also anal or oral invasions.

The Council of Europe has also condemned the systematic use of sexual violence in armed conflicts and called for better legal protection for women, including implementing legislation treating rape as a war crime or crime against humanity.¹⁷⁸⁹ In Resolution 1670 of 2009, the Parliamentary Assembly asserted that sexual violence against women in armed conflict is a crime against humanity and a war crime.¹⁷⁹⁰ The Resolution understands the existence of such sexual violence as a matter of gender inequality and “patriarchal societal modes”.¹⁷⁹¹

Various human rights documents have called for the eradication of sexual violence also in armed conflicts. The 1993 World Conference on Human Rights particularly noted the situation for women in armed conflict and in its Vienna Declaration stated that “violations of the human rights of women in situations of armed conflict are violations of the fundamental principles of international human rights and humanitarian law (and) require a particularly effective response”.¹⁷⁹² In the 1995 Beijing Declaration, the systematic rape of women in armed conflicts is noted: “All violations of this kind, including in particular murder, rape, including systematic rape, sexual slavery and forced pregnancy require a particularly effective response.”¹⁷⁹³ It noted that “parties to conflict often rape women with impunity, sometimes using systematic rape as a tactic of

¹⁷⁸⁸ UN Doc. E/CN.4/Sub.2/1998/13, para. 25.

¹⁷⁸⁹ Resolution 1212 (2000), Council of Europe. See also Recommendation 1403 (1999) on Kosovo.

¹⁷⁹⁰ Resolution 1670 (2009), Sexual Violence against Women in Armed Conflict, Parliamentary Assembly, Council of Europe, para. 1.

¹⁷⁹¹ Ibid, para. 9. It is seen as “gender-based persecution” in para. 10 (3).

¹⁷⁹² Vienna Declaration and Programme of Action, A/CONF.157/23, 12 July 1993, para. 38.

¹⁷⁹³ Beijing Declaration, para. 132.

war and terrorism”.¹⁷⁹⁴ The 2003 Protocol on the Rights of Women in Africa obliges states to protect women in armed conflicts against sexual exploitation and calls for such acts to be considered war crimes, genocide and/or crimes against humanity.¹⁷⁹⁵

The acknowledgment of the precarious situation for particularly women, has therefore advanced in the international community as well as the realisation that impunity often is a consequence. The eradication of impunity for sexual violence has become a principal objective and the obligations of states to criminalise and punish perpetrators have increased. As will be viewed in the following, though the international community has become more efficient in the form of creating *ad hoc* tribunals and a permanent court of international criminal law, the main responsibility still lies on the individual state to provide protection, thus the focus of this thesis on national implementation in the process of condemning rape.

¹⁷⁹⁴ Beijing Declaration, para. 135.

¹⁷⁹⁵ Article 11 (3) of Protocol on the Rights of Women in Africa.

9. International Criminal Law

9.1 Introduction

While international criminal law delineates individual criminal responsibility, focus in this chapter will be given to the degree of state obligations in relation to, primarily, the ICC. This considers the level of state cooperation and national implementation of international crimes such as rape, in order to evince state obligations as to the definition of the offence. The analysis of the jurisprudence of *ad hoc* tribunals will serve several goals in relation to this focus. The case law has, and may continue, to influence the definition of rape adopted by the ICC which affects many member states. The case law has also influenced regional human rights courts and even domestic legal systems. The findings may also serve as indications of customary international law. The statutes of the *ad hoc* tribunals and the ICC are all presumed to represent such customary norms.¹⁷⁹⁶ Lastly, the reasoning in the cases raises important questions as to the nature of rape and its elements in the context of international criminal law.

As will be viewed, unlike in the international human rights field, a substantial number of cases and regulations exist concerning the definition of rape, albeit the results are rather inconsistent. Similar concepts are discussed as in human rights law and municipal laws, i.e. non-consent, force, the *actus reus* and *mens rea* of the crime, but particular concerns are raised regarding the coercive nature of the context in which rape often occurs in international criminal law. The degree to which coercion informs the definition of rape tends to be the main concern. The “contextual” elements for each international crime, e.g. requiring the context of a widespread attack or armed conflict, are therefore particularly important. The conclusion to the chapter will be a general discussion on the possibilities of harmonising the approach to the prohibition of rape in international criminal law and international human rights law or if the distinct nature of the regimes necessitates a continued fragmented approach.

¹⁷⁹⁶ See regarding the ICTY: Report of the Secretary-General, UN Doc. S/25704, para. 34. This is not, however, clearly asserted regarding the jurisdiction of the ICTR. See Report of the Secretary-General Pursuant to Paragraph 5 of Security Council Resolution 955 (1994), UN Doc. S/1995/134, 13 February 1995. On the ICC: Arsanjani, Mahnouch H, *The Rome Statute of the International Criminal Court*, AJIL, vol. 93:22, p. 25. In general: Karagiannakis, Magdalini, *Case Analysis: The Definition of Rape and Its Characterization as an Act of Genocide – A Review of the Jurisprudence of the International Criminal Tribunals for Rwanda and the Former Yugoslavia*, 12 LJIL, Issue 2, (1999), p. 480.

9.2 Prosecution of Rape – The Ad Hoc Tribunals

The ICTR, ICTY and the ICC are governed by statutes. The ICC, however, is the only court established on the basis of a multilateral treaty. The statutes of the *ad hoc* tribunals are the work of the UN and are not as explicit as the Rome Statute of the ICC, since the substance of international criminal law was still at its inception. Because rape prior to the work of the tribunals was not internationally defined, their judgments are particularly interesting in the application of the full range of sources of international law, with the tribunals reviewing conventions such as the UN Convention against Torture and the 1949 Geneva Conventions, customary international law, e.g. regarding the torture definition, general principles distilled through surveys of national criminal law and finally, judicial decisions, with the *ad hoc* tribunals consistently adopting and inter-changing conclusions and legal reasoning from each other.

The statutes of the *ad hoc* tribunals as well as the Rome Statute establish jurisdiction over crimes against humanity, war crimes and genocide. Rape is explicitly mentioned as a crime against humanity in both statutes of the *ad hoc* tribunals, a war crime in the ICTR statute, and has additionally been interpreted as a sub-category of genocide.¹⁷⁹⁷ The difference between the charges of rape as a crime against humanity and as a war crime is that crimes against humanity must be part of a widespread or systematic attack whereas war crimes must be closely linked to an armed conflict and the victims designated as protected persons.¹⁷⁹⁸ Genocide requires the intent to destroy part of, or a whole group, either based on nationality, ethnicity, race or religion.¹⁷⁹⁹ Because of the difficulty in proving that the assault was part of an orchestrated plan, the prosecutor of the ICTY has primarily charged rape as a grave breach or a violation of the laws and customs of war, i.e. war crimes.¹⁸⁰⁰ In the ICTR, rape has successfully been charged as all three crimes and convictions reached also for genocide.¹⁸⁰¹

The mere codification of rape as an international crime was a major development, considering the marginalisation of the recognition of sexual violence as a serious concern in previous conflicts. The tribunals have also

¹⁷⁹⁷ Rape as a crime against humanity: Article 5 (g), ICTY Statute, Article 3 (g) ICTR Statute. Rape as a violation of Article 3 Common to the Geneva Conventions: Article 4 (e) ICTR Statute.

¹⁷⁹⁸ See Articles 3 and 4 of the ICTR Statute and Articles 2, 3 and 5 of the ICTY Statute.

¹⁷⁹⁹ Article 2, ICTR Statute, Article 4 ICTY, Statute.

¹⁸⁰⁰ Murphy, Sean, *Progress and Jurisprudence of the International Criminal Tribunal for the Former Yugoslavia*, AJIL, vol 93:57, January 1999, p. 88.

¹⁸⁰¹ See in the following, e.g. *The Prosecutor v. Jean-Paul Akayesu*, Judgment of 2 September, 1998.

successfully given substance to the prohibition of rape by defining the crime. As will be viewed in the following chapters, the legacy of both *ad hoc* tribunals concerning the definition of rape is that of ambivalence, balancing the consideration for sexual autonomy with the particular coercive aspects of armed conflicts, striving to find a suitable definition within international criminal law. The tribunals are not bound by *stare decisis* in the same manner as national courts, though it would be preferable for reasons of legal certainty, hence the inconsistent approach to defining rape.

Though a definition of rape is not provided in the statutes, evidence of consent as a defence in cases of sexual violence is regulated in identical provisions of both tribunals in Rule 96 of the Rules of Procedure and Evidence. It stipulates that in cases of sexual assault

“(ii) Consent shall not be allowed as a defence if the victim:

Has been subjected to or threatened with or has had reason to fear violence, duress, detention or psychological oppression; or

Reasonably believed that if the victim did not submit, another might be so subjected, threatened or put in fear.”

The rule has undergone several changes since the first proposal in 1994. This regulation has only to a limited extent been analysed in case law as it does not inform whether the *definition* shall contain an element of non-consent but solely the manner in which it may be raised as an affirmative defence. However, the discussions surrounding the Rule demonstrate the understanding of non-consent in armed conflicts and are of interest since it reflects issues such as the balance between the rights of the accused versus the victim.¹⁸⁰² The first version proposed by the judges held that in cases of sexual assault “consent shall not be allowed as a defence”.¹⁸⁰³ This reflected the view that the inquiry into the non-

¹⁸⁰² The drafting process of Rule 96 clearly reflects the balancing act between the due process rights of the accused versus diminishing the traumatising of the victim during trial. Though there is no in-depth research on the number of false accusations of rape, and no indication that the number of false reports is higher in wartime as opposed to in peace, the possibility of false reporting must always be taken into account for the purposes of due process rights. Certain authors hold that although there is no evidence of a higher instance of false reporting in armed conflicts, the incentive may be different, e.g. to gain asylum or revenge. Particularly in conflicts where sexual assault has become politicized and used as a weapon in the conflict, e.g. in such ethnic-based conflicts as Rwanda, former Yugoslavia and Darfur, allegations of sexual violence are readily brought forward against the other side. See Fitzgerald, Kate, *Problems of Prosecution and Adjudication of Rape and other Sexual Assaults under International Law*, p. 642.

¹⁸⁰³ UN Doc IT/32 (1994).

consent of the victim is irrelevant in the context of armed conflicts and coercive situations. The conflict itself would, according to this reasoning, be sufficient to prove coercion and no physical or mental compulsion of the victim necessary. The procedural rule would then reflect a difference between rape in peacetime as opposed to in armed conflict. This first version has also been heralded as a step towards eliminating gender prejudice in the courtroom.¹⁸⁰⁴ Arguably, the victim would be spared the humiliation of publicly recanting the details of the event, as well as his/her emotions and behaviour while countering allegations of consenting to the act.

The second version clearly exhibited more concern that all possible avenues of defence should be open to the defendant, maintaining the due process rights of the accused and thereby ensuring a fair trial. Though the first draft considered the oppressive nature of armed conflicts, it was also criticised for invading the rights of the defendant by finding him/her guilty based on the context of widespread violence rather than investigating the specific actions of the accused.¹⁸⁰⁵ A blanket rule of classifying all sexual relations between members of opposite sides of the conflict as rape was to be avoided.¹⁸⁰⁶ The draft was consequently revised and instead provided for the possibility of using consent as a defence, but listed various situations where consent is automatically negated, which remain in the current version – for example in cases of duress, detention. The situations where consent is not allowed as a defence are, however, sensitive to the particulars of armed conflict and rather broadly worded.

The rule is important from several standpoints and on certain points differs greatly from the majority of procedural rules in domestic jurisdictions. Though the rule refers to employing consent as ‘defence’, the ICTY in the *Kunarac* case dismissed the traditional understanding that using consent as a defence would entail a switching of the burden of proof to the accused. Instead it interpreted ‘consent as a defence’ in the rule as outlining various coercive situations where non-consent is presumed, e.g. detention. In such circumstances it is presumed that consent cannot be freely given and any apparent consent which is expressed by the victim is not voluntary. The Tribunal importantly also emphasised that the

¹⁸⁰⁴ Fitzgerald, Kate, *Problems of Prosecution and Adjudication of Rape and other Sexual Assaults Under International Law*, p. 641.

¹⁸⁰⁵ Ibid, p. 641. The discussions concerning the introduction of the rule were highly divided. Certain feminist groups argued that consent should never be raised as a defence due to the coercive circumstances of war, whereas others held that such a defence was important for the legitimacy of the process of the tribunal, even though it is highly unlikely as a successful claim.

¹⁸⁰⁶ Halley, Janet, *Rape in Berlin: Reconsidering the Criminalisation of Rape in the International Law of Armed Conflict*, p. 88.

above mentioned situations are not the only conditions where consent is negated and avoided providing a static and specified list.¹⁸⁰⁷

9.2.1 ICTR: The First Definition of Rape in International Law

Subsequent to the harrowing accounts from Rwanda detailing mass-slaughter and widespread rape, the UN appointed both a Special Rapporteur and a Commission of Experts to investigate the allegations of war crimes.¹⁸⁰⁸ According to reports, approximately 800,000 people were killed.¹⁸⁰⁹ The Special Rapporteur found that “rape was the rule and its absence the exception” and estimated that between 250,000 and 500,000 rapes occurred.¹⁸¹⁰ It is assessed that between 2,000 and 5,000 children were born of rape from the conflict, at times dubbed “children of bad memories” or “little killers”.¹⁸¹¹ Based on the number of victims as well as the nature of the rapes that occurred, the UN expert concluded that sexual violence was systematic and used as a weapon by the perpetrators.¹⁸¹² The attacks were indiscriminate and the victims included underage and elderly women, pregnant women and “untouchable” women such as nuns as well as corpses.¹⁸¹³ The incidents of rape were gruesome and often occurred in the form of gang rapes or forced incest, many women dying as a result. The latter form entailed forcing close relatives such as father and daughter, son and mother, to engage in sexual intercourse. Many victims were subjected to sexual mutilations such as having their breasts cut off or tree

¹⁸⁰⁷ *Prosecutor v. Kunarac, Kovac and Vukovic*, Judgment of 22 February 2001, para. 464.

¹⁸⁰⁸ According to the UN report on Rwanda prior to the establishment of the Tribunal, the genocide followed a particular pattern; the husbands and male children were killed first, most often in front of their spouses and mothers and subsequently the women were killed, often after being raped. The perpetrators of the massacres were primarily the interhamwe militia, targeting tutsis but also moderate hutus or hutu women married to tutsis. See Report on the Situation of Human Rights in Rwanda Submitted by Mr. R. Degni-Séqui, UN Doc. E/CN.4/1996/68, 29 January 1996, para. 13.

¹⁸⁰⁹ Report of the Independent Inquiry into the actions of the United Nations during the 1994 genocide in Rwanda, UN Doc. S/1999/1257, 16 December 1999, p. 3.

¹⁸¹⁰ UN Doc. E/CN.4/S-3/1 of 25 May 1994, UN Doc. E/CN.4/1996/68, 29 January 1996, para. 16.

¹⁸¹¹ Mukangendo, Marie Consolee, *Caring for Children Born of Rape in Rwanda*, in *Born of War: Protecting Children of Sexual Violence Survivors in Conflict Zones*, ed. Charli Carpenter, Kumarian Press, (2007), p. 40.

¹⁸¹² UN Doc. E/CN.4/1996/68, 29 January 1996, para. 16.

¹⁸¹³ *Ibid.*, para. 17.

branches or bottles pushed into their vaginas.¹⁸¹⁴ Militiamen carrying the HIV-virus used it as a weapon, aiming to ensure a slow death.¹⁸¹⁵ The traumas were deemed even more serious by the UN Rapporteur due to the taboos of the acts in the African tradition, causing immense shame on the part of the victim as well as social exclusion, especially in cases where the woman became pregnant as a result of the rape.¹⁸¹⁶

As a result of the conflict, the Rwandan justice system had been annihilated and the new Rwandan government, occupying a seat on the UN Security Council, initiated discussions on the establishment of a UN *ad hoc* tribunal due to the dismal opportunities for bringing the perpetrators to justice through the national system. The Security Council subsequently acted under Chapter VII of the UN Charter and established the International Criminal Tribunal of Rwanda, limiting the jurisdiction to perpetrators of genocide and other international crimes committed between 1 January 1994 and 31 December 1994. The Statute of the Tribunal allows for the prosecution of war crimes, crimes against humanity and genocide. Rape is explicitly listed as a crime against humanity and a war crime.¹⁸¹⁷ What it does lack, however, is a definition of rape, the reason being that the elements of rape had not previously been discussed in the international arena. This thus became the task for the ICTR, which was further developed through the case law of the ICTY. Though the crimes may be customary in nature, the ICTR Statute also reflects treaty-based crimes in conventions which Rwanda had ratified, thereby not raising the question of their customary nature or the legality of the Tribunal.¹⁸¹⁸ As of 2009, 36 of 87 indictees have been charged with rape and other forms of sexual violence. Four had been convicted of rape in the 13 completed cases.¹⁸¹⁹

¹⁸¹⁴ UN Doc. E/CN.4/1996/68, para. 18.

¹⁸¹⁵ Ibid, para. 20.

¹⁸¹⁶ Ibid, para. 22.

¹⁸¹⁷ Article 3 (g) (Crime against Humanity) and Article 4 (e) (Common Article 3 of the Geneva Conventions), Statute of the ICTY.

¹⁸¹⁸ Gallant, Kenneth, *The Principle of Legality in International and Comparative Criminal Law*, p. 306. In fact, in Report of the Secretary-General Pursuant to Paragraph 5 of Security Council Resolution 955 (1994), UN Doc. S/1995/134, 13 February 1995, para. 12, the Secretary-General explains that the Security Council has elected an expansive approach to the choice of applicable law and includes norms based on international instruments “regardless whether they were considered part of customary international law”.

¹⁸¹⁹ Obote-Odora, Alex, *The Prosecution of Rape and Other Sexual Violence*, Development Dialogue, No. 52, Nov. (2009), p. 180. See also Report of the Secretary-General pursuant to Security Council resolution 1820, S/2009/362, 15 July 2009, para. 10.

9.2.1.1 The *Akayesu* Case - A Conceptual Approach to Rape

The case of *The Prosecutor v. Jean-Paul Akayesu* of 1998 is deemed as the landmark case in classifying sexual violence as genocide as well as promulgating a definition of rape on the international level for the first time.¹⁸²⁰ The judgment is also historic in that it constitutes the first conviction for genocide in an international tribunal. Jean-Paul Akayesu, a mayor in the Taba commune of Rwanda, was initially charged with 12 counts of genocide, crimes against humanity and war crimes, though no charges included gender-related crimes despite diligent documentation by NGOs and UN representatives of the widespread occurrence of rape. The indictment was only amended to include charges of sexual violence after several witnesses during the trial testified of gruesome instances of rape. The evidence, coupled with international pressure to include gender-crimes as well as the presence of female Judge Navanethem Pillay led to an amendment.¹⁸²¹ Akayesu was found guilty of aiding and abetting the sexual violence, by allowing it to take place on the bureau communal while he was present and by facilitating the commission of the acts through words of encouragement, conveying official tolerance for sexual violence.¹⁸²²

The judgment provided a harrowing insight into the use of rape in the context of war. Tutsi women were subjected to repeated instances of sexual violence, often by several perpetrators and often in public.¹⁸²³ In most cases, the rapes preceded being killed and many assaults were perpetrated near mass graves with the intent of disposing the victims.¹⁸²⁴ As for the purpose of the rapes, the Tribunal noted that sexual violence causes extensive harm and in cases of mass violence such as in Rwanda, it is used to subjugate and demolish a collective enemy group, in this case, the Tutsis. Witness testimony relayed such statements by Akayesu and other perpetrators as “let us now see what the vagina of a Tutsi woman tastes like”, in connection to the attacks.¹⁸²⁵ The Tribunal emphasised that the injury of sexual violence extended beyond the individual to the collective. In finding that a widespread and systematic attack against the civilian

¹⁸²⁰ *The Prosecutor v. Jean-Paul Akayesu*, Judgment of 2 September 1998.

¹⁸²¹ *Ibid*, para. 417. The fact that the gender-based charges were not included from the beginning has been criticised by the UN Special Rapporteur on Violence against Women, who was “absolutely appalled that the first indictment on the grounds of sexual violence at the International Tribunal for Rwanda (ICTR) was issued only in August 1997, and only then after heavy international pressure from women’s groups”. See UN Doc. E/CN.4/1998/54/Add.1 (1998), para. 38.

¹⁸²² *The Prosecutor v. Jean-Paul Akayesu*, Judgment of 2 September 1998, para. 693.

¹⁸²³ *Ibid*, para. 731.

¹⁸²⁴ *Ibid*, para. 733.

¹⁸²⁵ *Ibid*, para. 732.

ethnic population of Tutsis had taken place, the Tribunal found that the incidents of rape constituted crimes against humanity.¹⁸²⁶ The Chamber also found that the rape crimes constituted genocide “in the same way as any other act as long as they were committed with the specific intent to destroy, in whole or in part, a particular group, targeted as such...these rapes resulted in physical and psychological destruction of Tutsi women, their families and their communities.”¹⁸²⁷ In this case, “Tutsi women were subjected to sexual violence because they were Tutsi. Sexual violence was a step in the process of destruction of the Tutsi group - destruction of the spirit, of the will to live, and of life itself”.¹⁸²⁸ In framing the rapes as crimes against humanity and genocide, the Tribunal asserted that rape in wartime fulfils different purposes to sexual violence in peacetime, which was also reflected in the definition of the crime.

In attempting to define the crime of rape, the Trial Chamber concluded that there, at the time, existed no established definition in international law and therefore evaluated the criminalisation in national jurisdictions in order to find general principles. Though it found that domestic penal codes historically have defined rape as “non-consensual sexual intercourse”, the Chamber argued that a broader definition was necessary, aiming to take into consideration the specific context of international criminal law and the particulars of the forms of rape witnessed in Rwanda. Accordingly, “...variations on the act of rape may include acts which involve the insertion of objects and/or the use of bodily orifices not considered to be intrinsically sexual”.¹⁸²⁹ Non-consent would then not be of value to elucidate under such coercive circumstances that exist in situations rising to the level of international crimes.¹⁸³⁰

In providing a more liberal understanding of rape, the Trial Chamber argued that rape is “a form of aggression” and that the elements of the crime “cannot be captured in a mechanical description of objects and body parts”.¹⁸³¹ It held that rape and sexual violence are “some of the worst ways (to) inflict harm on the

¹⁸²⁶ *The Prosecutor v. Jean-Paul Akayesu*, Judgment of 2 September 1998, para. 695.

¹⁸²⁷ *Ibid*, para. 731.

¹⁸²⁸ *Ibid*, para. 732.

¹⁸²⁹ *Ibid*, para. 597.

¹⁸³⁰ In Rule 96 (ii) of the Rules of Procedure and Evidence of the ICTR, the issue of consent is explicitly dealt with and relays circumstances where evidence of consent is inadmissible: if the victim,

(a) Has been subjected to or threatened with or has had reason to fear violence, duress, detention or psychological oppression; or

(b) Reasonably believed that if the victim did not submit, another might be so subjected, threatened or put in fear.

¹⁸³¹ *The Prosecutor v. Jean-Paul Akayesu*, Judgment of 2 September 1998, para. 687.

victim as he or she suffers both bodily and mental harm”.¹⁸³² It further drew an analogy to the crime of torture and noted that rape is “like torture, rape is used for such purposes as intimidation, degradation, humiliation, discrimination, punishment, control or destruction of a person. Like torture, rape is a violation of personal dignity, and rape in fact constitutes torture”.¹⁸³³ The broad definition of torture in the UN Convention against Torture inspired the Tribunal, which asserted that the Convention “does not catalogue specific acts in its definition of torture, focusing rather on the conceptual framework of state sanctioned violence. This approach is more useful in international law”.¹⁸³⁴ The construction of the definition of torture as a concept rather than a list of acts was thus deemed appropriate. In applying a broad understanding of rape, the definition was determined as: “*A physical invasion of a sexual nature, committed on a person under circumstances which are coercive.*”¹⁸³⁵

The Trial Chamber argued that the amount of coercion required does not need to amount to physical force since “threats, intimidation, extortion and other forms of duress which prey on fear or desperation may constitute coercion, and coercion may be inherent in certain circumstances, such as armed conflict or the military presence of Interhamwe among refugee Tutsi women at the bureau communal”.¹⁸³⁶ The particular context of war therefore warranted a broad understanding of coercion, further emphasising the particular nature of sexual violence in armed conflicts and the necessity of a contextual approach. As such, the ‘coercive’ element is automatically fulfilled in armed conflict and the only element needed to be proven is the “physical invasion of a sexual nature”. There would not need to be an establishment of either force or non-consent. The focus shifted from the common view of evaluating the subjective state of the perpetrator and victim to focusing on the objective surrounding facts, in effect concluding that no individual consents to sexual relations under such circumstances. The conceptual approach would also preclude witness testimonies of the explicit details of the rape, with the Tribunal noting “...the cultural sensitivities involved in public discussion of intimate matters and recalls the painful reluctance and inability of witnesses to disclose graphic anatomical details of sexual violence they endured”.¹⁸³⁷

¹⁸³² *The Prosecutor v. Jean-Paul Akayesu*, Judgment of 2 September 1998, para. 731.

¹⁸³³ *Ibid.*, para. 687.

¹⁸³⁴ *Ibid.*, para. 597.

¹⁸³⁵ *Ibid.*, para. 688. Emphasis added.

¹⁸³⁶ *Ibid.*, para. 688.

¹⁸³⁷ *Ibid.*, para. 687.

The definition is also purposefully gender-neutral, applying both to men and women as victims. The Tribunal, in a gender-conscious manner, moved away from the restrictive view that solely sexual intercourse constitutes rape and instead included also acts involving the insertion of objects and/or the use of bodily orifices not considered to be intrinsically sexual. For example, the act of thrusting a piece of wood into the sexual organs of a woman, as depicted in the witness statements, constituted rape in the Tribunal's view.¹⁸³⁸ It seems that the events in Rwanda, such as the use of objects thrust into sexual organs, which in a conservative definition would fall outside the boundaries of the offence, inspired the broad definition, and lead to a focus on the *intent* of the act, i.e. as a sexual invasion, rather than the actual technicalities of the act. This is progressive in that the definition opens up for a variety of acts that the perpetrator intended to be sexual and the victim experienced as invasive. It is therefore victim-sensitive since it uses the experience of the victim as the starting point. However, the definition is still qualified in that there needs to be a "physical invasion", not including e.g. sexual touching, which could be considered a lesser degree of sexual violence. The judgment has been criticised for its focus on 'invasion' of the body which is seen by some as referring to 'penetration'.¹⁸³⁹ However, it does not solely refer to penile penetration but also the use of other body parts and objects. Rather, 'invasion' was purposefully chosen instead of 'penetration' to focus on rape from the perspective of the victim, who is invaded, rather than the perpetrator.¹⁸⁴⁰

The legal reasoning concerning the definition is relatively sparse. It does not e.g. specify which legal systems it has relied upon in aiming to establish a general principle on the elements of rape, leading to the conclusion that non-consent is predominant. It thus diverges from the thorough decisions of the ICTY. Nevertheless, the *Akayesu* judgment has been welcomed by many who have applauded the broad definition that may lead to more possibilities for prosecution.¹⁸⁴¹ The UN Special Rapporteur on Violence against Women has stated that the definition "reconceptualises rape as an attack on an individual woman's security of person, not on the abstract notion of virtue and not as a taint on an entire family's or village's honor".¹⁸⁴² As Prosecutor Louise Arbour noted: "the judgment is truly remarkable in its breadth and vision, as well as in the

¹⁸³⁸ *The Prosecutor v. Jean-Paul Akayesu*, Judgment of 2 September 1998, para. 686.

¹⁸³⁹ Quéniwet, Noëlle, *Sexual Offenses in Armed Conflict & International Law*, p. 13.

¹⁸⁴⁰ Tonkin, Hannah, *Rape in the International Arena: The Evolution of Autonomy and Consent*, 23 U. Tas. L. Rev. 243, (2004), p. 249.

¹⁸⁴¹ Askin, Kelly, *Sexual Violence in Decisions and Indictments of the Yugoslav and Rwandan Tribunals: Current Status*, 93 Am. J. Int'l L. 97, (Jan. 1999), p. 100.

¹⁸⁴² UN Doc. E/CN.4/2001/73, 23 January 2001, para. 38.

detailed legal analysis on many issues that will be critical to the future of both ICTR and ICTY, in particular with respect to the law of sexual violence”.¹⁸⁴³ Apart from the definition, the decision is also important in that it regards rape as subsumed within the crime of genocide and crimes against humanity, and rape may therefore be prosecuted by any state on the basis of universal jurisdiction. However, the premise of the prosecution of rape as genocide is the context of an attack with intent to destroy a specific group, and the acknowledgment of the individual violation is thus subsumed in the breach against a group. As Catherine MacKinnon holds, rape must be defined in terms of its function in collective crimes and the *Akayesu* case shifts the focus of proof from individual interactions to collective realities, with an emphasis on objective factors rather than the subjective psychological state.¹⁸⁴⁴

9.2.1.2 Beyond the *Akayesu* Judgment

The definition of rape was again discussed in the *Musema* judgment in the context of genocide.¹⁸⁴⁵ Musema was the director of a tea factory and both personally attacked Tutsis as well as incited his employees to take part in the assaults. The attacks included the participation, aiding and abetting in a gang-rape. The Tribunal again noted the role of rape as a part of war tactics, stating that “acts of rape and sexual violence were an integral part of the plan conceived to destroy the Tutsi group. Such acts targeted Tutsi women, in particular, and specifically contributed to their destruction and therefore that of the Tutsi group as such”.¹⁸⁴⁶ The Trial Chamber noted the difference in the jurisprudence of both *ad hoc* tribunals in that the Chamber in the *Akayesu* case used a conceptual approach while in the *Furundzija* judgment discussed below, the ICTY adopted a mechanical definition of the *actus reus*. In comparing the two, the Trial Chamber held that the conceptual approach of rape was preferable due to the “dynamic ongoing evolution of the understanding of rape [in national jurisdictions] and the incorporation of this understanding into principles of international law”.¹⁸⁴⁷ It rejected the focus on sexual intercourse that exists in most national jurisdictions in order to allow for other acts, such as the insertion of objects and/or the use of orifices not intrinsically sexual. Again, it did not specify which legal systems it consulted. Similarly to the *Akayesu* case, the Chamber found that “...the essence

¹⁸⁴³ Press release, ICTY Office of the Prosecutor, Statement by Justice Louise Arbour, ICTY Doc. CC/PIU/342-E (4 September 1998).

¹⁸⁴⁴ MacKinnon, Catherine, *Defining Rape Internationally: A Comment on Akayesu*, 44 Colum. J. Transnat’l L 940, (2006), p. 955.

¹⁸⁴⁵ *Prosecutor v. Musema*, ICTR-96-13-I, ICTR, Judgment of 27 January 2000.

¹⁸⁴⁶ *Ibid*, para. 933.

¹⁸⁴⁷ *Ibid*, para. 228.

of rape is not the particular details of the body parts and objects involved, but rather the aggression that is expressed in a sexual manner under conditions of coercion”.¹⁸⁴⁸ As such, a determination of what constitutes rape will be performed on a case by case basis. It found the definition of rape in the *Akayesu* case useful since it “clearly encompasses all the conduct” covered by the *Furundzija* definition of rape, but allows for more categories of violations. Accordingly, a conceptual definition will better accommodate evolving norms of criminal justice, e.g. noted by the expansion of encompassing also oral sexual acts into the rape definition.¹⁸⁴⁹

Subsequent case law demonstrates ambivalence by the Tribunal, at intervals arguing for retaining the conceptual approach and alternately adopting the approach of the ICTY in its *Kunarac* decision, discussed below. In *Kunarac*, the ICTY held that solely a non-consent based standard would fully acknowledge the sexual autonomy of the victim. In *Semanza*, the ICTR confirmed that non-consent shall be “assessed within the context of the surrounding circumstances”, largely borrowing the approach by the ICTY in the *Kunarac* case.¹⁸⁵⁰ The following day, the Trial Chamber yet again applied the *Akayesu* definition in the *Niyitegeka* case, albeit not finding the defendant guilty of the crime.¹⁸⁵¹ A few months later, the Tribunal in *Kajelijeli* stated:

“Given the evolution of the law in this area, culminating in the endorsement of the *Furundzija/Kunarac* approach by the ICTY Appeals Chamber, the Chamber finds the latter approach of persuasive authority and hereby adopts the definition as given in *Kunarac* as quoted above. The mental element of the offence of rape as a crime against humanity is the intention to effect the above described sexual penetration, with the knowledge that was being done without the consent of the victim.”¹⁸⁵²

This was affirmed in the *Kamuhanda* case in 2004, where the Tribunal yet again reviewed the previous jurisprudence of both the ICTR and the ICTY in defining rape. It explained the difference between “a physical invasion of a sexual nature”, i.e. the conceptual definition of *Akayesu*, and “any act of a sexual

¹⁸⁴⁸ *Prosecutor v. Musema*, Judgment of 27 January 2000, para. 226.

¹⁸⁴⁹ *Ibid*, para. 228.

¹⁸⁵⁰ *The Prosecutor v. Laurent Semanza*, Case No. ICTR-97-20-T, ICTR, Judgment of 15 May 2003, para. 344.

¹⁸⁵¹ *The Prosecutor v. Eliezer Niyitegeka*, Case No. ICTR-96-14-T, ICTR, Judgment of 16 May 2003.

¹⁸⁵² *The Prosecutor v. Juvénal Kajelijeli*, Case No. ICTR-98-44A-T, ICTR, Judgment of 1 December 2003, para. 914.

nature”, as the difference between rape and sexual assault.¹⁸⁵³ Concluding that the ICTY had changed its course in the *Kunarac* case from the approach reflected in the *Furundzija* judgment, it found the non-consent-based approach more convincing. It also ruled that *mens rea* was understood to mean the intention to effect sexual penetration and the knowledge that it occurs without consent.¹⁸⁵⁴

The *Muhimana* case further exemplifies the systematic nature of rape in the conflict.¹⁸⁵⁵ Muhimana was held responsible for both directly perpetrating rape and for inciting and commanding the execution of sexual violence, which led to a finding of rape as a crime against humanity. In a certain incident, Muhimana invited others to see “what naked Tutsi girls look like” following the rape¹⁸⁵⁶ and also spread the legs of a nurse after raping her at the hospital and stated that “[e]veryone should see what the vagina of a Tutsi woman looks like”.¹⁸⁵⁷ The Tribunal further discussed the issue of non-consent, and the Trial Chamber held that “coercion is an element that may obviate the relevance of consent as an evidentiary factor in the crime of rape” and the context of international crimes “will be almost universally coercive, thus vitiating true consent”.¹⁸⁵⁸ It thereby found that a lack of consent was not necessary as an element of the crime. Instead, lack of consent is categorised as evidence of coercion. Interestingly, the ICTY in its later case law qualifies force as evidence of lack of consent, giving the impression that the concepts of force, non-consent and coercion are interchangeable elements. However, coercion must necessarily be a broader concept that includes both force and elements encompassed in non-consent.

The Trial Chamber concluded that the *Akayesu* approach and the definition in the *Kunarac* case were not mutually exclusive but that *Kunarac* provided “additional details on the constituent elements of acts considered to be rape”.¹⁸⁵⁹ As such: “Whereas *Akayesu* referred broadly to a ‘physical invasion of a sexual nature’, *Kunarac* went on to articulate the parameters of what would constitute a physical invasion of a sexual nature amounting to rape.”¹⁸⁶⁰ It therefore supported the conceptual approach in *Akayesu* since it also encompassed the

¹⁸⁵³ *The Prosecutor v. Jean de Dieu Kamuhanda*, Case No. ICTR-95-54A-T, ICTR, Judgment of 22 January 2004, para. 546.

¹⁸⁵⁴ *Ibid.*, paras. 707-709.

¹⁸⁵⁵ *The Prosecutor v. Mikaeli Muhimana*, Case No. ICTR-95-1B-T, ICTR, Judgment of 28 April 2005.

¹⁸⁵⁶ *Ibid.*, para. 33.

¹⁸⁵⁷ *Ibid.*, para. 265.

¹⁸⁵⁸ *The Prosecutor v. Mikaeli Muhimana*, Summary of Judgment, para. 31.

¹⁸⁵⁹ *Ibid.*, paras. 34-35.

¹⁸⁶⁰ *The Prosecutor v. Mikaeli Muhimana*, para. 559.

elements in *Kunarac*.¹⁸⁶¹ It hereby aimed to reconcile two rather distinct definitions of the two *ad hoc* tribunals. In the case, the Prosecution argued that the incident where a victim was disembowelled by cutting her open with a machete from her breasts to her vagina constituted rape. However, the Chamber found that while the act interfered with the sexual organs, it did not constitute a physical invasion of a *sexual* nature.¹⁸⁶²

The Tribunal in *Gacumbitsi* of 2006 again had reason to explore the parameters of the definition of rape and the concept of non-consent.¹⁸⁶³ Gacumbitsi, as a bourgmestre in the Rusumo commune, played a major role in organising a campaign against the Tutsis by instructing lower-level government officials to, in turn, incite the Hutu to publicly rape and kill Tutsis. His instructions directly led to attacks following the meetings. Witness testimony found to be credible by the Tribunal relayed an incident where the accused had driven around, using a megaphone instructing young Hutu men to have sex with young girls and “in the event they resisted, they had to be killed in an atrocious manner”.¹⁸⁶⁴ Subsequent to the announcement, a group of attackers raped eight Tutsi women and girls. Witness TAP testified that a group of approximately 30 men attacked her mother and drove a stick through the mother’s genitals to her head. The same witness was raped by three men and a branch slightly longer than a meter was driven into her genitals. During the attack, the assailants stated that “in the past Tutsi women and girls hated Hutu men and refused to marry them, but now they were going to abuse the Tutsi girls and women freely”.¹⁸⁶⁵ Witness TAQ was raped while heavily pregnant. The attacker asked if the “child she was bearing was a boy or a girl, for he would have disembowelled her in order to kill the child if it was a boy”.¹⁸⁶⁶

Gacumbitsi was found guilty of genocide and rape as a crime against humanity by the Tribunal, which led the Tribunal to review previous jurisprudence on rape, concluding that the *Akayesu* and *Kunarac* judgments must be the prevailing views on rape, and albeit displaying different approaches, the cases were reconcilable. The victim’s lack of consent was established by the fact that Gacumbitsi had threatened to kill them in an atrocious manner if they resisted and that the victims who escaped were consequently attacked.¹⁸⁶⁷

¹⁸⁶¹ *The Prosecutor v. Mikaeli Muhimana*, para. 551.

¹⁸⁶² *Ibid*, para. 557. Rather, instead it was analysed under the classification of murder.

¹⁸⁶³ *The Prosecutor v. Sylvestre Gacumbitsi*, Case No. ICTR-2001-64-T, ICTR, Judgment of 17 June 2004.

¹⁸⁶⁴ *Ibid*, para. 215

¹⁸⁶⁵ *Ibid*, paras. 207-208.

¹⁸⁶⁶ *Ibid*, para. 203.

¹⁸⁶⁷ Summary Judgment, para. 48.

However, the Trial Chamber was not explicit in whether these threats were necessary to establish non-consent. It is likely that it followed the *Kunarac* standard in viewing threats of force merely as evidence of non-consent.

The case was brought before the Appeals Chamber where the Prosecution sought a clarification as to the law on rape as a crime against humanity or genocide. Because of the disparity in the case law developed by the ICTR, interchangeably using two different definitions of rape, the Prosecutor explicitly requested a clarification of the matter. According to the Prosecution, neither non-consent of the victim nor the perpetrator's knowledge of this should be elements of the crime proved by the prosecution but rather, in line with the limitations of Rule 96 of the Rules of Procedure and Evidence, consent should instead be considered an affirmative defence. The importance of the question is that if non-consent is an element of the definition of rape, the Prosecution bears the burden of proving the element beyond reasonable doubt. If non-consent instead is a possible affirmative defence, the accused would carry the burden of producing evidence as support for the defence that the victim did consent. In short, the matter of non-consent is a matter of which side has the burden of proof. The Prosecution argued that rape only comes into the Tribunal's jurisdiction in the context of such serious situations as genocide, armed conflict or a widespread or systematic attack against a civilian population, circumstances where genuine consent would be impossible.¹⁸⁶⁸ The Appeals Chamber did note that the Trial Chamber had found the circumstance so coercive as to negate consent and that there was no complaint on the result, but agreed that the question should be clarified since it was a matter of "general significance" for the Tribunal's jurisprudence.¹⁸⁶⁹

The Chamber relied greatly on the *Kunarac* decision and concluded in no uncertain terms that non-consent is an element of rape as a crime against humanity. It explained that Rule 96 refers to consent as a defence but does not define the elements of crimes of which the Tribunal has jurisdiction, which instead are specified in the Statute. It quoted the Trial Chamber in *Kunarac*:

"The reference in the Rule (96) to consent as a 'defence' is not entirely consistent with traditional legal understandings of the concept of consent in rape. Where consent is an aspect of the definition of rape in national jurisdictions, it is generally understood...to be absence of consent which is an element of the crime. The use of the word 'defence', which in its technical sense carries an implication of the shifting of the burden of proof to the accused, is inconsistent with this understanding. The Trial Chamber does not

¹⁸⁶⁸ *The Prosecutor v. Sylvestre Gacumbitsi*, Case No. ICTR-2001-64-A, ICTR, Appeal Judgment of 7 July 2006, para. 148.

¹⁸⁶⁹ *Ibid.*, para. 150.

understand the reference to consent as a ‘defence’ in Rule 96 to have been used in this technical way.”¹⁸⁷⁰

As such, Rule 96 does not change the definition of the crime of rape but rather defines the circumstances of when evidence of consent is admissible.

Furthermore: “The Prosecution can prove non-consent beyond reasonable doubt by proving the existence of coercive circumstances under which meaningful consent is not possible. As with every element of any offence, the Trial Chamber will consider all of the relevant and admissible evidence in determining whether, under the circumstances of the case, it is appropriate to conclude that non-consent is proven beyond reasonable doubt. But it is not necessary, as a legal matter, for the Prosecution to introduce evidence concerning the words or conduct of the victim or the victim’s relationship to the perpetrator. Nor need it introduce evidence of force. Rather, the Trial Chamber is free to infer non-consent from the background circumstances, such as an ongoing genocide campaign or the detention of the victim.”¹⁸⁷¹

The Appeals Chamber hereby found a practical solution to focus on the non-consent of the victim while taking into consideration the commonly coercive circumstances of armed conflict, which negates genuine consent. This entails a larger focus on the context rather than on the victim, which avoids examining the behaviour of the victim in situations of obvious coercion, e.g. detention, further causing humiliation. Importantly, it dismissed the argument by the Prosecution that the fact that the case falls within the jurisdiction of the Tribunal is sufficient to establish non-consent, i.e. the sexual act took place in the context of genocide, armed conflict or a widespread or systematic attack against a civilian population.¹⁸⁷² Rather, the Prosecution still bears the burden of proving non-consent and knowledge beyond reasonable doubt. However, the Appeals Chamber acknowledged that, in general, the context of the international crimes constitutes sufficiently coercive circumstances.

As for *mens rea*, the Trial Chamber re-confirmed the requirement that the perpetrator is aware, or had reason to be aware, of the coercive circumstances that negated the possibility of genuine consent.¹⁸⁷³

¹⁸⁷⁰ *The Prosecutor v. Sylvestre Gacumbitsi*, Case No. ICTR-2001-64-A, ICTR, Appeal Judgment of 7 July 2006, para. 154, *Prosecutor v. Kunarac, Kovac and Vukovic*, Judgment of 22 February 2001, para. 463. Emphasis added.

¹⁸⁷¹ *The Prosecutor v. Sylvestre Gacumbitsi*, Appeal Judgment of 7 July 2006, para. 155.

¹⁸⁷² *Ibid*, para. 153

¹⁸⁷³ *The Prosecutor v. Sylvestre Gacumbitsi*, Judgment of 17 June 2004, para. 157.

In the case of *Muvunyi* in 2006, the Tribunal again noted that “[t]he jurisprudence of the *ad hoc* Tribunals reveals a rather chequered history of the definition of rape”.¹⁸⁷⁴ It similarly to the *Muhimana* case confirmed that the *Akayesu* and *Kunarac* judgments were not incompatible and noted the following regarding the purpose of the prohibition of rape:

“The Chamber...considers that the underlying objective of the prohibition of rape at international law is to penalise serious violations of sexual autonomy. A violation of sexual autonomy ensues whenever a person is subjected to sexual acts of the genre listed in *Kunarac* to which he/she has not consented, or to which he/she is not a voluntary participant. Lack of consent therefore continues to be an important ingredient of rape as a crime against humanity. The fact that unwanted sexual activity takes place under coercive or forceful circumstances may provide evidence of lack of consent on the part of the victim.”¹⁸⁷⁵

Since both the *Akayesu* and *Kunarac* approaches reflect this objective of protecting sexual autonomy, they are arguably reconcilable.

9.2.1.3 Conclusions

In conclusion, the ICTR has applied two distinct definitions of the crime of rape simultaneously, using a conceptual framework in the cases of *Akayesu* and *Muhimana*, while adopting a definition based on the ICTY’s decision in *Kunarac*, using non-consent as the fundamental element of rape in several cases: *Semanza*, *Kajelijeli*, and *Kamahunda*. The latest cases, *Gacumbitsi* and *Muvunyi*, have further cemented the impression that the *Kunarac* definition is leading also in the jurisprudence of the ICTR. Though appearing to be highly divergent solutions in defining the crime, the Tribunal has continuously held that a non-consent based definition is not in opposition to a conceptual understanding focusing on coercion, but rather that the acts covered in the *Kunarac* decision would be included in such a wide definition. The *Akayesu* approach, however, would in its effort to avoid specificity most likely entail a wider scope of *actus reus*. Though the *Akayesu* definition allows flexibility and in an idealistic manner aims, to a certain extent, to use the experience of the victim in determining the scope of rape, it is also unclear and may be in violation of the principles of legal certainty and specificity. The fact that the Tribunal has primarily employed a non-consent based standard has been criticised from a gender perspective in that no other acts of crimes against humanity need to be

¹⁸⁷⁴ *The Prosecutor v. Tharcisse Muvunyi*, Case No. ICTR-2000-55A-T, ICTR, Judgment of 12 September 2006, para. 517.

¹⁸⁷⁵ *Ibid.*, para. 521.

proved non-consensual. In the words of Catherine MacKinnon: “With sex, it seems, women can consent to what would otherwise be a crime against their humanity...”.¹⁸⁷⁶ In the following, the jurisprudence of the ICTY will be discussed, further exploring the boundaries of a definition of rape in the international criminal law context and its relation to the case law of the ICTR.

9.2.2 ICTY: New Approaches in Defining Rape

The establishment of the ICTY and its case law has been monumental in the legacy of prosecuting wartime sexual violence and developing the relevant regulations on international law. Various reports supported by fact-finding missions conducted in the conflict of former Yugoslavia reveal evidence of widespread and systematic rape, clearly committed with the purpose of ethnic cleansing.¹⁸⁷⁷ Estimates of the extent of sexual violence vary but demonstrate numbers of up to 60,000 rapes being committed during the armed conflict.¹⁸⁷⁸ The most common form of attack were rapes in detention camps, military headquarters, in apartments maintained as soldier’s residences and at times in the homes of the victims.¹⁸⁷⁹ Detention sites were also established solely for the purpose of sexual abuse of women, with separate camps for men and women. Both men and women were sexually assaulted by soldiers, camp guards, paramilitaries or even civilians that could enter the camp and choose women. Gang-rapes were common and torture accompanied most of the reported rapes. It was not uncommon for the assaults to occur before other detainees or for detainees to be forced to rape each other. Victims were at times sexually assaulted by foreign objects, such as broken glass bottles and guns, and some men were castrated.¹⁸⁸⁰ Sexual assault would also occur in conjunction with fighting and often in public in order to convey a message to the opposing party. Propaganda campaigns were observed by NGOs, enticing armed combatants to commit rape and other forms of sexual violence.¹⁸⁸¹

¹⁸⁷⁶ MacKinnon, Catherine, *Defining Rape Internationally: A Comment on Akayesu*, p. 952. This will be discussed further below.

¹⁸⁷⁷ Annex: Final report of the Commission of Experts Pursuant to Security Council Resolution 780, (1992), UN SCOR, 49th Sess., UN. Doc. S/1994/674, paras. 250-251, Human Rights Watch, Federal Republic of Yugoslavia - Kosovo: Rape as a Weapon of “Ethnic Cleansing”, 2000.

¹⁸⁷⁸ Ellis, Mark, *Breaking the Silence: Rape as an International Crime*, p. 226.

¹⁸⁷⁹ *Prosecutor v. Kunarac, Kovac and Vukovic*, Appeal Judgment of 12 June 2002, para. 132.

¹⁸⁸⁰ UN Doc. S/1994/674/Add.2 (Vol.V), 28 Dec. 1994, Rape and Sexual Assault, Final Report of the UN Commission of Experts Established Pursuant to Security Council Resolution 780, (1992), pp. 6 & 8.

¹⁸⁸¹ Boon, Kristen, *Rape and Forced Pregnancy Under the ICC Statute: Human Dignity, Autonomy, and Consent*, p. 629.

The UN Commission of Experts investigating the situation in 1994 concluded that though some cases of rape were the result of actions of individuals acting without orders, “[m]any more cases seem to be part of an overall pattern. These patterns strongly suggest that a systematic rape and sexual assault policy exists...”¹⁸⁸² The indication of a plan was based on the fact that the rapes occurred simultaneously as military action or activities to displace certain ethnic civilian groups. Testimony of victims also recorded that the perpetrators in connection to attacks at times stated that they were ordered to rape the victims or were performing the assaults in order for the families not to want to return to the area. The Commission unequivocally found that most reports of rape contained an ethnic motivation.¹⁸⁸³

Sexual assault was reportedly committed by all warring factions and was not limited to a particular ethnic group. However, the considerable majority of the victims were Bosnian Muslim with the majority of alleged perpetrators Bosnian Serbs.¹⁸⁸⁴ The primary targets of rape in the Yugoslavia conflict were women of childbearing age, which accorded with the purpose of impregnating women of a certain ethnic origin to halt procreation of this particular group. Pregnant women were subsequently often detained until it was too late to obtain an abortion. Also prominent members of the community and educated women were likely targets.¹⁸⁸⁵ The trauma pursuant to the rapes was particularly severe among the Muslim community in Bosnia, where it is customary for women to remain chaste until marriage.¹⁸⁸⁶ The Commission noted that the “rapes and sexual assaults are conducted in ways that emphasize the shame and humiliation of the assault - such as forcing family members to rape each other, raping victims in front of family members, including children, and raping persons in public places...”¹⁸⁸⁷ The ostracism and rejection by their community that often followed the sexual assault heightened the ordeal faced by the women upon return, causing shame and humiliation, traumatising certain women to the point of inability to conceive or leading to unwanted pregnancies and fewer marriage possibilities. The Commission in fact stated that rape is a particularly effective means of ethnic cleansing in that “[r]ape...harm[s] not only the body of the victim. The more significant harm is the feeling of total loss of control over the most intimate and

¹⁸⁸² UNSC 1994: Annex IX Conclusions, p. 9.

¹⁸⁸³ UN Doc. S/1994/674/Add.2 (Vol.V), 28 December 1994, p. 8.

¹⁸⁸⁴ *Ibid.*, p. 6.

¹⁸⁸⁵ *Ibid.*, pp. 7-8.

¹⁸⁸⁶ *Mass Rape: The War Against Women in Bosnia-Herzegovina*, ed. Stiglmeier, Alexandra, p.X.

¹⁸⁸⁷ UN Doc. S/1994/674/Add.2 (Vol.V), 28 December 1994, p. 8.

personal decisions and bodily functions. This loss of control infringes on the victim's human dignity..."¹⁸⁸⁸

Strong similarities thus existed between the forms and purposes of sexual violence in the Rwanda and Yugoslavia conflicts. The United Nations Security Council, as in the Rwanda conflict, acted under Chapter VII of the UN Charter when establishing an *ad hoc* tribunal. The Statute of the ICTY was adopted by a resolution of the UN Security Council meanwhile the Rules of Procedure and Evidence were drafted by the judges of the Tribunal. Rape is explicitly mentioned solely as a crime against humanity in the Statute, unlike the Statute of the ICTR.¹⁸⁸⁹ The UN Secretary-General stated that the Statute included only crimes "undoubtedly" customary under international law "so that the problems of adherence of some but not all States to specific conventions does not arise".¹⁸⁹⁰ Since precedent from international criminal trials was scant, the judges have to a great extent relied on national penal codes and procedural rules, both from common law and civil law traditions, while at the same time acknowledging the particular circumstances of the conflict in former Yugoslavia.¹⁸⁹¹

9.2.2.1 The *Furundzija* Judgment - A Focus on Force or the Threat of Force

In the *Celebici* judgment the Tribunal interpreted rape as a form of torture.¹⁸⁹² It was the first case where the Tribunal considered a definition of rape and though

¹⁸⁸⁸ UN Doc. S/1994/674/Add.2 (Vol.V), 28 December 1994, p. 10. In the *Karadzic and Mladic* decision, the Trial Chamber noted the following of the role of sexual violence: "On the basis of the features of all these sexual assaults, it may be inferred that they were part of a widespread policy of ethnic cleansing. The victims were mainly "non-Serbian" civilians, the vast majority being Muslims. Sexual assault occurred in several regions of Bosnia and Herzegovina, in a systematic fashion and using recurring methods (e.g. gang rape, sexual assault in camps, use of brutal means, together with other violations of international humanitarian law). They were performed together with an effort to displace civilians and...to increase the shame and humiliation of the victims and of the community they belonged to in order to force them to leave. It would seem that the aim of many rapes was enforced impregnation; several witnesses also said that the perpetrators of sexual assault-often soldiers - had been given orders to do so and that camp commanders and officers had been informed thereof and participated therein." *Prosecutor v. Karadzic and Mladic*, Review of the Indictment Pursuant to Rule 61 of the Rules of Procedure and Evidence, No. IT-95-5-R61 and IT-95-18-R61, 11 July 1996, Transcript, p. 960.

¹⁸⁸⁹ UN Doc. S/25704 at 36, adopted by the Security Council on 25 May 1993, UN Doc S/RES/827 (1993), Article 5(g).

¹⁸⁹⁰ Report of the Secretary-General, UN Doc. S/25704, para. 34.

¹⁸⁹¹ Fitzgerald, Kate, *Problems of Prosecution and Adjudication of Rape and other Sexual Assaults Under International Law*, p. 639.

¹⁸⁹² *Prosecutor v. Delalic et al, (Celebici Camp)*, Case No. IT-96-21-T, Judgment of 16 November 1998. See further Chapter 9.2.2.

it does not analyse rape beyond concurring with the *Akayesu* judgment, it is important from the aspect in that it supported a conceptual understanding of rape and constitutes one of three definitions adopted by the Tribunal.¹⁸⁹³

Furundzija was the first war crimes prosecution in which rape and sexual assault was the sole charge.¹⁸⁹⁴ The case is also of particular interest because of its development of the definition of rape and the fact that the case was built on the rape of a single victim, demonstrating that rape does not need to be widespread in order to constitute a serious violation of international criminal law. The case concerned a Bosnian Muslim woman who was arrested during the conflict in central Bosnia Herzegovina and brought to the headquarters of the Croatian Defense Council. During the course of her interrogation at the police station, the victim was raped repeatedly in the presence of the accused Furundzija, a local commander of the so-called “Jokers”, a special unit of the military police. Furundzija encouraged the assault, albeit not participating physically, and was therefore charged with two counts of violations of the laws or customs of war, torture and outrages upon personal dignity, including rape. In aiming to define rape, the ICTY first established that a rule on the prohibition of rape had come into being at the customary level, referring to the Lieber Code, Martens Clause, the Nuremberg and Tokyo Trials as well as the 1949 Geneva Conventions.¹⁸⁹⁵ It also noted the prohibition of rape within international human rights law, as a violation of the prohibition of torture and physical integrity.¹⁸⁹⁶ The prohibition of rape *per se* is thus regulated by customary international law.

¹⁸⁹³ *Prosecutor v. Delalic et al. (Celebici Camp)*, Judgment of 16 November 1998, para. 479. It confirmed that vaginal and anal penetration by the penis under coercive circumstances constituted rape and indicated that oral sex also could constitute such an offence. See paras. 940, 962 & 1066.

¹⁸⁹⁴ *Prosecutor v. Furundzija*, Judgment of 10 December 1998.

¹⁸⁹⁵ *Ibid.*, paras. 168-169 stating: “The prohibition of rape and serious sexual assault in armed conflict has also evolved in customary international law. It has gradually crystallised out of the express prohibition of rape in Article 44 of the Lieber Code and the general provisions contained in Article 46 of the Regulations annexed to Hague Convention IV, read in conjunction with the ‘Martens clause’ laid down in the preamble to the Convention. While rape and sexual assault were not specifically prosecuted by the Nuremberg Tribunal, rape was expressly classified as a crime against humanity under Article II (1) (c) of Control Council no. 10. The Tokyo International Military Tribunal convicted Generals Toyoda and Matsui of command responsibility for violations of the laws or customs of war committed by their soldiers in Nanking, which included widespread rapes and sexual assaults. The former Foreign Minister of Japan, Hirota, was also convicted for these atrocities. This decision and that of the United States Military Commission in Yamashita, along with the ripening of the fundamental prohibition of ‘outrages upon personal dignity’ laid down in Common Article 3 into customary international law, has contributed to the evolution of universally accepted norms of international law prohibiting rape as well as serious sexual assault.”

¹⁸⁹⁶ *Prosecutor v. Furundzija*, Judgment of 10 December 1998, paras. 170-171.

As for the definition of rape, the Tribunal stated that no elements other than a few could be evinced from international treaty or customary law, general principles of international criminal law or general principles of international law. General principles therefore had to be derived from other sources. The Trial Chamber found that “[t]o arrive at an accurate definition of rape based on the criminal law of specificity...it is necessary to look for principles of criminal law common to the major legal systems of the world”. The general principles could be “derived, with all due caution, from national laws”.¹⁸⁹⁷ At the outset, it declared that it would evaluate “general concepts and legal institutions common to all the major legal systems of the world”, including both common and civil law countries, avoiding a too extensive reliance on one legal tradition.¹⁸⁹⁸ Considering the varying approaches found in the two separate legal systems, and even within the systems, it was an ambitious exercise. It did note that such an assessment needed to be performed with care since a comparison

“presupposes a process of identification of the common denominators in these legal systems so as to pinpoint the basic notions they share; (ii) since ‘international trials exhibit a number of features that differentiate them from national criminal proceedings’, account must be taken of the specificity of international criminal proceedings when utilising national law notions. In this way a mechanical importation or transposition from national law into international criminal proceedings is avoided, as well as the attendant distortions of the unique traits of such proceedings.”¹⁸⁹⁹

The Tribunal found that though sources of international law provided no insight into a definition of rape, and national penal codes were the sole possibility for a clarification, the separate systems contained such major differences that a definition of rape could not be automatically adopted because it existed in the majority of states. Further considerations would thus need to be made. In looking at domestic law it noted the following:

¹⁸⁹⁷ *Prosecutor v. Furundzija*, Judgment of 10 December 1998, para. 177, The penal codes examined were those of the following countries: Chile, China, Germany, Japan, SFR of Yugoslavia, Zambia, Austria, France, Italy, Argentina, Pakistan, India, South Africa, Uganda, New South Wales, The Netherlands, England and Wales and Bosnia and Herzegovina. As concerns general principles as a source, reviewing domestic laws and jurisprudence is only employed if such principles cannot be drawn from either general principles of international criminal law or general international law in this category of a source. See e.g. Cassese, Antonio, *International Criminal Law*, Oxford University Press, 2nd ed. (2008), p. 22.

¹⁸⁹⁸ *Ibid*, para. 178.

¹⁸⁹⁹ *Ibid*, para. 178.

“The Trial Chamber would emphasise at the outset, that a trend can be discerned in the national legislation of a number of States of broadening the definition of rape so that it now embraces acts that were previously classified as comparatively less serious offences, that is sexual or indecent assault. This trend shows that at the national level States tend to take a stricter attitude towards serious forms of sexual assault; the stigma of rape now attaches to a growing category of sexual offences, provided of course they meet certain requirements, chiefly that of forced physical penetration.”¹⁹⁰⁰

It found major variations in national laws with respect to the putative victim, whether it could be committed against a victim of either sex or solely women, as well as whether penetration should be an element of rape. There were major discrepancies in the approach to forceful oral sex in all jurisdictions that were evaluated, where in certain states it was considered rape but in others only sexual assault. Though noting that most legal systems in common law and civil law traditions consider rape to constitute forcible sexual penetration of the human body with a penis or other objects into the vagina or anus, it decided to also include forced oral penetration.¹⁹⁰¹ While not finding a general principle in domestic laws due to the disparate attitudes, it instead focused on the concept of the protection of human dignity. The Tribunal argued as follows:

“The Trial Chamber holds that the forced penetration of the mouth by the male sexual organ constitutes a most humiliating and degrading attack upon human dignity. The essence of the whole corpus of international humanitarian law as well as human rights law lies in the protection of the human dignity of every person, whatever his or her gender. The general principle of respect for human dignity is the basic underpinning and indeed the very *raison d'être* of international humanitarian law and human rights law, indeed in modern times it has become of such paramount importance as to permeate the whole body of international law. This principle is intended to shield human beings from outrages upon their personal dignity, whether such outrages are carried out by unlawfully attacking the body or by humiliating and debasing the honour, the self-respect or the mental well being of a person. It is consonant with this principle that such an extremely serious sexual outrage as forced oral penetration should be classified as rape.”¹⁹⁰²

The accused raised the complaint that categorising forced oral sex as rape rather than sexual assault would constitute a breach of the general principle of *nullum crimen sine lege* since it was too liberal an expansion of traditional

¹⁹⁰⁰ *Prosecutor v. Furundzija*, Judgment of 10 December 1998, para. 179.

¹⁹⁰¹ *Ibid.*, para. 181.

¹⁹⁰² *Ibid.*, para. 183.

notions of rape.¹⁹⁰³ The argument was, however, rejected as the Tribunal asserted:

“It is not a question of criminalising acts which were not criminal when they were committed by the accused, since forcible oral sex is in any event a crime, and indeed an extremely serious crime...[I]n prosecutions before the Tribunal forced oral sex is invariably an aggravated sexual assault as it is committed in times of armed conflict on defenceless civilians; hence it is not simple sexual assault but sexual assault as a war crime or crime against humanity...”¹⁹⁰⁴

The accused also argued that a greater stigma attaches to being a convicted rapist rather than a convicted sexual assailant, and the classification of the act was therefore of the utmost importance. The Tribunal rejected also this argument with reference to the principle of human dignity insisting that

“...one should bear in mind the remarks above to the effect that forced oral sex can be just as humiliating and traumatic for a victim as vaginal or anal penetration. Thus the notion that a greater stigma attaches to a conviction for forcible vaginal or anal penetration than to a conviction for forcible oral penetration is a product of questionable attitudes. Moreover any such concern is amply outweighed by the fundamental principle of protecting human dignity, a principle which favours broadening the definition of rape.”¹⁹⁰⁵

The Tribunal hereby expounded upon the concept of human dignity and stressed that this principle must be guiding in determining the boundaries of a definition of rape. However, not all violations of a sexual nature that are inconsistent with the principle of human dignity should be considered rape. The Tribunal held that “such an extremely serious sexual outrage” as forced oral penetration constitutes rape, i.e. less grave violations of human dignity could be considered sexual assault. Though the Tribunal liberally applied the definition of rape to also forceful oral penetration, it was not extended to penetration by the perpetrator’s tongue or fingers, which could be encompassed by the *Akayesu* approach.

Specificity and accuracy in defining the *actus reus* was viewed as a necessity to provide essential due process guarantees, thus the Trial Chamber opted for a more detailed definition. It did emphasise the importance in distinguishing

¹⁹⁰³ *Prosecutor v. Furundzija*, Judgment of 10 December 1998, para. 184.

¹⁹⁰⁴ *Ibid*, para. 184.

¹⁹⁰⁵ *Ibid*, para. 184. Emphasis added.

between rape, which is specified as a crime against humanity in the ICTY Statute, and other less grave forms of sexual assault, which could be prosecuted as “other inhumane acts”. It therefore stressed that rape is to be regarded as “the most serious manifestation of sexual assault”.¹⁹⁰⁶ The elements of rape in international law are considered the following:

- “(i) the sexual penetration, however slight:
 - of the vagina or anus of the victim by the penis of the perpetrator or any other object used by the perpetrator; or
 - of the mouth of the victim by the penis of the perpetrator;
- (ii) by coercion or force or threat of force against the victim or a third person.”¹⁹⁰⁷

All laws that were analysed contained an element of either non-consent, force or coercion, the three main criminal elements of most rape definitions in domestic laws, even though the wording varied considerably.¹⁹⁰⁸ The issue of consent was only mentioned in passing when the Tribunal proclaimed that “any form of captivity vitiates consent”.¹⁹⁰⁹ Though the Trial Chamber in its comparison of national laws concluded that non-consent is one of the most common elements, it still found that, despite discrepancies, “...most legal systems in the common and civil law worlds consider rape to be the forcible sexual penetration of the human body...”¹⁹¹⁰ The definition is purposefully gender-neutral, speaking in terms of ‘victim’ and ‘perpetrator’, motivated by the facts of the conflict in former Yugoslavia, which also saw male victims of rape.

In conclusion, the Tribunal chose a technical and clearly defined definition compatible with the principles of legality and specificity while progressively discussing the boundaries of rape in the context of human dignity. As viewed, the approach by the ICTY in this case was conducted in a distinctly different manner than by the ICTR in the *Akayesu* judgment, preferring a more careful positivist examination, and providing a thorough legal basis when reviewing international treaties, customary law as well as jurisprudence and domestic legislation. The *Akayesu* decision had been rendered solely a few months prior to the judgment of *Furundzija*, but the conceptual approach established by the ICTR was fundamentally rejected in order to avoid the criticism subsequent to the *Akayesu* case for lacking in clarity. The *Furundzija* judgment has, however, also been criticised for being too narrow in its focus on penetration, which could

¹⁹⁰⁶ *Prosecutor v. Furundzija*, Judgment of 10 December 1998, para. 175.

¹⁹⁰⁷ *Ibid.*, para. 185.

¹⁹⁰⁸ *Ibid.*, para. 180.

¹⁹⁰⁹ *Ibid.*, para. 271.

¹⁹¹⁰ *Ibid.*, para. 181.

arguably reinforce gender stereotypes of sexual violence, not viewing the harm from the victim's perspective.¹⁹¹¹ The decision may also seem rather arbitrary in that the Tribunal extensively refers to human dignity as the source for determining what constitutes rape and thereby qualifies forced oral penetration as such, yet simultaneously restricts the possibilities of finding rape to solely a few specifically enumerated acts. The discussion on using human dignity as the gauge of rape is more similar to the conceptual framework in the *Akayesu* case. Though the definition has not been adopted in subsequent cases of the ICTY, it is particularly relevant in that, at the time of the creation of the ICC, the *Furundzija* judgment was the most recent definition promulgated internationally and therefore greatly influenced the ICC's Elements of Crimes.

9.2.2.2 The *Kunarac* Judgment - Rape as a Violation of Sexual Autonomy

The *Kunarac et al.* judgment of 2001 is in several ways the most groundbreaking case in the area of sexual violence in current international criminal law, as regards both the elements of rape and torture.¹⁹¹² It was the first judgment by the ICTY to recognise rape as a crime against humanity and held that "rape is one of the worst sufferings a human being can inflict upon another".¹⁹¹³ The charges were based solely on crimes of sexual violence against women. Kunarac was one of eight men accused of various forms of sexual violence committed in the Foca community and the leader of a special unit of the Serb army. When the Serb army invaded the municipality of Foca in 1992, the people in the town were gathered and separated into groups of Muslims and Croatian men, both groups placed in separate detention facilities. Women and children were systematically raped by the armed forces, either by individual perpetrators or gang-rapes.¹⁹¹⁴

In deliberating the definition of rape in international law, the Tribunal first concluded that no definition could be evinced from customary- or conventional international law, whether in international human rights law or humanitarian law. It therefore examined the definition promulgated by the Trial Chamber in the *Furundzija* case. Though the Tribunal agreed that the elements of rape

¹⁹¹¹ De Brouwer, Anne-Marie, *Supranational Criminal Prosecution of Sexual Violence: The ICC and the Practice of the ICTY and the ICTR*, p. 114.

¹⁹¹² *Prosecutor v. Kunarac, Kovac and Vukovic*, Case No. IT-96-23 & 23/1, Judgment of 22 February 2001.

¹⁹¹³ *Ibid*, para. 655.

¹⁹¹⁴ The Tribunal noted: "As the most egregious aspect of the conditions (in captivity), the victims were considered the legitimate sexual prey of their captors. Typically, the women were raped by more than one perpetrator and with a regularity that is nearly inconceivable. (Those who initially sought help or resisted were treated to an extra level of brutality)." *Prosecutor v. Kunarac, Kovac and Vukovic*, Case No. IT-96-23 & IT-96-23/1-A, Appeal Judgment of 12 June 2002, para. 132.

articulated constituted the *actus reus* of the crime of rape in international law, it found the (ii) prong requiring coercion, force or a threat of force to be too narrow. The Tribunal argued:

“In stating that the relevant act of sexual penetration will constitute rape only if accompanied by coercion or force or threat of force against the victim or a third person, the Furundzija definition does not refer to other factors which could render an act of sexual penetration non-consensual or non-voluntary on the part of the victim.”¹⁹¹⁵

The Tribunal further noted the contradiction in the *Furundzija* judgment of accepting non-consent as a relevant factor in many national penal codes but not incorporating it into the final definition.¹⁹¹⁶ Though it affirmed the manner in which the Trial Chamber had evaluated general principles among national laws concerning force and non-consent, it did not reach the same conclusion. It similarly held that such a method may indeed identify the “common denominators, in those legal systems which embody the principles which must be adopted in the international context” and can “[d]isclose an international approach to a legal question which may be considered as an appropriate indicator of the international law on the subject.”¹⁹¹⁷ It thereby conducted its own review in order to evince general principles.

The Tribunal identified three categories of factors that frequently determine when a sexual activity constitutes rape in domestic penal codes:

“ (i) the sexual activity is accompanied by force or threat of force to the victim or a third party;

(ii) the sexual activity is accompanied by force or a variety of other specified circumstances which made the victim particularly vulnerable or negated her ability to make an informed refusal; or

(iii) the sexual activity occurs without the consent of the victim.”¹⁹¹⁸

It noted that common law systems typically define rape by the absence of the victim’s free will or genuine consent and that this appears to be a trend in most

¹⁹¹⁵ *Prosecutor v. Kunarac, Kovac and Vukovic*, Judgment of 22 February 2001, para. 438. Emphasis added.

¹⁹¹⁶ *Ibid.*, para. 440.

¹⁹¹⁷ *Ibid.*, para. 439.

¹⁹¹⁸ *Ibid.*, para. 442.

states.¹⁹¹⁹ It found that while force, threat of force or coercion are relevant, these factors are not exhaustive and the emphasis must be placed on the violation of sexual autonomy because “the *true* common denominator which unifies the various systems may be a wider or more basic principle of penalising violations of sexual *autonomy*”, again referring to national penal codes.¹⁹²⁰ Thus, the focus on force in the *Furundzija* decision led to a definition that was too restrictive. Sexual autonomy was therefore deemed to be the basis for the determination of whether a sexual activity constitutes rape. Sexual autonomy is violated whenever “the person subjected to the act has not freely agreed to it or is otherwise not a voluntary participant”.¹⁹²¹ On the issue of force or threat of force, the Tribunal provided:

“In practice, the absence of genuine and freely given consent or voluntary participation may be evidenced by the presence of the various factors specified in other jurisdictions - such as force, threats of force, or taking advantage of a person who is unable to resist. A clear demonstration that such factors negate true consent is found in those jurisdictions where absence of consent is an element of rape and consent is explicitly defined not to exist where factors such as use of force, the unconsciousness or inability to resist of the victim, or misrepresentation by the perpetrator.”¹⁹²²

Force or coercion are thus aspects that may prove the absence of consent. Of particular interest to understanding the concept of consent, perhaps also for rape committed in peacetime, the Tribunal noted that it is important to recognise the deception of the victim or the victim’s vulnerability that makes her unable to refuse sex, e.g. “an incapacity of an enduring or qualitative nature (e.g. mental or physical illness, or the age of minority) or of a temporary or circumstantial nature (e.g. being subjected to psychological pressure) or otherwise in a state of inability to resist”.¹⁹²³ By mentioning the importance of the surrounding

¹⁹¹⁹ This has been criticised eg by De Brouwer, Anne-Marie, *Supranational Criminal Prosecution of Sexual Violence: The ICC and the Practice of the ICTY and the ICTR*, p. 120, in that lack of consent is primarily featured in common law systems and is not representative of most criminal law systems.

¹⁹²⁰ *Prosecutor v. Kunarac, Kovac and Vukovic*, Judgment of 22 February 2001, para. 440. Emphasis added. It, however, referred to more countries’ penal codes in its survey: Bosnia and Herzegovina, Korea, China, Norway, Austria, Spain, Brazil, United States of America, Switzerland, Portugal, France, Italy, Denmark, Sweden, Finland, Estonia, Japan, Argentina, Costa Rica, Uruguay, the Philippines, Canada, New Zealand, Australia, India, Bangladesh, South Africa, Zambia, Belgium.

¹⁹²¹ *Ibid*, para. 457.

¹⁹²² *Ibid*, para. 458. Emphasis added.

¹⁹²³ *Ibid*, para. 452.

circumstances in evaluating the element of non-consent, the particular conditions that exist in armed conflicts can be acknowledged, without compromising the definition of rape as non-consensual sexual relations. This is a more liberal interpretation of illegal forms of coercion than exist in most domestic penal codes. Considering such common forms of coercion greatly advances the notion of sexual autonomy and the ability to form a free and informed choice to engage in sex. In this particular case, the victims had been held in captivity when subjected to repeated rapes, which would also negate consent as a defence according to Rule 96.

In conclusion, the Tribunal followed the technical construction of the *actus reus* in the *Furundzija* case, but opted for focusing on the non-consent of the victim rather than the use of force, defining rape as:

“sexual penetration, however slight: (a) of the vagina or anus of the victim by the penis of the perpetrator or any other object used by the perpetrator; or (b) of the mouth of the victim by the penis of the perpetrator; where such sexual penetration occurs without the consent of the victim. Consent for this purpose must be consent given voluntarily, as a result of the victim’s free will, assessed in the context of the surrounding circumstances. The mens rea is the intention to effect this sexual penetration, and the knowledge that it occurs without the consent of the victim”.¹⁹²⁴

Also: “there are factors other than force which would render an act of sexual penetration non-consensual or non-voluntary on the part of the victim. A narrow focus on force or threat of force could permit perpetrators to evade liability for sexual activity to which the other party had not consented by taking advantage of coercive circumstances without relying on physical force.”¹⁹²⁵

How does the *Kunarac* decision relate to the *Furundzija* definition? According to Antonio Cassese, it would appear that the two definitions are in substance equivalent, for ‘coercion, or force, or threat of force’ in essence implies or means ‘lack of consent’.¹⁹²⁶ In fact, the Trial Chamber also concluded that its findings do not differ greatly from the reasoning in the *Furundzija* case since the Trial Chamber there emphasised that the terms coercion, force or threat of force were not to be interpreted narrowly and that the element of coercion

¹⁹²⁴ *Prosecutor v. Kunarac, Kovac and Vukovic*, Judgment of 22 February 2001, para. 460.

¹⁹²⁵ *Ibid.*, para. 129.

¹⁹²⁶ Cassese, Antonio, *International Criminal Law*, p. 79.

would encompass most conduct which also negates consent.¹⁹²⁷ The practical effect of the two cases may therefore be more similar than the definition would indicate. Though the Trial Chamber appeared to depart from the Tribunal's prior definitions of rape, by emphasising the "absence of consent as the *condition sine qua non* of rape", it thus did not distinctly depart from the jurisprudence.¹⁹²⁸ This demonstrates that not only the elements chosen for defining rape are relevant but, essentially, the interpretation and application of such.

Similarly, the Appeals Chamber in the *Kunarac* case was careful in explaining the relationship between force and non-consent, while at the same arguing that it did not "disavow the Tribunal's earlier jurisprudence".¹⁹²⁹ The Appeals Chamber further accentuated that the surrounding circumstances in cases with charges of rape as crimes against humanity tend to be "almost universally coercive" to such a degree that "true consent will not be possible".¹⁹³⁰ The detention facilities where the women were imprisoned in Foca amounted to "circumstances that were so coercive as to negate any possibility of consent".¹⁹³¹

However, in one instance the issue of consent was still considered, in which *Kunarac* raised the claim of 'mistake of fact' as to the victim's consent. One of the victims had taken an active part in initiating sexual relations with *Kunarac*, arguably acting seductively, leading the defence to claim that *Kunarac* had mistaken her actions to display genuine consent. The Trial Chamber concluded that since the advances followed threats of violence, albeit not expressed by *Kunarac* himself, he had no reasonable belief that the victim could have consented.¹⁹³² First it affirmed the alleged intercourse:

"The Trial Chamber is satisfied that it has been proven beyond reasonable doubt that D.B [the victim] subsequently also had sexual intercourse with Dragoljub *Kunarac* in which she took an active part by taking off the trousers of the accused and kissing him all over the body before having vaginal intercourse with him. The accused *Kunarac* admitted having had intercourse with D.B....*Kunarac* had put forward that he was not aware of he

¹⁹²⁷ *Prosecutor v. Kunarac, Kovac and Vukovic*, Judgment of 22 February 2001, para. 459.

¹⁹²⁸ *Ibid*, para. 129.

¹⁹²⁹ *Prosecutor v. Kunarac, Kovac and Vukovic*, Case No. IT-96-23 & IT-96-23/1-A, Appeal Judgment of 12 June 2002, para 129.

¹⁹³⁰ *Ibid*, paras. 130 & 132.

¹⁹³¹ *Ibid*, para. 132.

¹⁹³² *Prosecutor v. Kunarac, Kovac and Vukovic*, Judgment of 22 February 2001, paras. 644-647.

fact that D.B did not have sex with him on her own free will but that she had only complied out of fear.”¹⁹³³

“The Trial Chamber, however, accepts the testimony of D.B who testified that, prior to the intercourse, she had been threatened by ‘Gaga’ that he would kill her if she did not satisfy the desires of his commander, the accused Dragoljub Kunarac. The Trial Chamber accepts D.B’s evidence that she only initiated sexual intercourse with Kunarac because she was afraid of being killed by ‘Gaga’ if she did not do so.”¹⁹³⁴

Further, the Tribunal continued by rejecting Kunarac’s statements that he was not aware of the fact that the victim only initiated sex with him for reasons of fear of her life and stated that it considered it

“...highly improbable that the accused Kunarac could realistically have been ‘confused’ by the behaviour of D.B, given the general context of the existing war-time situation and the specifically delicate situation of the Muslim girls detained in Partizan or elsewhere in the Foca region during that time.”¹⁹³⁵

The issue of consent in the *Kunarac* case was, however, not uncomplicated. Some of the women previously housed in rape camps were removed by the defendants and placed in houses and apartments in the city, where they in certain cases had keys and were free to leave. The women performed housework and engaged in sexual relations with the captors. The defendants argued that the relationships were consensual and that they were merely protecting the women.¹⁹³⁶ This raised issues as to the true meaning of consent and the impact of a coercive context. The Trial Chamber partly addressed the situation by analysing the meaning of freely given consent, stating:

“where the victim is ‘subjected to or threatened with or has reason to fear violence, duress, detention or psychological oppression’ or ‘reasonably believed that if (he or she) did not submit, another might be so subjected, threatened or put in fear’, any apparent consent which might be expressed by the victim is not freely given.”¹⁹³⁷

¹⁹³³ *Prosecutor v. Kunarac, Kovac and Vukovic*, Judgment of 22 February 2001, para. 644.

¹⁹³⁴ *Ibid.*, para. 645.

¹⁹³⁵ *Ibid.*, para. 646.

¹⁹³⁶ *Ibid.*, paras. 63, 156, 772 & 780.

¹⁹³⁷ *Ibid.*, para. 464.

This in an excellent manner demonstrates the possibility of maintaining a consent-based definition of rape, focusing on the sexual autonomy of a person, yet recognises the particular circumstances that may exist in armed conflicts. The Tribunal clearly stated that the general level of violence and the exacerbated situation for Muslim girls were important negating factors in Kunarac's mistake of fact defence.

Before the Appeals Chamber, Kunarac further argued that "nothing short of continuous resistance provides adequate notice to the perpetrator that his attentions are unwanted", which the Chamber rejected as "wrong on the law and absurd on the facts".¹⁹³⁸ A similar argument that the victim must show "permanent and lasting resistance" was raised also in the *Kvočka* case but was rejected.¹⁹³⁹

The definition of the *Kunarac* decision has been applied by the ICTY as well as the ICTR in the following cases: *Kvočka*,¹⁹⁴⁰ *Haradinaj*,¹⁹⁴¹ *Kamuhanda*,¹⁹⁴² *Semanza*,¹⁹⁴³ *Stakic*,¹⁹⁴⁴ *Kajelijeli*,¹⁹⁴⁵ *Gacumbitsi*,¹⁹⁴⁶ and *Muhimana*,¹⁹⁴⁷ affirming its general acceptance. Sexual autonomy as the main focus in defining rape, developed in the *Kunarac* decision, was particularly noted in the *Kvočka* judgment.¹⁹⁴⁸ The ICTY upheld the definition of rape as developed in the *Kunarac* case and reiterated that "coercive conditions are inherent in situations of armed conflict" and "any form of captivity vitiates consent".¹⁹⁴⁸ Considering that the Tribunal affirmed the *Akayesu* definition in the *Celibici* case and applied a force-based approach in *Furundzija*, three different definitions of rape have thus been advanced by the same tribunal.

The legacy of the *Kunarac* decision is that the use of force cannot be considered an element of rape *per se*, but can be presented as evidence of non-

¹⁹³⁸ *Prosecutor v. Kunarac, Kovac and Vukovic*, Appeal Judgment of 12 June 2002, para. 128.

¹⁹³⁹ *Prosecutor v. Kvočka*, Appeal Judgement of 28 February 2005, paras. 393 & 395.

¹⁹⁴⁰ *Prosecutor v. Ramush Haradinaj, Idriz Balaj and Lahi Brahimaj*, Case No. IT-04-84-T, ICTY, Judgment of 3 April 2008, p. 69.

¹⁹⁴¹ *The Prosecutor v. Jean de Dieu Kamuhanda*, Judgment of 22 January 2004, para. 709.

¹⁹⁴² *The Prosecutor v. Laurent Semanza*, Judgment of 15 May 2003, para. 345.

¹⁹⁴³ *Prosecutor v. Milomir Stakic*, Case No. IT-97-24-T, Judgment of 31 July 2003, para. 755.

¹⁹⁴⁴ *The Prosecutor v. Juvénal Kajelijeli*, Judgment of 1 December 2003, para. 915.

¹⁹⁴⁵ *The Prosecutor v. Sylvestre Gacumbitsi*, Judgment of 17 June 2004, para. 321.

¹⁹⁴⁶ *The Prosecutor v. Mikaeli Muhimana*, Summary of Judgment, 28 April 2005, paras. 34-35.

¹⁹⁴⁷ *Prosecutor v. Miroslav Kvočka*, Judgment of 2 November 2001, para. 177.

¹⁹⁴⁸ *Ibid*, para. 178, based on the *Celibici* and *Furundzija* cases.

consent. Coercive circumstances without force may, however, be sufficient to prove such lack of consent, thereby acknowledging other means than force in violating a person's sexual autonomy and freedom of choice. The *Kunarac* decision has not avoided criticism. Anne-Marie De Brouwer calls the introduction of the element 'non-consent' absurd given the context in which rape usually takes place in international criminal law, e.g. in detention.¹⁹⁴⁹ However, the definition does acknowledge the particular conditions of sexual violence in armed conflicts by automatically excluding consent in coercive situations.

When reviewing the jurisprudence from the tribunals it appears that the context where rape occurs is a vital factor in elevating rape as an international crime and in defining the offence. The harm experienced by the victim may be similar in rape committed in peacetime and armed conflict. However, due to the large-scale nature of the offence in the latter situations and the overall specific intent, rape can be prosecuted as an international crime and is deemed to be of a graver nature. This is due to the emphasis placed on the harm to the collective in international criminal law, acknowledging that sole instances of rape is better suited for domestic criminal jurisdictions.

9.2.3 Conclusions Based on the Case Law of the ICTR and ICTY

One of the frequently heralded main achievements of the ICTY and ICTR is the progress in acknowledging gender-based violence.¹⁹⁵⁰ As mentioned, despite considerable evidence and witness testimony on sexual violence during the Nuremberg trials, these types of violations were largely ignored in the judgments by the military tribunal, further confirming the existence of gender-based crimes as an innate part of war. The ICTY and ICTR have significantly expanded the understanding of sexual violence and its role in coercive circumstances such as armed conflicts, and have applied criminal law in a gender-conscious manner. Though the tribunals have been lauded for this gender-sensitivity and for rejecting the approach to rape as a violation of the woman's honour in the 1949 Geneva Conventions, such indications, however, still remain in the case law. For example, in the *Stakic* case the ICTY concluded that "[f]or a woman, rape is by far the ultimate offense, sometimes even worse than death because it brings

¹⁹⁴⁹ De Brouwer, Anne-Marie, *Supranational Criminal Prosecution of Sexual Violence: The ICC and the Practice of the ICTY and the ICTR*, p. 120.

¹⁹⁵⁰ Meron, Theodor, *The Humanization of International Law*, p. 179, Halley, Janet, *Rape at Rome: Feminist Interventions in the Criminalization of Sex-Related Violence in Positive International Criminal Law*, De Brouwer, Anne-Marie, *Supranational Criminal Prosecution of Sexual Violence: The ICC and the Practice of the ICTY and the ICTR*, p. 17.

shame on her”,¹⁹⁵¹ connecting rape to dishonour. However, the use of such language is limited and should not over-shadow the achievements of the tribunals.

The fact that rape is prosecuted under the *chapeau* of other crimes, e.g. genocide or torture, has been criticised as minimising the potential deterrent effect for sexual violence since the language does not indicate that the crime punished is rape.¹⁹⁵² This is of particular importance considering the impunity with which rape has been treated historically. Criticism has also been raised that the indictments on sexual violence of the tribunals fail to reflect the common occurrence of such assault in the conflicts.¹⁹⁵³ The example of the *Lukic* trial demonstrates this. Despite substantial witness testimonies concerning mass rapes perpetrated by Lukic in other trials, in the actual trial of Lukic, charges of sexual violence were purposefully left out for reasons of expediency. The Prosecution stated that “(Del Ponte) had taken the position that fulfilling her obligations to conclude the work of the prosecutor in the time frame mandated by the UN Security Council did not permit an amendment to add sex crimes charges which she believed would add to the length of the trial”.¹⁹⁵⁴

The *ad hoc* tribunals have constructed several definitions of rape, using varying approaches - from a conceptual understanding in the case of *Akayesu*, not detailing acts or body parts but rather viewing rape as a sexual expression of aggression, to a force-based definition in the *Furundzija* judgment, to a non-consent-based approach in the *Kunarac* case. Three separate technical solutions of the definition can therefore be garnered from an evaluation of the case law. This leaves an inconsistent impression and questions as to the legacy and impact of the case law. Positive aspects of all three definitions have been noted. The *Akayesu* approach avoids a restrictive *actus reus*, allowing a wide scope of included acts. Its broad definition has been praised for taking into account the realities of wartime violence.¹⁹⁵⁵ The *Furundzija* judgment provides legal certainty with its concrete definition. The *Kunarac* decision in a progressive

¹⁹⁵¹ *Prosecutor v. Stakic*, Case No. IT-97-24, Judgment of 31 July 2003, para. 803. This statement is, however, reminiscent of the focus on the dishonour of the female rape victim, found in the Geneva Conventions and Additional Protocols.

¹⁹⁵² Askin, Kelly, *The Jurisprudence of International War Crimes Tribunals: Securing Gender Justice for Some Survivors*, p. 133.

¹⁹⁵³ *Lukic* Trial Ruling provokes Outcry, IWPR’s ICTY - Tribunal Update, No. 562, iwpr.net, Simon Jennings, 7 August 2008.

¹⁹⁵⁴ Prosecution motion seeking leave to amend the second amended indictment, *Lukic*, 16 June 2008. See also *Lukic* Trial Ruling provokes Outcry, IWPR’s ICTY - Tribunal Update, No. 562, iwpr.net, Simon Jennings, 7 August 2008.

¹⁹⁵⁵ Obote-Odora, Alex, *The Prosecution of Rape and Other Sexual Violence*, p. 183.

manner discusses the sexual autonomy of the individual. Despite these inconsistencies, the tribunals have contributed to a substantial clarification of several aspects of the definition of rape in the context of international criminal law and IHL.

The definition in the *Kunarac* case has since been applied in a multitude of cases heard by the ICTY where it has been confirmed as the most appropriate construction, since it includes a wider range of acts and situations as opposed to a definition requiring some level of force or threat of force. Even in the ICTR, the Tribunal has applied the *Kunarac* definition in a manner not conflicting with the case of *Akayesu*. As mentioned in the *Muhimana* judgment, the *Kunarac* approach provides additional details on the elements of the acts that constitute rape, further expanding on the basis of the *Akayesu* judgment and, perhaps necessarily, specifying the substance in the overly conceptual definition in *Akayesu*. Important to note is that the tribunals on several occasions, when discussing the determination of non-consent, assert that in situations of genocide or crimes against humanity consent is almost always automatically negated because of the coercive surroundings, e.g. in detention camps. Unfortunately, at the time of the construction of the Rome Statute of the ICC, the existing definitions at the time consisted of the *Akayesu* and *Furundzija* decisions, with the Rome Conference favouring a more detailed definition and with force as an element. As will be discussed, the prevailing view during the Rome Conference was that a non-consent based definition was degrading in presuming that women could still consent under such coercive circumstances as armed conflicts and that such an element would lead to a focus on the victim's behaviour preceding the rape.¹⁹⁵⁶

The above discussed definitions of rape in the case law of the *ad hoc* tribunals have garnered much debate among scholars concerning the virtues of the various approaches, i.e. a force, non-consent, or coercion-based focus. Particularly the suitability of a non-consent standard has been questioned. Anne-Marie De Brouwer, subsequent to the *Kunarac* decision listed the reasons why a non-consent based definition is inappropriate.¹⁹⁵⁷ Firstly, she holds that non-consent is not representative as a common denominator of most major criminal law systems, but rather chiefly a construction in common law countries. However, as the ICTY asserts, many countries specifically mention non-consent in their legislation, but also beyond this, even more use non-consent as a standard in practice when determining e.g. coercion.

¹⁹⁵⁶ Halley, Janet, *Rape at Rome: Feminist Interventions in the Criminalization of Sex-Related Violence in Positive International Criminal Law*, p. 99.

¹⁹⁵⁷ De Brouwer, Anne-Marie, *Supranational Criminal Prosecution of Sexual Violence: The ICC and the Practice of the ICTY and the ICTR*, p. 120.

A second, more persuasive argument, is that it is not possible to transfer elements of rape from national laws into supranational criminal law without taking into account the specifics of the two bodies of law. The same author finds the transposition of the non-consent standard unfortunate since in the context of genocide, crimes against humanity and armed conflict, rape will in practically all cases have been committed under force or coercive circumstances where the question of consent is redundant. She states: “in the context of oppression or violence”...where the conditions may be even more extreme”, non-consent is a highly irrelevant element of rape.¹⁹⁵⁸

De Brouwer is by no means alone in her critique. Gay McDougall, UN Special Rapporteur on Systematic Rape, Sexual Slavery and Slavery-Like Practices During Armed Conflict, holds 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”.¹⁹⁵⁹ Schomburg and Petersen argue that what separates international crimes from ordinary domestic crimes is the “international element” which presumes mass-atrocities. This in turn makes the question of consent redundant since such situations are inherently coercive.¹⁹⁶⁰ In a manner, the determination of whether the crime is encompassed by the jurisdiction of each tribunal is an affirmation *per se* that the circumstances are such that they vitiate consent. Such an argument was, however, rejected by the ICTR in *Gacumbitsi*, affirming that the fact that the case comes within the jurisdiction of the tribunal is not sufficient to assume non-consent. The burden of proof still falls on the Prosecution to present evidence as to the coercive circumstances, albeit these can easily be established under such conditions. Additionally, as viewed in both tribunals’ case-law, the same evaluation of non-consent is rarely applied in practice as that in domestic procedures due to the coercive and brutal circumstances of armed conflicts.

De Brouwer also poses the question whether it is reasonable to imply that a victim could consent to genocide, rape being one possible element of

¹⁹⁵⁸ De Brouwer, Anne-Marie, *Supranational Criminal Prosecution of Sexual Violence: The ICC and the Practice of the ICTY and the ICTR*, pp. 120-121. See also Kalosieh, Adrienne, *Consent to Genocide? The ICTY’s Improper Use of the Consent Paradigm to Prosecute Genocidal Rape in Foca*, p. 122.

¹⁹⁵⁹ UN Doc. E/CN.4/Sub.2/1998/13, 22 June 1998, para. 25.

¹⁹⁶⁰ Schomburg, Wolfgang & Peterson, Ines, *Genuine Consent to Sexual Violence Under International Criminal Law*, p. 128. See also Kalosieh, Adrienne, *Consent to Genocide? The ICTY’s Improper Use of the Consent Paradigm to Prosecute Genocidal Rape in Foca*, p. 121, MacKinnon, Catherine, *Defining Rape Internationally; A Comment on Akayesu*, p. 952, De Brouwer, Anne-Marie, *Supranational Criminal Prosecution of Sexual Violence: The ICC and the Practice of the ICTY and the ICTR*, p. 121.

genocide.¹⁹⁶¹ Similarly, Catherine MacKinnon notes that no other forms of crimes against humanity require proof of non-consent and that doing so diminishes the gravity of the crime, and the non-consent standard implies that the interactions in e.g. Rwanda was similar to dating.¹⁹⁶² However, it is not a question of consenting to genocide or rape, but whether the sexual relations are consensual, since rape is one of few crimes where the act is the same in an illegal and legal form, depending on the consent of the participants.

MacKinnon further argues that there is a danger in viewing rape in a decontextualised manner and that by framing it as potentially wanted individual sexual encounters rather than mass atrocities will impose an excessively high threshold of evidence.¹⁹⁶³ A counter-argument, based on feminist theories, is that rape in times of war is but a continuation of sexual violence in peacetime, i.e. that women are constantly under “oppression or violence” and that attacks on an individual’s sexuality are always extreme situations regardless of the surrounding circumstances.¹⁹⁶⁴ Another counter-argument is that the harm of rape is the violation of a person’s sexual autonomy, and the only standard that takes this into account is a non-consent based definition, though the coercive circumstances can surely be considered. Such coercive conditions most assuredly also exist in peacetime and are not exclusive to armed conflicts.

The same argument concerning rape trials on the domestic level is also raised in this context, i.e. concern that humiliating questions will be posed during the proceedings on the victim’s state of mind and conduct, if the definition centres on the non-consent of the victim. De Brouwer holds that posing such questions to the victim in the context of armed conflict and international crimes, is inappropriate.¹⁹⁶⁵ Is it more inappropriate than during trials at the domestic level? Arguably, because of the gravity of international crimes, it is indeed less relevant

¹⁹⁶¹ De Brouwer, Anne-Marie, *Supranational Criminal Prosecution of Sexual Violence: The ICC and the Practice of the ICTY and the ICTR*, p. 121.

¹⁹⁶² MacKinnon, Catherine, *Defining Rape Internationally: A Comment on Akayesu*, p. 952.

¹⁹⁶³ Ibid, p. 953.

¹⁹⁶⁴ Copelon, Rhonda, *Surfacing Gender: Reconceptualizing Crimes Against Women in Time of War*, in *Mass Rape: The War against Women in Bosnia-Herzegovina*. See also discussion in Halley, Janet, *Rape at Rome: Feminist Interventions in the Criminalization of Sex-Related Violence in Positive International Criminal Law*, p. 66.

¹⁹⁶⁵ De Brouwer, Anne-Marie, *Supranational Criminal Prosecution of Sexual Violence: The ICC and the Practice of the ICTY and the ICTR*, p. 122. See also Kalosieh, Adrienne, *Consent to Genocide? The ICTY’s Improper Use of the Consent Paradigm to Prosecute Genocidal Rape in Foca*, p. 122, who argues that a non-consent based standard will make victims/witnesses subject to insinuation that “she was able to be complicit in the dehumanizing treatment that befell her village during a genocidal campaign”.

to question the frame of mind of the victim. In the *Akayesu* case, the witnesses often simply referred to being raped but did not need to describe the physical acts this included.¹⁹⁶⁶ However, even in such an extreme situation as that in the Foca camp, the question of consent was still posed in the *Kunarac* case even subsequent to the witness testimony by a victim that, while at the rape camp, she was raped more than 150 times during a period of 40 days.¹⁹⁶⁷ According to Judge Hunt of the ICTY, inquiries into the consent of the victim served “the proper prosecution procedure not to leave matters to implication”.¹⁹⁶⁸

As the ICTY establishes in the *Kunarac* case, coercive circumstances vitiate consent and make an investigation into the frame of mind of the victim unnecessary. The conditions required to establish the international crimes are “almost universally coercive”. Is the presumption of non-consent based on the context appropriate? A problem with using ‘coercive circumstances’ as a standard is that the determination of what constitutes coercive in effect becomes a measurement of normalcy. Like in times of peace, judging what is ‘coercion’ becomes an exercise in evaluating what is normal in sexual relations or dating. Authors range from a feminist point of view, finding all sexual relations unbalanced because of gender inequality, to viewing unequal power-relations such as teacher-student automatically coercive, to others who argue that only physically forceful situations should be included in the concept.¹⁹⁶⁹ However, in the field of international criminal law it is often argued that the armed conflict itself constitutes a coercive factor. Is the existence of unrest or war sufficient in itself to meet the element of coercion? As mentioned, this was rejected by the ICTR in *Gacumbitsi*, which affirmed that the fact that rape is within the jurisdiction of the tribunal does not equal non-consent. It is certainly accurate that it may be *easier* to identify coercive situations in times of armed conflict, but the status of unrest cannot itself be adequate as the defining factor. This would diminish the gravity of rape in times of peace by raising a higher standard of proof of the violation and by designating prevailing conditions as more important than the actual events. In such situations as referred to in the *Kunarac* case, where women were placed in a camp and consequently had sexual relations

¹⁹⁶⁶ *The Prosecutor v. Jean-Paul Akayesu*, Judgment of 2 September 1998, para. 686-687.

¹⁹⁶⁷ *Prosecutor v. Kunarac, Kovac and Vukovic*, Transcripts, 25 April 2000, pp. 2235-2236, witness nr 95.

¹⁹⁶⁸ *Ibid*, Transcripts, 19 April 2000, p. 1981.

¹⁹⁶⁹ See e.g. MacKinnon, Catherine, *Toward a Feminist Theory of the State*, p. 174, McGregor, Joan, *Is it Rape?: On Acquaintance Rape and Taking Women's Consent Seriously*, MacKinnon, Catherine, *Women's Lives, Men's Laws*, Brownmiller, Susan, *Against Our Will*, pp. 430-432, Estrich, Susan, *Real Rape*, Schulhofer, Stephen, *Unwanted Sex: The Culture of Intimidation and the Failure of Law*.

with a multitude of men, it is not difficult to establish coercion and thereby exclude the necessity to evaluate non-consent on the victim's part.

Karen Engle points out that the ICTY in the *Kunarac* decision not only analysed the captivity of the victim but also placed emphasis on her ethnicity, a fact that supported the notion of coercion.¹⁹⁷⁰ Could one from this draw the conclusion that the perpetrator must have assumed non-consent on the victim's part because of her ethnicity? Would the same assumption of non-consent have been made of a woman of the same ethnicity in this context? This may be an example where the decisions of the tribunals have been context-specific, interpreting the elements in light of the particular circumstances of these conflicts. This determination may not have been made in non-ethnic conflicts.

The jurisprudence of the *ad hoc* tribunals in all mentioned cases focus on penetration, in the *Akayesu* judgment denoted invasion, albeit a broad understanding is given to the *actus reus*. All cases support the inclusion of not only vaginal penetration, but also forced anal and oral penetration. This includes the insertion of objects into the genitals. Apart from *Akayesu*, the list of acts is restricted. As discussed in *Furundzija*, a particular stigma is attached to rape, a fact which the *ad hoc* tribunals appear to have adhered to in distinguishing rape from other forms of sexual violence. This has been both criticised and welcomed by feminist legal scholars, certain feminists supporting a definition as broad as possible and covering a multitude of sexual acts, whereas others see the distinction as a necessity in order for light sexual touching and penetration not to be placed in the same category.¹⁹⁷¹ The ICTY does insist that all forms of sexual violence are equally appalling, but for sentencing purposes a distinction must be maintained.¹⁹⁷² However, different levels of sentencing certainly imply that the different categories of violence are not viewed in an equally grave manner.

As noted in the case law of both the ICTY and the ICTR, the definition of rape applies to both men and women and aim to create a gender-neutral standard that does not exclude the male victim nor single out women as the weaker class of victims. The gender-neutrality of the definition has disappointed certain feminist authors who argue that sexual violence is primarily an oppression of women and that the language should reflect this fact.¹⁹⁷³ However, as found particularly in the Yugoslavia conflict, men were also victims of rape. As discussed earlier, excluding a whole group of potential victims because of gender would not increase the protection of women.

¹⁹⁷⁰ Engle, Karen, *Feminism and its (Dis)Contents: Criminalizing Wartime Rape in Bosnia and Herzegovina*, AJIL 99 (2005), pp. 804-805.

¹⁹⁷¹ Quéniwet, Noëlle, *Sexual Offenses in Armed Conflict & International Law*, p. 13.

¹⁹⁷² *Prosecutor v. Furundzija*, Judgment of 10 December 1998, para. 186.

¹⁹⁷³ Quéniwet, Noëlle, *Sexual Offenses in Armed Conflict & International Law*, p. 14.

A concern regarding the definitions developed by the ICTY and the ICTR is that they may violate the principle of legality in that individuals have been prosecuted retroactively for newly created crimes. The prohibition of rape is not new as an international crime since it was included in the 1949 Geneva Conventions and two of its Additional Protocols and was prosecuted in a limited manner during the Tokyo trials after the Second World War. According to Anne-Marie De Brouwer, the retrospective effect of defining rape is thus not forbidden since rape as an international crime is not a new phenomenon and already has been prosecuted under the umbrella of other crimes.¹⁹⁷⁴ However, the exercise of defining the crime is a new endeavour. Since rape is not defined in the statutes of the *ad hoc* tribunals, the content of the definition of the offence has been developed *post factum*. The tribunals are allowed to interpret provisions on offences, and the unique nature and development of international law often leads to a less strict interpretation of the principle of legality than found in domestic criminal law. International law norms are often broadly constructed to be interpreted by both international courts/tribunals but also by domestic legal systems through domestic implementation. However, certain criteria still have to be met. The definition of the crime must meet requisite levels of ‘foreseeability’. A general agreement, however, appears to exist that as long as the various definitions abide by the *essence* of the crime, the tribunals are allowed wide powers of interpretation. Using a vague principle such as human dignity to extend the *actus reus* of rape, can be nevertheless be criticised. Another aspect of the legality principle are the internal discrepancies in maintaining a single definition, even within the jurisprudence of the same tribunal. Though the tribunals are not bound by previous case law in the same manner as domestic courts, for the sake of fair warning to individuals of which acts constitute a crime, a certain level of consistency should be maintained.

The discussion on the legality of prosecution of international crimes is not new. The same arguments were raised regarding the production of the Nuremberg trials, as well as in connection to the establishment of the two *ad hoc* tribunals by the UN. Because international criminal law is a relatively new area of international law and has remained undeveloped until its revitalisation in the past few decades, questions of legality are expected, since much of the discipline has developed primarily through case law. The establishment of the ICC, with a foundation built on a multilateral treaty and a document containing definitions of the crimes, constitutes a major step in the direction of providing a consistent definition and practice of the crime of rape. The establishment of the ICC

¹⁹⁷⁴ De Brouwer, Anne-Marie, *Supranational Criminal Prosecution of Sexual Violence: The ICC and the Practice of the ICTY and the ICTR*, p. 128.

therefore is a major progression towards making international criminal law a multilateral enterprise, abiding by principles of specificity and legality.

The methodology used by the *ad hoc* tribunals in evincing a definition of rape is of particular interest from a legal-technical standpoint. Since the definition of rape has been unregulated in treaty law as well as customary international law, the tribunals have resorted to other sources. Cherif Bassiouni notes in general that customary international law and treaties have proven to be inadequate in responding to major issues in human rights law and international criminal law and that general principles will become an all the more important source.¹⁹⁷⁵ This has proved right in the cases heard by the ICTY and ICTR, which have evinced such principles from domestic criminal codes and procedures as well as human rights standards. The same could be said of the jurisprudence from the European Court of Human Rights, particularly the case of *M.C. v. Bulgaria*. A major advantage of relying on general principles of law is that, like customary international law, its basis is the consensus of various justice systems in the world, while it avoids some of the practical problems of generating custom, through state practice and *opinio iuris*.

However, as Hilary Charlesworth asserts, particularly when it comes to women's human rights, relying on general principles of law may be troublesome. Whatever ideology has influenced the national system will automatically be transposed into international law through the principles. Arguably, the universal feature of all domestic legal systems is that violence against women has been tolerated or condoned.¹⁹⁷⁶ A risk therefore exists that a gender-bias in domestic laws is transposed into international law. This could e.g. pertain to the focus on penetration in the *actus reus* of the definitions. Another concern is that the review of domestic laws tends to focus solely on certain legal systems, predominantly Western. The ICTR failed to specify which states it compared in drawing its conclusions. The ICTY's analysis, however, seems to be more thorough, though the European systems appear to have been favoured, which most likely has affected the outcome in defining rape.

The most relevant question after reviewing the case law of the *ad hoc* tribunals is whether the jurisprudence creates a legacy beyond the jurisdictions of Rwanda and former Yugoslavia. The case law of the tribunals is only restricted to the particular states and conflicts of its subject matter. However, the *ad hoc* tribunals not solely base their case law on their respective statutes but also on

¹⁹⁷⁵ Bassiouni, Cherif, *A Functional Approach to General Principles of International Law*, p. 768.

¹⁹⁷⁶ Charlesworth, Hilary & Chinkin, Christine, *The Boundaries of International Law: A Feminist Analysis*, p. 79.

customary international law and general principles.¹⁹⁷⁷ Both tribunals have concluded that the prohibition of rape *per se* constitutes customary international law, which is an important conclusion. This was conversely not the case concerning the definition of the offence. Could the jurisprudence then *influence* the creation of a customary law norm as concerns the elements of the crime of rape? Magdalini Karagiannakis asserts that, given that the jurisdiction of the tribunals concerns crimes that are prohibited on the customary level, the interpretation of the offences will similarly constitute customary international law.¹⁹⁷⁸ However, considering the multitude of approaches by the tribunals it is not likely that one particular definition of rape as of yet may be considered as reflecting customary law. Nevertheless, bearing in mind the general acceptance by the ICTR and later cases of the ICTY of a non-consent based standard, this may certainly at least constitute one contributing factor in the development of such a norm in international law. Certain elements are also common to the case law, e.g. regarding the *actus reus* and gender-neutrality of the definition.

The Special Court of Sierra Leone on a general level discussed the utility of the jurisprudence of the *ad hoc* tribunals in a recent case:

“In determining the state of customary international law, the Chamber has found it useful to consider decisions of the International Criminal Tribunals for Rwanda and the former Yugoslavia. Such decisions have persuasive value, although modifications and adaptations may be required to take into account the particular circumstances of the Special Court.”¹⁹⁷⁹

This view is similarly held by many authors.¹⁹⁸⁰ The jurisprudence also directly influenced the definition of rape in the Elements of Crimes of the ICC. As Patricia Viseur Seller notes: “The ad hoc Tribunals by trying and convicting

¹⁹⁷⁷ UN Doc. E/CN.4/Sub.2/2004/12, 20 July 2004, para. 10.

¹⁹⁷⁸ Karagiannakis, Magdalini, *Case Analysis: The Definition of Rape and Its Characterization as an Act of Genocide – A Review of the Jurisprudence of the International Criminal Tribunals for Rwanda and the Former Yugoslavia*, p. 480.

¹⁹⁷⁹ *Case No. SCSL-04-15-T against Sesay, Kallon, Gbao*, Judgment of 2 March 2009.

¹⁹⁸⁰ McDougall, Carrie, *The Sexual Violence Jurisprudence of the International Criminal Tribunal for the Former Yugoslavia and the International Criminal Tribunal for Rwanda, The Silence Has Been Broken but There’s Still a Lot to Shout About*, p. 346. McDougall notes: “...jurisprudence developed by the Tribunals is likely to make a significant contribution to the development of customary law, as already reflected in the International Criminal Court’s Elements of Crimes, as well as providing persuasive judicial precedent to the future judges of the ICC”. See, also, Meron, Theodor, *The Humanization of International Law*, p. 179, stating: “The ICTY has also given a robust, yet credible, reading to international customary law.”

perpetrators (for sex-based crimes) fomented a legal climate beyond its jurisdiction that made it conducive to draft several sex-based crimes into the Rome Statute...”.¹⁹⁸¹ The ICC definition was promulgated through a process of compromise by the majority of the world’s states, who participated in the conferences creating the Elements of Crimes. Given the multilateral support of the ICC, it is likely that its definition will have a greater resonance. However, it is understood that the ICC will continue to use the jurisprudence of the *ad hoc* tribunals as guidance for its deliberations. Various states have also made similar statements, particularly in connection to implementing international criminal law statutes on the domestic level.¹⁹⁸²

One must recall that the definitions particularly concern the context of armed conflict and mass violence and are formulated with the protection of vulnerable groups in such situations in mind. As De Brouwer argues, the definition of rape in the *Akayesu* judgment was most likely a reflection of the horrifying facts of the case which left no doubt as to the non-consent of the victims.¹⁹⁸³ Kelly Askin argues further that there is an implicit awareness that evidence such as sperm, fingerprints and bruises may not be as readily available during sustained periods of lawlessness, which is taken into account in these cases.¹⁹⁸⁴ Are the elements thus too case-specific to contribute to the international discussion at large? Given that the promulgation of the criminal elements were interpreted as parts of international crimes, such definitions should be appropriate in general within the area of international criminal law, beyond the scope of their jurisdictions. The definition in the *Kunarac* judgment has even been used as a reference in the area of human rights law, by the ECtHR and Inter-American Commission on Human Rights, which may indicate that the main principles of such definitions may extend even beyond this field of law. Francoise Hampson e.g. in a UN report on the administration of justice, argues that the definitions of the international *ad hoc* tribunals can be applied in situations outside of the context of armed conflicts or mass-violence.¹⁹⁸⁵ Interestingly, as Alex Obote-

¹⁹⁸¹ Viseur Seller, Patricia, *Individual(s) Liability for Collective Sexual Violence*, in Gender and Human Rights, ed. Karen Knop, Oxford University Press, (2004), p. 163.

¹⁹⁸² See e.g. Sweden, SOU 2002:98, p. 216. See, also, Obote-Odora, Alex, *The Prosecution of Rape and Other Sexual Violence*, pp. 189-190.

¹⁹⁸³ De Brouwer, Anne-Marie, *Supranational Criminal Prosecution of Sexual Violence: The ICC and the Practice of the ICTY and the ICTR*, p. 108.

¹⁹⁸⁴ Askin, Kelly, *The Jurisprudence of International War Crimes Tribunals: Securing Gender Justice for Some Survivors*, p. 132.

¹⁹⁸⁵ UN Doc. E/CN.4/Sub.2/2004/6, para. 23. Hampson, while discussing the issue of national as opposed to international definitions of sexual violence, concludes that this topic highlights the tripartite relationship between international human rights law, international humanitarian law and international criminal law. See para. 19.

Odora has found, the jurisprudence of the tribunals do not only create important legal precedents for the ICC, but also for national courts. For example, the DRC, Niger, Senegal and Ghana have drafted implementing legislation or have established review committees for law reforms to implement the gender-related jurisprudence of the ICTR.¹⁹⁸⁶ This indicates that because of the novelty in the area of defining rape in international law, the reasoning of the tribunals have had a broad impact. It must also be borne in mind that they are largely based on general principles of domestic penal codes, not generally addressing rape under the special conditions of armed conflicts.

9.2.4 The Special Court for Sierra Leone

Because the Court was established as a joint enterprise by the government of Sierra Leone and the United Nations, its statute is an amalgam of both national law and an import of UN sources, as well as the jurisprudence of the two *ad hoc* tribunals of Rwanda and former Yugoslavia.¹⁹⁸⁷ Its mandate is to prosecute the individuals who hold the greatest responsibility for serious violations of international humanitarian law and Sierra Leonean law committed on the territory after 30 November 1996 and the Court was established pursuant to a UN Security Council resolution.¹⁹⁸⁸ The Statute is of interest since it, to an extent, confirms the precedents of the *ad hoc* tribunals. The UN Secretary-General stated regarding the establishment of the Court: “In the recognition of the principle of legality...the international crimes enumerated, are crimes considered to have had the character of customary international law at the time of the alleged commission of the crime.”¹⁹⁸⁹

Rape and other forms of sexual violence are qualified as crimes against humanity¹⁹⁹⁰ as well as violations of Common Article 3 of the 1949 Geneva Conventions, in the form of “outrages upon personal dignity, in particular humiliating and degrading treatment”.¹⁹⁹¹ Sexual violence against girls is specified in a separate article, referring to the domestic law of Sierra Leone, proscribing the separate crimes of “(i), abusing a girl below the age of 13, (ii),

¹⁹⁸⁶ Obote-Odora, Alex, *The Prosecution of Rape and Other Sexual Violence*, pp. 189-190.

¹⁹⁸⁷ Statute of the Special Court for Sierra Leone, pursuant to Security Council resolution 1315 (2000) of 14 August 2000.

¹⁹⁸⁸ SC Res. 1315 of 14 August 2000.

¹⁹⁸⁹ Report of the Secretary-General on the Establishment of a Special Court for Sierra Leone of 4 October 2000, UN Doc. S/2000/915, para. 12.

¹⁹⁹⁰ Article 2, Statute of the Special Court for Sierra Leone.

¹⁹⁹¹ Ibid, Article 3.

abusing a girl between 13 and 14 years of age and (iii), abducting a girl for immoral purposes”.¹⁹⁹²

Rape is not defined in the Statute. However, principles pertaining to cases of sexual assault are listed in Rule 96 of the Rules of Procedure and Evidence. It states that the Court shall be guided by the following principles:

“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;

Consent cannot be inferred by reason of any words or conduct of a victim where the victim is incapable of giving genuine consent;

Consent cannot be inferred by reason of the silence of, or lack of resistance by, a victim to the alleged sexual violence.”

Considering that the issue of non-consent is included in a document on rules of procedure indicates that the element concerns non-consent as an affirmative defence, rather than as part of the definition of the crime.

On 20 June 2007, three members of the Armed Forces Revolutionary Council were convicted of rape as a crime against humanity as well as sexual slavery as a war crime, emanating from the common practice of soldiers and rebels abducting young women and keeping them as sexual slaves.¹⁹⁹³ The “bush-wives” travelled with the armed faction and were regularly subjected to rape. The three individuals were also convicted of conscripting children who, under their command, committed sexual violence against the civilian population. The indictment describes the rapes as brutal, often performed by multiple rapists. In the judgment, the Trial Chamber first noted the prohibition of rape as customary international law¹⁹⁹⁴ and adopted the following definition of the ICTY in the *Kunarac* decision:

“(1) The non-consensual penetration, however slight, of the vagina or anus of the victim by the penis of the perpetrator or by any other object used by the perpetrator, or of the mouth of the victim by the penis of the perpetrator; and

(2) The intent to effect this sexual penetration, and the knowledge that it occurs without the consent of the victim.”¹⁹⁹⁵

¹⁹⁹² Article 5, Statute of the Special Court for Sierra Leone.

¹⁹⁹³ *Case No. SCSL-04-16-T against Brima, Kamara, Kanu*, Judgment of 20 June 2007.

¹⁹⁹⁴ *Ibid.*, para. 692.

¹⁹⁹⁵ *Ibid.*, para. 693.

The judgment quoted the *Kunarac* decision and further stated:

“Consent of the victim must be given voluntarily, as a result of the victim’s free will, assessed in the context of the surrounding circumstances. Force or threat of force provides clear evidence of non-consent, but force is not an element per se of rape and there are factors other than force which would render an act of sexual penetration non-consensual or non-voluntary on the part of the victim. This is necessarily a contextual assessment. However, in situations of armed conflict, coercion is almost always universal. Continuous resistance of the victim and physical force or even threat of force by the perpetrator are not required to establish coercion.”¹⁹⁹⁶

The Court did acknowledge the particular situation in the Sierra Leone conflict and the difficulties in providing evidence of rape and, quoting case law from the ICTR, confirmed that “the very specific circumstances of an armed conflict where rapes on a large scale are alleged to have occurred, coupled with the social stigma which is borne by victims of rape in certain societies, render the restrictive test set out in the elements of the crime difficult to satisfy. Circumstantial evidence may therefore be used to demonstrate the *actus reus* element of rape.”¹⁹⁹⁷

This definition of rape was, however, abandoned in a subsequent case. In March of 2009, the judgment against three senior leaders for the Revolutionary United Front (RUF) was issued by the Special Court.¹⁹⁹⁸ The judgment detailed horrific acts of rape. Witnesses described an incident where the rebels divided the female civilians into two groups, separating the youngest, who were believed to be virgins, and older women. The witness in question was raped by two men and one rebel inserted a stick into her vagina.¹⁹⁹⁹ The Court referred to a report by Human Rights Watch which found that, though the rebel forces were indiscriminate in their attacks and subjected women of all ages and ethnic groups to rape, they favoured girls and young women believed to be virgins.²⁰⁰⁰ When attacking the area of Penduma, the civilians were divided into groups, one comprising of non-pregnant women, from which the rebel leader instructed his men to each pick a woman. The women were raped inside houses or in view of civilians. Witness TFI-217 was forced to watch the rape of his wife by eight men

¹⁹⁹⁶ Case No. SCSL-04-16-T against Brima, Kamara, Kanu, Judgment of 20 June 2007, para. 694.

¹⁹⁹⁷ Ibid, para. 695.

¹⁹⁹⁸ Case No. SCSL-04-15-T against Sesay, Kallon, Gbao, Judgment of 2 March 2009.

¹⁹⁹⁹ Ibid, para. 1185.

²⁰⁰⁰ Footnote 2268 of the case. HRW Report on Sexual violence, p. 28.

before she was killed.²⁰⁰¹ Captives were also forced to engage in intercourse with each other in front of the rebels, in one instance a couple in front of their daughter. The daughter was subsequently ordered to wash her father's penis.²⁰⁰²

The Chamber largely adopted the approach of the ICC and defined rape in the following manner:

“The Accused invaded the body of a person by conduct resulting in penetration, however slight, of any part of the body of the victim or of the Accused with a sexual organ, or of the anal or genital opening of the victim with any object or any part of the body;

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;

The Accused intended to effect the sexual penetration or acted in the reasonable knowledge that this was likely to occur; and

The Accused knew or had reason to know that the victim did not consent.”²⁰⁰³

The first two prongs are identical to the definition provided in the Elements of Crimes of the ICC.²⁰⁰⁴ The elements are further explained by the Court but largely mimic the reasoning provided by the ICC. The penetration of “any part of the body” refers to genital, anal or oral penetration.²⁰⁰⁵ The definition is also consciously gender-neutral.²⁰⁰⁶ Persons unable to provide consent refers to victims of tender age, under the influence of a substance or suffering from an illness or disability.²⁰⁰⁷ Consent in prong (iv) refers to the *mens rea* element of the accused in relation to persons incapable of giving genuine consent. The Court does not, however, discuss why it dismisses its earlier definition of rape.

²⁰⁰¹ *Case No. SCSL-04-15-T against Sesay, Kallon, Gbao*, Judgment of 2 March 2009, paras. 1191-1195.

²⁰⁰² *Ibid.*, paras. 1205 & 1307.

²⁰⁰³ *Ibid.*, para. 145.

²⁰⁰⁴ See Article 7 (1) (g)-1, Elements of Crimes, ICC.

²⁰⁰⁵ *Case No. SCSL-04-15-T against Sesay, Kallon, Gbao*, Judgment of 2 March 2009, para. 146.

²⁰⁰⁶ *Ibid.*, para. 146.

²⁰⁰⁷ *Ibid.*, para. 148.

As was often the case before the ICTR, many witnesses described being raped without the Prosecution seeking to clarify which acts had occurred. The Court acknowledged that it is natural for some witnesses to be reluctant in providing explicit details of sexual violence “especially in Sierra Leonean society where stigma often attaches to victims of such crimes”.²⁰⁰⁸ The Court simply concluded that “[t]he Chamber is therefore of the view that the use of the term ‘rape’ by reliable witnesses describes acts of forced or non-consensual sexual penetration consistent with the *actus reus* of the offence of rape. This approach may be reinforced by circumstantial evidence of violence or coercion”.²⁰⁰⁹

The Court in its evaluation of the facts particularly noted the coercive context as a factor in the evaluation of the offence. Regarding the rapes in the district Koidu, the Court “observes that an atmosphere of violence prevailed in Koidu during the attack, noting the lootings, burnings and killings occurring simultaneously. The Chamber finds that in such violent circumstances the women were not capable of genuine consent”.²⁰¹⁰

The enforced intercourse of a couple was also considered rape on both participants. Though the Prosecution had restricted its pleadings on sexual violence to crimes committed against “women and girls”, thus excluding male victims, this mistake was “cured” by the timely notice of material facts to the accused.²⁰¹¹ In several instances, the fact that the Prosecution did not include male victims in the indictment was raised by the Court.²⁰¹²

In a persuasive section of the judgment, the Court found the widespread acts of sexual violence to constitute acts of terrorism, enumerated in the Statute as a violation of Common Article 3 of the 1949 Geneva Conventions and Additional Protocol II.²⁰¹³ The Chamber stated the following:

“The Chamber observes that sexual violence was rampantly committed against the civilian population in an atmosphere in which violence, oppression and lawlessness prevailed. The Chamber finds that the nature and manner in which the female population was a target of the sexual violence portrays a calculated and concerted pattern on the part of the perpetrators to use sexual violence as a weapon of terror. These fighters employed perverse methods of sexual violence against women and men of all ages ranging from brutal gang rapes, the insertion of various objects into victims’ genitalia, the raping of

²⁰⁰⁸ *Case No. SCSL-04-15-T against Sesay, Kallon, Gbao*, Judgment of 2 March 2009, para. 1285.

²⁰⁰⁹ *Ibid.*, para. 1285.

²⁰¹⁰ *Ibid.*, para. 1287.

²⁰¹¹ *Ibid.*, para. 1303.

²⁰¹² *Ibid.*, paras. 1303 & 1307.

²⁰¹³ Article 3 of the Statute. Para. 1347 of the judgment.

pregnant women and forced sexual intercourse between male and female civilian abductees.”²⁰¹⁴

“The Chamber is satisfied that the manner in which the rebels ravaged through villages targeting the female population effectively disempowered the civilian population and had a direct effect of instilling fear on entire communities. The Chamber moreover finds that these acts were not intended merely for personal satisfaction or a means of sexual gratification for the fighter. We opine that the savage nature of such conduct against the most vulnerable members of the society demonstrates that these acts were committed with the specific intent of spreading fear amongst the civilian population as a whole, in order to break the will of the population and ensure their submission to AFRC/RUF control.”²⁰¹⁵

As to the impact on the community, the Court noted:

“...the physical and psychological pain and fear inflicted on the women not only abused, debased and isolated the individual victim, but deliberately destroyed the existing family nucleus, thus undermining the cultural values and relationships which held the societies together. Victims of sexual violence were ostracised, husbands left their wives, and daughters and young girls were unable to marry within their community. The Chamber finds that sexual violence was intentionally employed by the perpetrators to alienate victims and render apart communities, thus inflicting physical and psychological injury on the civilian population as a whole”.²⁰¹⁶

The Court consequently found the rapes to constitute crimes against humanity, acts of terrorism and outrages upon personal dignity.²⁰¹⁷

The impression of the two rulings, coupled with the principles of Rule 96 on the role of non-consent, is perplexing. In the two cases where rape has been discussed, two distinctive definitions have been offered without an analysis as to the reasons for the departure of the first definition. The latest case has fully adopted the definition found in the Elements of Crimes of the ICC, with a focus on force, threat of force or coercion. Non-consent is merely mentioned for purposes of excluding certain categories of individuals, based on age, inebriation or mental incapacities, hence prong (ii) of Rule 96. Yet prong (i) of the Rule describes force, threat of force or coercion as situations that automatically vitiate consent, implying that the issue of non-consent is relevant and may be examined

²⁰¹⁴ *Case No. SCSL-04-15-T against Sesay, Kallon, Gbao*, Judgment of 2 March 2009, para. 1347.

²⁰¹⁵ *Ibid*, para. 1348.

²⁰¹⁶ *Ibid*, para. 1349.

²⁰¹⁷ *Ibid*, p. 678.

in other situations. Are these provisions compatible? A non-consent based standard would theoretically encompass more acts than the definition adopted in the *Sesay* case of the Special Court. In conclusion, the case law of the *ad hoc* tribunals and the Special Court continues the mode of the *ad hoc* tribunals in altering between several accepted approaches to defining rape. It leaves the impression that evincing the appropriate elements of crimes of rape is as difficult a task in the field of international criminal law as it is in domestic criminal laws. Though the case law of the Court has yet to have had a manifest impact beyond its jurisdiction regarding the definition of rape, its reasoning on the matter and its acceptance of definitions of other bodies constitutes a further brick in developing customary norms in the matter.

9.3 The International Criminal Court

Though international criminal law consists of regulations on individual criminal responsibility, this chapter will principally analyse obligations for states in prohibiting and defining rape on the domestic level, i.e. the implementation mechanisms of the crimes in the Rome Statute. The prohibition of rape is found under the *chapeau* of the crimes as described in the Rome Statute, whereas the definition of the crime is included in the Elements of Crimes, a separate document of the Court, both which will be examined in this chapter. The main question is to what extent states must enact domestic penal codes pertaining to the international crimes, and if this includes a particular definition of rape.

9.3.1 The Birth of the ICC

International criminal law has primarily developed on an *ad hoc* basis as a reaction to certain events, evident by the establishment of the Nuremberg trials and the ICTY and ICTR. This fragmentary approach has caused a lack of cohesion in international criminal law, which will hopefully be cured by the establishment of the ICC. The ICC was established after a long process of negotiations stemming from discussions directly following the Nuremberg trials. The International Law Commission was handed the task by the UN General Assembly to examine the possibilities of a permanent court addressing the most serious international crimes, covered in the Nuremberg trials. However, varying

political goals among the members and the reluctance to relinquish state sovereignty led the project to stall until the 1990s.²⁰¹⁸

The experience gained from the *ad hoc* tribunals, and an increased sensitivity and awareness of human rights and humanitarian concerns, generated the will to create a forum for international justice without regard to the absolute nature of national boundaries. The newer trends in war-fare with the increased targeting of civilians also furthered the impetus to bring an end to impunity and encourage deterrence of such atrocities.²⁰¹⁹ Few states have prosecuted international crimes, be it on the basis of universal jurisdiction, on the basis of a treaty obligation or simply domestic legislation unrelated to either.²⁰²⁰ Reasons for the extensive impunity include the fact that international crimes are of such a grave or widespread nature that the state machinery tends to be actively or passively involved in the commission of the crime. Though individual acts of e.g. war crimes do occur, the acquiescence of the state is nearly a characteristic of the international crimes.²⁰²¹ The international community therefore cannot rely on the initiative of states alone.

It was understood that a permanent court would avoid the necessity of establishing a temporary tribunal subsequent to every major armed conflict leading to atrocities, as well as avoid criticism of the application of ‘victor’s justice’, even though concerns of political agendas in the work of the ICC have

²⁰¹⁸ G.A. Res. 260B(III) (9 December 1948), UN. Doc. A/180, (1948): “...in the course of development of the international community, there will be an increasing need of an international judicial organ for the trial of certain crimes under international law.” See also Broomhall, Bruce, *International Justice & The International Criminal Court*, p. 64, Lee, Roy, *The International Criminal Court: The Making of the Rome Statute - Issues, Negotiations, and Results*. Lee argues that not only worries regarding sovereignty stalled the project but also the fact that the concept of individual criminal responsibility was a great concern to persons who may directly or indirectly be involved in the actions of military or para-military groups.

²⁰¹⁹ Nill, David, *National Sovereignty: Must it be Sacrificed to the International Criminal Court?* 14 *BYU Journal of Public Law* 119, (1999), p. 120. The preamble of the Rome Statute emphasizes that the establishment of the ICC was necessary for the “sake of present and future generations” and intends to “put an end to impunity for the perpetrators and thus to contribute to the prevention of such crimes.”

²⁰²⁰ Discussed in Chapter 9.4.

²⁰²¹ Ferdinandusse, Ward N., *Direct Application of International Criminal Law in National Courts*, p. 92. Naturally, the state does not tend to prosecute members within its own government and studies show that if prosecutions occur, they tend to primarily have been committed by past regimes. See p. 93.

also arisen.²⁰²² The foundation of the Court would thus have a greater legitimacy.²⁰²³ It is also hoped that a permanent court will work in a preventative manner in ending impunity, rather than acting subsequent to a conflict.²⁰²⁴ The ILC completed its draft in 1994, upon which an Ad Hoc Committee followed by a Preparatory Committee worked on the draft text of the Court's statute, culminating in the Rome Conference.²⁰²⁵ The Rome Statute of the International Criminal Court entered into force on 1 July 2002 after receiving the requisite amount of ratifications by states. The Court thus differs from the ICTY and the ICTR in that its basis is a multilateral treaty rather than a resolution by the UN Security Council.

The Rome Statute covers genocide, war crimes and crimes against humanity, reflecting international customary law in order to make the Statute widely acceptable among states.²⁰²⁶ The character of the international crimes is regularly coached in terms of "the gravest concern to the international community" or "shocking to the conscience of mankind" and a threat to the peace and security of all, which is also emphasised in the Rome Statute, clearly acknowledging its roots in natural law.²⁰²⁷ The prevention and punishment of these crimes are therefore essential for the survival of humanity by promoting international stability.

The Rome Statute is naturally not binding on states that are not party to the treaty. However, the ICC and its mechanisms to prosecute rape are of particular interest to study, considering the large number of states that have become members, at the present time 108 nations.²⁰²⁸ It may also have an impact on third states through its wide scope of jurisdiction and restatement of customary

²⁰²² Certain fears have been raised that the assessment of admissibility will become a political question, judging it restrictively or liberally depending on the situation and the interest of the Assembly of State Parties, the UN Security Council or the interests of the Prosecutor. See discussion in Cryer, Robert, *Prosecuting International Crimes: Selectivity and the International Criminal Law Regime*, Cambridge University Press, (2005), p. 225.

²⁰²³ McGoldrick, Dominick, Rowe, Peter, Donnelly, Eric, *The Permanent International Criminal Court: Legal and Policy Issues*, Hart Publishing (2007), p. 460.

²⁰²⁴ Preamble of the Rome Statute.

²⁰²⁵ 160 states participated, 20 intergovernmental organisations and 250 NGOs. See list of participating NGOs: UN Doc. A/CONF.183/INF/3. See more on the process of the conference in Lee, Roy, *Introduction, The International Criminal Court: The Making of the Rome Statute - Issues, Negotiations, and Results*.

²⁰²⁶ Arsanjani, Mahnoush H, *The Rome Statute of the International Criminal Court*, AJIL, vol. 93:22, p. 25. It also has jurisdiction over the crime of aggression, which has yet to be defined and therefore is not available for prosecution as of yet.

²⁰²⁷ Preamble, The Rome Statute.

²⁰²⁸ See website: <http://www.icc-cpi.int/about.html>.

international law.²⁰²⁹ The ICTY has noted the mostly customary status of the Rome Statute:

“In many areas the Statute may be regarded as indicative of the legal views, i.e. *opinio iuris* of a great number of States...resort may be had *cum grano salis* to these provisions to help elucidate customary international law. Depending on the matter at issue, the Rome Statute may be taken to restate, reflect or clarify customary rules or crystallise them, whereas in some areas it creates new law or modifies existing law. At any event, the Rome Statute by and large may be taken as constituting an authoritative expression of the legal views of a great number of States.”²⁰³⁰

The Rome Statute is also exceptionally important for the advancement of international criminal law. Whereas the ICTY and the ICTR greatly developed this field by building on principles created at the Nuremberg trials and clarified and defined concepts in customary international law, the Rome Statute establishes a uniform document of international criminal law, confirming such customary norms. A permanent court avoids the lack of specificity in international law that the *ad hoc* tribunals struggled with in defining the crimes. Despite the impressive development of international law by the *ad hoc* tribunals, their jurisprudence has been criticised for lacking in consistency and judicial memory.²⁰³¹ Arguably, from a legal standpoint, the *ad hoc* tribunals generally do not achieve the desired level of consistency in the interpretation and application of international law since their statutes are inevitably tailored to meet the demands of the specific situation that led to their creation.²⁰³² This has been particularly evident in the case law concerning rape. A multilateral treaty such as the Rome Statute of the ICC detailing the crimes, coupled with the Elements of Crimes specifying the definitions of the crimes, ensure that the principle of legality is adhered to in an unprecedented manner in the temporary tribunals. This is important in maintaining a rule of law-approach also in international law, abiding by the principle of *nullum crimen, nulla poena sine lege*, i.e. no

²⁰²⁹ The Court has jurisdiction over an individual who is a national of a member state, the crime has occurred on the territory of a member state or the situation has been referred to the Court by the Security Council acting under Chapter VII of the UN Charter. See Articles 12-13 of the Rome Statute.

²⁰³⁰ *Prosecutor v. Furundzija*, Judgment of 10 December 1998, para. 227.

²⁰³¹ Nill, David, *National Sovereignty: Must it be Sacrificed to the International Criminal Court?*, p. 129.

²⁰³² Pejic, Jelena, *Creating a Permanent International Criminal Court*, 29 Colum. Hum. Rts. L. Rev. (1998), p. 293.

retroactive punishment. The new Court thus shoulders the grand expectations of eradicating impunity, deterring future abuses and promoting the rule of law.²⁰³³

9.3.2 The Rome Statute and the Prohibition of Rape

The ICC and its jurisdiction are governed principally by the Rome Statute but also two subsidiary documents that will assist the judges in interpreting the Statute: the Rules of Procedure and Evidence and the Elements of Crimes. These are the first international documents to define a range of sexual offences and the Elements of Crimes is the first document to define the elements of the international crime of rape. The Rome Statute contains categorisations of the international crimes, where rape may be a sub-category of the three crimes. The definitions of the sub-categories are listed in the Elements of Crimes, e.g. containing a definition of the crime of rape. Though the definitions of the crimes are “breathtakingly broad and elastic” in the Rome Statute, these are circumscribed by the additional documents.²⁰³⁴

Rape can, according to the Rome Statute, be considered a crime against humanity (Article 7 (1) (g)-1 or a war crime (Article 8 (2) (b) (xxii)). Rape can also constitute an element of genocide. However, the article on genocide does not contain a particular reference to rape, unlike the provisions on crimes against humanity and war crime. Instead, under Article 6 (b) it is stated that genocide can be caused by serious bodily or mental harm, conduct which may include rape, as stated in the Elements of Crimes.²⁰³⁵

Many of the NGOs present at the PrepCom meetings were concerned that the draft Statute was not gender-sensitive nor reflected advances in international humanitarian law regarding sexual violence, as reflected e.g. through the jurisprudence of the two *ad hoc* tribunals. A group was therefore created among the NGOs under the name of the “Women’s Caucus for Gender Justice in the ICC”.²⁰³⁶ The most noteworthy impact through their lobbying was the acknowledgment and inclusion of provisions in the Rome Statute and Elements of Crimes on gender-based crimes such as sexual violence, forced pregnancy and enforced sterilisation. It also successfully lobbied for the introduction of provisions for the protection of witnesses and victims as well as a gender balance

²⁰³³ Broomhall, Bruce, *International Justice & The International Criminal Court*, p. 1.

²⁰³⁴ See McGoldrick, Rowe and Donnelly who argue that the ICC is given wide discretion in interpreting the offences because of the broad definition of crimes, McGoldrick, Dominick, Rowe, Peter, Donnelly, Eric, *The Permanent International Criminal Court: Legal and Policy Issues*, p. 464.

²⁰³⁵ Article 6 (b), footnote 3 of the Elements of Crimes.

²⁰³⁶ Oosterveld, Valerie, *The Making of a Gender-Sensitive International Criminal Court*, 1 *International Law Forum du droit International* 38, (1999), p. 39.

in the recruitment of personnel to the Court.²⁰³⁷ Though several suggestions were heavily objected to by conservative organisations and states, such as the inclusion of the crime of “forced pregnancy”, as well as the inclusion of the word “gender” rather than “sex” in the statute, the inclusion of sexual violence generally garnered little discussion.²⁰³⁸ Instead, the characterisation of rape as a war crime or crime against humanity received general acceptance.

Certain criticism has been raised over the fact that in order to prosecute rape, it has to fall under the *chapeau* of one of the three crimes.²⁰³⁹ This arguably “hides” or diminishes the sexual aspect of the crime, thereby not acknowledging the actual harm to the victim.²⁰⁴⁰ An instance of rape cannot simply be prosecuted as a violation *per se* but further elements must be proven in order for the act to be included in one of the categories of international crimes. Rape should arguably be a category of its own in order to attach the appropriate level of gravity to the crime and to increase possibilities for prosecutions void of the additional evidentiary requirements. Ciara Damgaard argues that the effects of gender-based crimes on the victims are no less severe when committed as individual, isolated acts as opposed to systematic violence.²⁰⁴¹ The reason for the limited list of categories of crimes is, however, to restrict prosecutions to the most serious crimes, be it a matter of quantity in that the attack was widespread, or for being committed with a particular aim. Such elements must then be attached also to the crime of rape. The surrounding circumstances of the rape are therefore essential for the prosecution of the offence as an international crime and this is reflected through its inclusion in the categories of crimes.

The Rome Statute relies heavily on the precedents of the ICTY and ICTR and to a large extent codifies the legal arguments of the jurisprudence of the two *ad hoc* tribunals. Since the statutes of the two tribunals are largely silent on the issue of sexual violence, the Rome Statute constitutes an important step in codifying the advancement of the approach to sexual violence. An important difference between the ICC and the two *ad hoc* tribunals is that the tribunals were created

²⁰³⁷ Arsanjani, Mahnoush H, *The Rome Statute of the International Criminal Court*, p. 23.

²⁰³⁸ Ibid, p. 40.

²⁰³⁹ Damgaard, Ciara, *The Special Court for Sierra Leone: Challenging the Tradition of Impunity for Gender-Based Crimes?*, 73 Nordic J. Int'l L. 485 (2004), p. 498, Halley, Janet, *Rape at Rome: Feminist Interventions in the Criminalization of Sex-Related Violence in Positive International Criminal Law*, 30 Mich. J. Intl. 1, (Fall 2008), p. 73

²⁰⁴⁰ Bedont, Barbara, *Gender-Specific Provisions in the Statute of the International Criminal Court*, in *Essays on the Rome Statute of the International Criminal Court*, Vol. 1, ed. Flavia Lattanzi & William Schabas, Il Sirente, (1999), p. 196.

²⁰⁴¹ Damgaard, Ciara, *The Special Court for Sierra Leone: Challenging the Tradition of Impunity for Gender-Based Crimes?*, p. 498.

by Security Council resolutions and were largely based on the 1949 Geneva Conventions. The Rome Statute and its Elements of Crimes, on the other hand, is the product of 4 years of state negotiations and took into consideration not only the 1949 Geneva Conventions, but also general customary international law and the jurisprudence from the *ad hoc* tribunals. The question to examine next is the extent to which member states must enact legislation incorporating the crimes of the Rome Statute and whether obligations include also all the categories of crimes in the *chapeaus*, i.e. is there an obligation to adopt a penal provision on rape as an international crime? Would it be sufficient for states to rely on existing laws on rape as an “ordinary” offence, i.e. not particularly pertaining to the context of international criminal law?

9.3.3 A Complementary Relationship

The relationship between the Court’s jurisdiction and that of its member states is unique. The jurisdiction of the ICC is built on the principle of *complementarity*, which means that the ICC solely can proceed with an investigation if it is established that the nation state in question has not initiated prosecutions or is deemed “unable” or “unwilling” to carry out the investigation or prosecution.²⁰⁴² This is expressed in Article 1 of the Rome Statute, which states that the Court shall be a permanent institution and “be complementary to national criminal jurisdictions”. It entails that the Court will only deal with cases in which the state in question in some manner has failed to do so, since the aim is not to replace national jurisdictions, but to complement them. It was agreed at an early stage of negotiations that the Court would not have primary jurisdiction in order to ensure the largest possible degree of state sovereignty, while at the same time providing a mechanism to eradicate impunity.²⁰⁴³ Complementarity was viewed as a necessity in order to attract a large number of ratifying states, many who may have been unwilling had the Court been given more extensive powers. The rationale of introducing complementarity is not only states’ interest in maintaining a certain level of sovereignty but also for reasons of legitimacy. This includes encouraging reconciliation by conducting trials or hearings in the country where the violations occurred.²⁰⁴⁴ The principle also recognises the

²⁰⁴² Article 17 of the Rome Statute.

²⁰⁴³ Informal Expert Paper: The Principle of Complementarity in Practice, ICC - Office of the Prosecutor, 2003, p. 3. See also Doherty, Katherine & McCormack, Timothy, “*Complementarity as a Catalyst for Comprehensive Domestic Penal Legislation*”, 5 UC Davis Journal of Int’l L., (1999), p. 151.

²⁰⁴⁴ Informal Expert Paper: The Principle of Complementarity in Practice, ICC - Office of the Prosecutor, 2003, p. 3.

obligation of states to exercise its criminal jurisdiction over the international crimes.

Thus, the protection of states internal affairs largely remains intact in that there will be no interference by the ICC if the state has a sufficient and effective legal system. The ICC will consult at an early stage with member states with conditions that may fall within the jurisdiction of the court, in order to respect the principle of complementarity and not duplicate national proceedings. As such, the member state may be obliged to inform the ICC of its progress in investigating and prosecuting the crime.²⁰⁴⁵ The ICC will subsequently evaluate the information to conclude whether the proceedings are conducted in good faith.²⁰⁴⁶ The greatest impact of the ICC is therefore the encouragement of effective enforcement of international criminal law in countries where the crimes have occurred.²⁰⁴⁷ To a certain extent, the ICC becomes a part of the state legal process since it conducts a form of judicial review when evaluating the willingness and ability of the domestic justice system. The ICC thus not only performs the duty of a regular court but also in this sense exercises a supervisory function over national criminal jurisdictions.

The premise of the complementarity regime is that the ICC will restrict its review to solely a few cases and that instead the Court and its Rome Statute will serve to encourage states to re-evaluate their domestic legislation and equip their domestic legal systems to handle such cases. The Prosecutor of the ICC, Luis Moreno-Ocampo, issued a statement upon assuming office in 2003, declaring that the “absence of trials before this Court, as a consequence of the regular functioning of national institutions, would be a major success”.²⁰⁴⁸ Similarly, in an address in 2004, Moreno-Ocampo revealed the Court’s strategy as taking “a positive approach to complementarity. Rather than competing with national justice systems for jurisdiction, we will encourage national proceedings

²⁰⁴⁵ Article 18, para. 5 of the Rome Statute.

²⁰⁴⁶ A challenge by the state as to the legitimacy of the ICC’s jurisdiction in a case may be brought solely under exceptional circumstances. Article 19, para. 4 of the Rome Statute.

²⁰⁴⁷ Broomhall, Bruce, *International Justice & The International Criminal Court*, p. 84.

²⁰⁴⁸ Moreno-Ocampo, Luis, Prosecutor of the ICC, Statement Made at the Ceremony for the Solemn Undertaking of the Chief Prosecutor of the International Criminal Court (16 June 2003).

wherever possible”.²⁰⁴⁹ As such, the impact of the Court in eradicating impunity for international crimes lies in a supportive complementarity that encourages national adjudication and improvements made at the national level. The extent of cooperation with the Court and obligations regarding the implementation of the international crimes will be analysed in the following as well as the implications of the complementarity regime.

9.3.4 The Rome Statute and the Scope of State Cooperation

9.3.4.1 A Duty to Implement the Crimes?

The question whether states are *obliged* to implement the core crimes and general principles into domestic legislation upon becoming a member state to the Rome Statute is rather ambiguous. The Rome Statute does not provide an immediate answer and the approach by state parties and legal scholars demonstrate divergent interpretations. Certain states have expressed that the complementarity regime requires the adoption of the international crimes,²⁰⁵⁰ whereas others hold that no such direct requirement exists.²⁰⁵¹ State practice thus highlights the lack of clarity as to the appropriate level of implementation, with

²⁰⁴⁹ Moreno-Ocampo, Luis, Prosecutor of the ICC, Statement of the Prosecutor to the Diplomatic Corps (12 Feb., 2004). An early approach by the Court, evident in statements, was to extend such a passive approach to consider the possibilities for a proactive version of complementarity where the ICC would encourage and also assist national governments to prosecute international crimes, the reason for this being that the Rome Statute does not solely delineate the jurisdiction and functions of the Court, but provides the mechanisms for national prosecutions. It remains to be seen whether this active strengthening of the internal justice system will occur. Informal Expert Paper: The Principle of Complementarity in Practice, ICC - Office of the Prosecutor, 2003. See also Burke-White, William, *Proactive Complementarity: The International Criminal Court and National Courts in the Rome System of International Justice*, 49 Harv. Int'l L.J. 53, Winter 2008, p. 56.

²⁰⁵⁰ See e.g. the Dutch Explanatory Memorandum on the substantive implementing legislation (Wet Internationale Misdrijven, Kamerstukken II 2001/02, 28 337, no. 3, MvT) noting: “Although not expressly provided for in the Statutes, the majority of states - including the Kingdom - were always of the opinion that the principle of complementarity entails that states parties to the Statute are obliged to criminalise the crimes that are subject to the International Criminal Court’s jurisdiction in their national laws and furthermore to establish extra-territorial, universal jurisdiction which enables their national criminal courts to adjudicate these crimes even if they have been committed abroad by a foreign national. In Kleffner, *The Impact of Complementarity on National Implementation of Substantive International Criminal Law*, Journal of Intl. Crim. Justice 1, (2003), p. 91.

²⁰⁵¹ See e.g. Sweden SOU 2002:98.

many states still lacking implementing legislation.²⁰⁵² Different opinions also exist among scholars regarding whether an obligation exists to adopt the crimes and, additionally, whether states must incorporate the exact wording of the crimes or if domestic “ordinary” crimes²⁰⁵³ are sufficient.²⁰⁵⁴

Explicit obligations for state parties under the Rome Statute include *cooperating with* and *assisting* the ICC.²⁰⁵⁵ However, these obligations primarily refer to the surrender of suspects, the gathering of evidence and protection of victims and witnesses. Apart from the complementarity mechanism, the obligation of national implementation finds *implicit* support in the text of the Rome Statute. The Preamble of the Statute states that it is “the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes”. The word “duty” connotes a strict *obligation* to prosecute. This has been further asserted by the Office of the Prosecutor stating: “the system of complementarity is principally based on the recognition that the exercise of national criminal jurisdiction is not only a right but also a duty of States”.²⁰⁵⁶ In order to establish jurisdiction over the crimes, a state must first adopt the appropriate legislation allowing for prosecution. Furthermore, in the Preamble it is emphasised regarding the “most serious crimes of concern to the international community as a whole must not go unpunished” that “their effective prosecution must be ensured by *taking measures at the national level* and by enhancing international cooperation”.²⁰⁵⁷

The object and purpose of the treaty thus demonstrates an intention of imposing such a duty on states. With the ultimate goal of ending impunity,

²⁰⁵² See e.g. Amnesty International, The International Criminal Court summary of draft and enacted implementing legislation, AI Index: IOR 40/041/2006, Council of Europe, Doc. 11722, 3 October 2008, Co-operation with the International Criminal Court (ICC) and its universality, Council of Europe, Committee on Legal Affairs and Human Rights, para. 12.

²⁰⁵³ I use the terminology “ordinary” crimes to describe the use of domestic versions in most criminal law statutes rather than the definitions of international crimes, e.g. torture may be prosecuted as assault etc.

²⁰⁵⁴ Darryl Robinson has e.g. argued that there is no obligation to adopt the international crimes. See *The Rome Statute and its Impact on National Law*, in A. Casses, Gaeta and John R.W.D. Jones, *The Rome Statute of the International Criminal Court: A Commentary*. Volume II, Oxford University Press, (2002) and Stigen, Jo, *The Relationship between the International Criminal Court and National Jurisdictions, The Principle of Complementarity*, p. 321. For the opposite view see Roscini, Marco, *Great Expectations: The Implementation of the Rome Statute*, 5 J. Int'l Crim. Just. 493, p. 496.

²⁰⁵⁵ Part. 9 of the Rome Statute: International Cooperation and Judicial Assistance.

²⁰⁵⁶ Paper on some policy issues before the Office of the Prosecutor, September 2003, p. 5.

²⁰⁵⁷ Emphasis added.

coupled with the complementarity regime, it is apparent that the minimum requirement is that state parties allow for the possibility to prosecute the international crimes domestically. As Jann Kleffner argues with regard to the purpose of the Statute: “the object of prosecuting with the necessary deterrent effect for the ultimate purpose of putting an end to impunity and preventing the commission of crimes in the future, would be undermined if States decided not to implement so as to fully criminalize conduct punishable under the Statute”.²⁰⁵⁸ The ICC can only function in an effective manner if states implement the crimes to allow national prosecution or it would become a court of first instance. As such, there is no direct obligation on states to create a domestic regime allowing for prosecution of the core crimes, but states must then be prepared to be found unable or unwilling to prosecute. The very structure of the jurisdiction of the Court rather than an explicit requirement therefore obliges states in such a manner.

It must be noted that an obligation to adopt necessary legislation already existed concerning a few of the core crimes before the adoption of the Rome Statute. Since the Statute draws inspiration from international treaties, such as the UN Genocide Convention, as well as customary international law, evidenced e.g. through jurisprudence of the *ad hoc* tribunals, certain duties exist on a parallel level through these sources.²⁰⁵⁹ Also the grave breaches regime in the 1949 Geneva Conventions poses duties and, albeit the extent of these are unclear, certain writers argue that the failure of states to enact the necessary domestic legislation and prosecute the crimes could generate some form of state responsibility.²⁰⁶⁰ The prohibition of torture also requires implementing legislation, evident in the UN Convention against Torture.²⁰⁶¹ However, the conclusion that a duty exists to provide for domestic jurisdiction for the crimes does not clarify the *extent* of the duty, e.g. whether the prosecution of “ordinary crimes” is sufficient. Additionally, this does not inform the duty to implement as a member state to the Rome Statute.

²⁰⁵⁸ Kleffner, Jann, *The Impact of Complementarity on National Implementation of Substantive International Criminal Law*, p. 93.

²⁰⁵⁹ Ibid, p. 91.

²⁰⁶⁰ Burke-White, William, *Proactive Complementarity: the International Criminal Court and National Courts in the Rome System of International Justice*, p. 201. However, how this state responsibility would lead to actual accountability is uncertain since the Court deals with individual responsibility.

²⁰⁶¹ Article 4, UN Convention against Torture. In the words of the ICTY: “states must immediately set in motion all those procedures and measures that may make it possible, within their municipal legal system, to forestall any act of torture or expeditiously put an end to any torture that is occurring.” *Prosecutor v. Furundzija*, Judgment of 10 December 1998, paras. 149-150.

9.3.4.2 Modes of Implementation

In general, states have a rather wide ‘margin of appreciation’ in choosing the method of implementing its international law obligations, depending on the state’s relationship to international law.²⁰⁶² A reason for this in the context of international criminal law is that states may take into account the particularities of their national criminal justice systems in order not to completely upheave procedures that are familiar to its citizens and court officials.²⁰⁶³ However, according to Article 27 of the Vienna Convention on the Law of Treaties, states cannot invoke the provisions of their internal law as a justification for the failure to perform international obligations.²⁰⁶⁴ The complementarity evaluation may restrict the state’s options. The degree of flexibility is further curtailed by the fact that international criminal law is becoming increasingly specific and precise in its provisions, owing to the legacy of the *ad hoc* tribunals and the Rome Statute of the ICC.

Treaties regulating issues of criminal law are often held to be a special category as concerns implementation since considerations such as the due process rights of the accused and principles of foreseeability and clarity demand that the regulations are sufficiently precise to be directly applied, which is not always present with human rights treaties. According to Gardocki: “The direct application of criminal law conventions would, at the present moment, be

²⁰⁶² Malanczuk, Peter, *Akehurst’s Modern Introduction to International Law*, 7th ed., HarperCollins, London, (1997), p. 63, Zahar, Alexander & Sluiter, Göran, *International Criminal Law*, p. 491. Though far from correctly portraying a rather more complicated reality, the methods of implementation tend to be divided into two separate approaches towards the relationship between international law and domestic law: monist versus dualist states. The purest form of monism entails that an international treaty automatically becomes a part of domestic legislation upon ratification, thereby giving it direct effect in the legal system. However, most states require a form of rule of reference in their national legislation allowing such a direct application. In dualistic states, national and international law are in general considered separate regimes and in order for the international rules to be given effect, the state must adopt national legislation introducing the treaty regulations. Here the international regulations must be transformed on the domestic level to national provisions. Certain states copy the wording directly from the treaty in question whereas others make changes that may be more or less inclusive than the original text.

²⁰⁶³ Terracino, Julio Bacio, *National Implementation of ICC Crimes, Impact on National Jurisdictions and the ICC*, Journal of International Criminal Justice, (2007), p. 3. Additionally, practical concerns are also promoted as a reason, since the state in question is most familiar with the intricacies of its own justice system and therefore are best apt to choose a suitable manner of implementation. Ferdinandusse, Ward N., *Direct Application of International Criminal Law in National Courts*, p. 133.

²⁰⁶⁴ As Ferdinandusse warns, states frequently overestimate the degree of flexibility provided and overstep the appropriate boundaries. Ferdinandusse, Ward N., *Direct Application of International Criminal Law in National Courts*, p. 134.

impossible or would violate the generally accepted standards of the criminal justice. From national reports it is evident, that in no state national courts apply directly international criminal law conventions...”.²⁰⁶⁵ Certain states that in principle allow the direct application of international law have rejected this notion regarding criminal law treaties due to the lack of precision.²⁰⁶⁶ The birth of the Rome Statute may, however, have brought increased possibilities of directly applying the provisions in states that have such a relationship with international law, since it is more specific and precise than its predecessors. It is, nevertheless, advised that monist states should not rely solely on automatic incorporation since the Rome Statute may affect a multitude of national laws, such as substantive and procedural criminal law and possibly constitutional provisions.²⁰⁶⁷

In dualistic states that implement the Rome Statute into their domestic legislation, national law has to be amended so as to ensure that they can exercise their jurisdiction. Certain countries have introduced references to the Rome Statute in their legislation, whereas others incorporate a detailed list of the crimes, using the exact definitions as in the Statute.²⁰⁶⁸ Yet other member states have also incorporated the Statute crimes but have subsequently redefined the violations, some in a broader manner whereas others adopt more restrictive interpretations.²⁰⁶⁹ Common is also for states to, as a matter of practicality, simply opt for relying on similar, already existing descriptions of offences in their domestic criminal law, i.e. the crimes are not qualified as international crimes.²⁰⁷⁰ The legislative process is thereby evaded by avoiding reforms, and domestic courts and prosecutors are already familiar with the scope of the existing crimes. Ordinary crimes are naturally also easier to prove since the additional elements attached to the international crimes, e.g. the widespread

²⁰⁶⁵ Gardocki, Lech, *Legal Problems Emerging From the Implementation of International Crimes in Domestic Criminal Law*, 60 RIDP 91, (1989), p. 94.

²⁰⁶⁶ Ferdinandusse notes a trend with a greater reluctance to directly apply provisions of international criminal law. Ferdinandusse, Ward N., *Direct Application of International Criminal Law in National Courts*, p. 3.

²⁰⁶⁷ Robinson, Darryl, *The Rome Statute and its Impact on National Law*, p. 1850.

²⁰⁶⁸ See e.g. the United Kingdom (International Crimes and International Criminal Court Act 2000, Public Act 2000 No. 26), Australia (International Criminal Court Act 2002, No. 42, 2002), South Africa (South Africa's Implementation of the Rome Statute of the International Criminal Court Act 27). The OAS has encouraged its members to define under their criminal law the crimes of the Rome Statute. See AG/RES 2433, Promotion of and Respect for International Humanitarian Law, 3 June 2008, OAS, para. 6.

²⁰⁶⁹ See e.g. France and Ecuador, who have broader definitions concerning genocide.

²⁰⁷⁰ Ferdinandusse, Ward N., *Direct Application of International Criminal Law in National Courts*, p. 106.

nature or genocidal intent, do not have to be demonstrated. A reliance on domestic regulations on rape will therefore not be uncommon, which may be detrimental to the victim depending on the national definition of the crime. In conclusion, states may, depending on their legal system, prosecute international crimes either as international crimes transformed into national criminal law, by direct application or as “ordinary crimes” under their statutes.

In the years following the adoption of the Rome Statute in 1998, few states had enacted comprehensive legislation that adequately covered the subject matter of the ICC.²⁰⁷¹ The overwhelming majority of countries would therefore need to conduct an extensive review of their penal legislation to see whether it covers the core crimes and their definitions as well as the requisite rules of evidence and procedure to handle trials of this calibre. Without such a review many member states would be unable to exercise primary jurisdiction in relation to the Court.

9.3.4.3 Complementarity - Creating Demands on the Content of Domestic Laws?

In accordance with the complementarity principle, the ICC can solely proceed with an investigation and prosecution if the conditions specified in Article 17 of the Rome Statute are fulfilled. If no state has initiated proceedings, the case is automatically admissible, if it fulfils other requirements such as reaching the requisite level of gravity.²⁰⁷² However, in cases where the state *is* investigating or *already has* completed such proceedings, further factors must be evaluated. The state which has jurisdiction over the case must be genuinely “unable” or “unwilling” to proceed.²⁰⁷³ The ICC therefore conducts a review of

²⁰⁷¹ Doherty, Katherine & McCormack, Timothy, “*Complementarity*” as a Catalyst for Comprehensive Domestic Penal Legislation, p. 150. For example, in Sweden as of 2010, no implementing legislation exists, despite a legislative proposal of 1998. See SOU 2002:98.

²⁰⁷² Informal Expert Paper: The Principle of Complementarity in Practice, ICC - Office of the Prosecutor, 2003, pp. 7-8.

²⁰⁷³ The term “genuine” will not be analysed in-depth but pertains to proceedings that are not feigned (in the case of unwillingness) and willing but unable (in the case of inability). It is believed that the relevance of the term will find guidance in human rights standards, see e.g. Informal Expert Paper: The Principle of Complementarity in Practice, ICC - Office of the Prosecutor, 2003, pp. 8-9. A further step in determining whether a situation will be examined by the Court is contained in Articles 53 (1) (c) and 53 (2) (c) of the Rome Statute, where it is stipulated that the Prosecutor may reject a case if in the “interests of justice”. Factors to evaluate the “interests of justice” criteria include the gravity of the crime and the interests of the victims, as detailed in the article. This is thus a matter of prosecutorial discretion rather than a jurisdictional matter. Since the purpose of the Court is to solely investigate the most severe crimes, a case is not permitted when it “is not of sufficient gravity to justify further action by the Court”. The scope of gravity will be determined by the ICC on a case by case basis, but considering the scope of the

crimes for which it bears jurisdiction, it will most likely entail a requirement of a certain magnitude or widespread nature of the crime in question. Article 17 (1) (d) establishes that a lack of “sufficient gravity” is an inadmissibility ground. Article 53 provides that the Prosecutor shall evaluate the information provided to him when assessing the initiation of an investigation and apart from admissibility take account of the gravity of the crime and the interests of the victims. See evaluation of “gravity” by the Prosecutore in *Informal Meeting of Legal Advisors of Ministries of Foreign Affairs, statement by Luis Moreno-Ocampo*, 24 October 2005, p. 6. See, also, Letter of Prosecutor dated 9 February 2006 (Iraq), pp. 8-9. As such, relatively few cases are deemed to reach the requisite level, demonstrating the Court’s role as an extraordinary measure rather than a court of last instance.

In evaluating whether the state has undertaken genuine proceedings against an individual, the characteristics of the particular legal system may be taken into account. The Prosecutor has stated: “In any assessment of these efforts, the Office will take into consideration the need to respect the diversity of legal systems, traditions and cultures”. See Paper on some policy issues before the Office of the Prosecutor, OTP, Sept. 2003, p. 5. Various forms of alternative justice can therefore be examined with respect to the interests of the victim, e.g. mediation and reconciliation. Additional considerations include the feasibility and effectiveness of an investigation, as well as the impact on the stability and security of the country in question. See OTP, Internal Memorandum: Interpretation and Scope of ‘Interests of Justice’ in Article 53 of the Rome Statute, 7 May 2004. The weight given to each factor or the combination of factors is not detailed in order to allow for flexibility. Whether the Office of the Prosecutor (OTP) in actuality will ever find alternative methods sufficient to serve the interests of justice concerning crimes that ‘shock the conscience’ is doubtful, but in theory a relativist approach to international justice is applied.

Whether “traditional” justice systems are considered is of interest since their approach to cases of sexual violence would be evaluated parallel to that of the national justice system. The approach to rape in various ethnic groups and the traditional village courts with laymen as judges would be assessed. In the case of Uganda, the traditional proceedings of Mato Oput were held not to reach the requisite level required of a legal system, considering both the lack of legal representation, proper investigations and modest punishment. See Uganda: Mato Oput Not a Viable Alternative to the ICC, 11 July 2007, allAfrica.com. See also Second Public Hearing of the Office of the Prosecutor, NGOs and Other Experts, New York, 18 October 2006, Transcript, Chief Prosecutor Luis Moreno-Ocampo. Reports from various constellations of traditional courts speak of a difficulty in handling particularly sexual violence cases, partly because of the precarious situation for the victim in providing testimony in front of village onlookers and being questioned by the village elders, which is further traumatising. They often lead to amicable settlements and sentences are lenient on perpetrators. It is likely that traditional systems in many countries will be considered insufficient from a due process viewpoint. See e.g. *Struggling to Survive: Barriers to Justice for Rape Victims in Rwanda*, Human Rights Watch, September 2003, Vol. 16, No. 10 (A) and Report of the Secretary-General pursuant to Security Council resolution 1820, S/2009/362, 15 July 2009, para. 27. In the latter report, the Secretary-General holds that such systems contribute to the culture of impunity since they often lead to settlements, undermining the criminal aspect of the offence. They often lead to a monetary benefit to the family, community of traditional leaders, rather than a remedy for the victim. Victims may also face pressure to drop charges of rape by their family or community. See e.g. also Committee against Torture, Concluding Comments on Burundi, 20 November 2006, UN Doc. CAT/C/BDI/CO/1,

the adequacy of the criminal system in the member states to the ICC. Both terms shall, however, be analysed in relation to a particular investigation or prosecution and not be a general reflection of the judicial system as a whole.²⁰⁷⁴ The elements of unwillingness and inability calls into question three possible failures of domestic laws that can lead to a finding of admissibility: 1) situations where states have not implemented the crimes and lack a domestic version, therefore leading to an impossibility to prosecute 2) the implemented version of the crime is overly restrictive also leading to such an inability and 3) the prosecution of ordinary crimes. This in turn leads to questions of whether an implicit obligation to implement the crimes exists through the elements of admissibility.

The question of admissibility of cases before the Court is of the utmost importance since it begs the question whether countries that do not include rape as an element of the three international crimes in their domestic legislation, or states that maintain restrictive regulations on rape, will be considered unwilling or unable and therefore risk having the ICC declare its national legal system flawed. In that sense, the Court and its internal admissibility review becomes an international measure of the standard of domestic penal legislation, on e.g. the offence of rape.

9.3.4.4 Unwillingness

The term ‘unwillingness’ concerns the intent of the state when prosecuting/deciding not to prosecute individuals and is deemed to exist in 1) cases where the proceeding themselves or the judicial decisions are aimed at shielding persons from justice 2) there has been an unjustified delay in the proceedings or 3) the proceedings are not conducted independently or impartially.²⁰⁷⁵ Investigations must be performed in a *bona fide* fashion. It is likely that the Court will turn to jurisprudence from human rights bodies in evaluating the proper requirements for national criminal proceedings concerning such aspects as delays or a lack of independence.²⁰⁷⁶ The will or intent of the state can be expressed by any branch of the government, be it the executive, legislative and adjudicative division.²⁰⁷⁷ The ICJ has stated: “[f]rom the standpoint of International Law and of the Court which is its organ, municipal laws...express the will and constitute the activities of States, in the same manner

para. 11, and Report of the Secretary-General pursuant to Security Council resolution 1820, S/2009/362, 15 July 2009, para. 27.

²⁰⁷⁴ Informal Expert Paper: The Principle of Complementarity in Practice, p. 10.

²⁰⁷⁵ Article 17 (2) a-b of the Rome Statute.

²⁰⁷⁶ Stigen, Jo, *The Relationship between the International Criminal Court and National Jurisdictions, The Principle of Complementarity*, p. 9.

²⁰⁷⁷ *Ibid*, p. 255.

as do legal decisions or administrative measures”.²⁰⁷⁸ Domestic laws are thus included in the review of unwillingness.

The lack of domestic laws that allow for prosecution of international crimes may lead to an admissibility finding as can laws intended to shield certain individuals, e.g. amnesty laws.²⁰⁷⁹ However, it must be borne in mind that it is only at the stage of investigation or prosecution in the national system that the ICC will review unwillingness, i.e. in a particular case. Whether the state is unwilling in general to investigate in broader terms is thus not a task for the ICC to evaluate. Though unwillingness pertains to the particular case, the Court will in practice evaluate procedural and substantive criminal laws as impediments to prosecution, e.g. as expressing an intent to shield persons.²⁰⁸⁰ A group of experts engaged by the ICC to clarify the terms of complementarity has acknowledged:

“[i]t will almost inevitably be necessary to consider the broader context, laws, procedures, practices and standards of the State concerned. One may credibly draw inferences from the general to the particular...[W]here a system shown to be plagued with political interference, scripted trials, and unwillingness to pursue certain groups of offenders or offences, this may contribute to an inference of a lack of genuineness in the particular case. Nonetheless, caution should be exercised, since the admissibility assessment is not intended to ‘judge’ a national legal system as a whole, but simply to assess the handling of the matter in question.”²⁰⁸¹

The International Commission of Inquiry on Darfur, which requested the ICC to investigate the Darfur conflict, noted regarding Sudan’s unwillingness and inability that “many of the laws in force in Sudan today contravene basic human rights standards. The Sudanese criminal laws do not adequately proscribe war crimes and crimes against humanity such as those carried out in Darfur and the

²⁰⁷⁸ *Case Concerning Certain German Interests in Polish Upper Silesia*, Judgment 25-5-1926, ICJ, p. 19.

²⁰⁷⁹ See e.g. Robinson, Darryl, *The Rome Statute and its Impact on National Law*, p. 1862. Bruce Broomhall e.g. links the absence of the international crimes of the Rome Statute domestically to a finding of unwillingness: “The absence of the prohibitions in the Statute could support a finding of unwillingness by the Court if such an absence were to amount to ‘shielding the person concerned from criminal responsibility’ or to the proceedings being ‘conducted in a manner which, in the circumstances, is inconsistent with an intent to bring the person concerned to justice’”, *The International Criminal Court: A Checklist for National Implementation*, in ICC Ratification and National Implementing Legislation, Bassiouni (ed.), 13 quarter Nouvelles Etudes Penales, (1999), pp. 148-149.

²⁰⁸⁰ Informal Expert Paper: The Principle of Complementarity in Practice, ICC- Office of the Prosecutor, 2003, p. 13.

²⁰⁸¹ *Ibid*, p. 11.

Criminal Procedure Code contains provisions that prevent the effective prosecution of these acts”.²⁰⁸² Procedural laws requiring medical examination of victims of rape, causing a reluctance to report rape, were also mentioned as limiting the access to justice and therefore a matter of unwillingness.²⁰⁸³ The Prosecutor has, however, subsequently clarified that the “admissibility assessment is a *case specific* assessment and not a judgment on the Sudan justice system as a whole. Once the Prosecutor has identified the cases he intends to take forward for prosecution, he must examine whether or not the national authorities are conducting or have conducted genuine national proceedings in relation to those cases”.²⁰⁸⁴

Certain authors argue that where an ICC crime is prosecuted as an ordinary crime, this can amount to shielding, discussed further below. However, this is contested by many states.²⁰⁸⁵ Arguably the *intent* of the state to e.g. shield individuals cannot be inferred in cases where the state genuinely has intended to investigate or prosecute but lacks the requisite legislation, either not having implemented the crimes or by relying on “ordinary” crimes.²⁰⁸⁶ The requisite level of finding intent sufficient to rise to the level of unwillingness in the sense of Article 17 is therefore rather strict.

9.3.4.5 Inability

The notion of ‘inability’ refers to an objective situation where there is “a total or substantial collapse or unavailability of its national judicial system, the State is unable to obtain the accused or the necessary evidence or testimony or otherwise unable to carry out its proceedings”.²⁰⁸⁷ The second consideration of inability, i.e. to obtain the accused or evidence must be a result of the first, i.e. the collapse. It is primarily applicable in “failed states” scenarios, where an armed

²⁰⁸² Report of the International Commission of Inquiry on Darfur, para. 586.

²⁰⁸³ Para. 587.

²⁰⁸⁴ Third Report of the Prosecutor of the International Criminal Court to the UN Security Council Pursuant to UNSCR 1593 (2005), 14 June 2006, p. 6. Emphasis added.

²⁰⁸⁵ Stigen, Jo, *The Relationship between the International Criminal Court and National Jurisdictions, The Principle of Complementarity*, p. 260, Terracino, Julio Bacio, *National Implementation of ICC Crimes, Impact on National Jurisdictions and the ICC*, p. 12.

²⁰⁸⁶ Terracino, Julio Bacio, *National Implementation of ICC Crimes, Impact on National Jurisdictions and the ICC*, p. 13.

²⁰⁸⁷ Article 17 (3) of The Rome Statute.

conflict has led to a substantial collapse of the legal system in the country.²⁰⁸⁸ The Informal Expert Paper of the OTP has emphasised that “the standard for showing inability should be a stringent one, as the ICC is not a human rights monitoring body, and its role is not to ensure perfect procedures and compliance with all international standards.”²⁰⁸⁹ However, it did list “lack of substantive or procedural penal legislation rendering the system ‘unavailable’,” as a consideration of the admissibility review.²⁰⁹⁰

Much support exists for the proposal that an obvious situation of inability exists in states that do not provide for prosecution of the core crimes in their domestic penal legislation.²⁰⁹¹ Both a total lack of implementation of international crimes and inadequate substantive domestic legislation could render the state party unable to carry out investigations and prosecutions of the crimes covered by the Rome Statute, which could make the case admissible. Bruce Broomhall e.g. argues that various kinds of national laws concerning criminal responsibility could lead to an inability finding, whether concerning the definitions of the crimes, general principles or defences, or if they are “markedly narrower” than in the Statute.²⁰⁹² The UN Special Rapporteur on Systematic Rape, Sexual Slavery and Slavery-Like Practices during Armed Conflict argues that gender-based stereotypes must be taken into account in the evaluation of

²⁰⁸⁸ It does not in general cover financial considerations, such as an overburdened administrative system, unable to handle the large workload, since the aim of the ICC is not to become an instant recourse to countries with a strained economy. Kleffner, Jann, *The Impact of Complementarity on National Implementation of Substantive International Criminal Law*, p. 89.

²⁰⁸⁹ Informal Expert Paper: The Principle of Complementarity in Practice, ICC - Office of the Prosecutor, 2003, p. 15.

²⁰⁹⁰ Ibid, p. 15.

²⁰⁹¹ Doherty, Katherine & McCormack, Timothy, “Complementarity” as a Catalyst for Comprehensive Domestic Penal Legislation, p. 152, Stigen, Jo, *The Relationship between the International Criminal Court and National Jurisdictions*, The Principle of Complementarity, p. 265, and Terracino, Julio Bacio, *National Implementation of ICC Crimes, Impact on National Jurisdictions and the ICC*.

²⁰⁹² Broomhall, Bruce, *International Justice & The International Criminal Court*, p. 91.

national proceedings.²⁰⁹³ The legislative framework would thus be an impediment to a genuine investigation or prosecution of the crime in question. This leads to a situation of *de facto* impunity. As concerns states that refrain from adopting the international crimes and rely on “ordinary” crime provisions, it is a more difficult case. The state is not “unable” to prosecute individuals if the ordinary crime is not more restrictive than the international crime.

In conclusion, it seems that the lack of possibilities to prosecute the international crimes due to absent domestic laws may lead to an admissibility finding through the criteria of “inability” and solely in limited cases through “unwillingness”. An implicit duty to provide for such jurisdiction thus exists through the complementarity regime. In effect, the sub-categories of the *chapeaus* must therefore exist in the domestic laws of member states. The implicit obligation to include the sub-categories would entail an obligation to enact legislation domestically providing for the prosecution of rape. It should be noted that the criminalisation of rape to a large degree already is a universal phenomenon among states, so the more interesting question will be to further evaluate whether a particular definition of rape must be adopted.

9.3.4.6 Ordinary Crimes

The complementarity regime and the admissibility criteria appears to create a duty on states to provide for prosecution of the international crimes in domestic law. However, obligations concerning the *substance* of such provisions are less clear. Must states adopt the crimes as defined in the Rome Statute or is the reliance on “ordinary” crimes provisions sufficient?

²⁰⁹³ UN Doc. E/CN.4/Sub.2/1998/13, para. 95. “A crucial concern in evaluating the competence of national judicial systems to try international crimes is the extent to which the municipal legal system in question adequately protects as a matter of general concern the rights of women to present and argue their legal claims on an equal basis with men in a court of law...the existence of gender-based stereotypes and biases in municipal laws or procedures must be taken into account when assessing the general competence of domestic courts to adjudicate violations of human rights and humanitarian law that are directed against women. For example, in some legal systems the crime of rape is not adequately defined as a crime of violence against the person. In other legal systems, evidentiary rules diminish the legal weight that is afforded to the testimony of a woman in a court of law, creating a legal barrier that would necessarily impede the adequate prosecution of crimes committed against women. Also, the general approach that a legal system takes to crimes of sexual violence, including rape and sexual slavery, may be an additional and equally important factor to consider in evaluating the overall utility of national rather than international prosecutions for acts of rape and sexual slavery committed during armed conflict. For instance, some legal systems emphasize the immoral status of the rape survivors rather than the violent nature of the offence committed by the perpetrator.” This is further supported by e.g. Gardam, Judith & Jarvis, Michelle, *Women, Armed Conflict and International Law*, p. 220.

State practice as to the implementation of the international crimes demonstrates a wide variety of solutions. The complementarity regime has been instrumental in domestic legislative reform concerning the core crimes. Albeit complementarity in itself does not explicitly require the adoption of the crimes nationally, many member states have referred to this regime as the catalyst for domestic reform and introduction of international crimes.²⁰⁹⁴ Member states have been left with the choice as to the degree with which it wishes to incorporate the crimes and definitions in order to avoid a finding of inability or unwillingness. As Zahar and Sluiter point out, it is interesting to note that despite the lack of clear guidelines for the evaluation of inability and unwillingness criteria by the court, coupled with the “margin of appreciation” states retain in the method and degree of domestic implementation, many member states have still seized the opportunity to introduce far-reaching legislative reform.²⁰⁹⁵

Certain states have not only adopted the crimes in the Rome Statute domestically but also the definitions contained in the Elements of Crimes, as well as either requiring or allowing their domestic courts to take into account future interpretations of the crimes by the ICC in case law.²⁰⁹⁶ The UK legislation e.g. provides that for the interpretation of the international crimes, the court shall consider the elements of crimes and in “interpreting and applying the provisions...the court shall take into account any relevant judgment or decision of the ICC. Account may also be taken of any other relevant international jurisprudence”.²⁰⁹⁷ Other countries have explicitly detailed that the national law will be interpreted according to the implementing domestic legislation rather than the jurisprudence of the ICC.²⁰⁹⁸ However, many countries that have implemented legislation subsequent to ratification of the Rome Statute show lacunas in the law, at the same time as it is not uncommon to include broader definitions of certain crimes, thereby managing to create legislation that is both under - and overinclusive depending on the crime.²⁰⁹⁹ The most common problem regarding underinclusion is utilising common crimes for prosecution which do not cover all the acts intended by the Rome Statute.²¹⁰⁰

On the national level, international crimes have in many cases been prosecuted as ordinary crimes since the Second World War and several states

²⁰⁹⁴ Zahar, Alexander & Sluiter, Göran, *International Criminal Law*, p. 489.

²⁰⁹⁵ Ibid, p. 490.

²⁰⁹⁶ Ibid, p. 113.

²⁰⁹⁷ Art. 50, International Criminal Court Act 2001, UK.

²⁰⁹⁸ International Criminal Court Act 2002, Australia.

²⁰⁹⁹ Ferdinandusse, Ward N., *Direct Application of International Criminal Law in National Courts*, p. 117.

²¹⁰⁰ Ibid, p. 119 ff.

have declared that they regard the prosecution of e.g. war crimes as ordinary crimes as valid.²¹⁰¹ Pillage as a war crime may e.g. be prosecuted as theft in certain states. Torture is at times recast as assault. Denmark has chosen this avenue of relying on ordinary crimes instead of adopting the definitions in the Rome Statute concerning war crimes and crimes against humanity. An example includes the prosecution of a Ugandan citizen for crimes that would have reached the level of war crimes but were instead framed as armed robbery and abduction.²¹⁰² Certain problems are attached to the prosecution of “common” crimes in that the Danish authorities in several instances have been unable to pursue investigations due to the ten year limitation period, whereas international crimes do not carry such statutes of limitation.²¹⁰³

Can the prosecution of an act as an ordinary crime lead to a finding of inadmissibility? States and scholars have approached the question in different manners. The statutes of the *ad hoc* tribunals contain a provision allowing the tribunals to interfere in cases where the state has characterised the crime as an ‘ordinary’ crime.²¹⁰⁴ The ICTY in dicta of the *Tadic* case also stated that an international criminal tribunal must be endowed with primacy over national courts because human nature will create “a perennial danger of international crimes being characterized as ordinary crimes”.²¹⁰⁵ During the prepcom negotiations of the Rome Statute, a similar provision such as in the *ad hoc*

²¹⁰¹ Ferdinandusse, Ward N., *Direct Application of International Criminal Law in National Courts*, p. 19. See e.g. an Argentinian court which stated explicitly that international crimes may be prosecuted as ordinary crimes, in Ferdinandusse, p. 205.

²¹⁰² The Special International Crimes Office, <http://www.sico.ankl.dk/page34.aspx>. Sweden has previously received criticism for not criminalising torture in the domestic criminal code but rather relying on provisions on assault. However, it has seen the ratification of the Rome Statute as an initiative to introduce the majority of the subcategories of international crimes, including torture. See legislative proposal SOU 2002:98: Internationella Brott och Svensk Jurisdiktion.

²¹⁰³ Human Rights Watch, *Universal Jurisdiction in Europe, The State of the Art*, Volume 18, No. 5 (D), June 2006, p. 24.

²¹⁰⁴ ICTY Statute Article 10 (2) and ICTR Statute Article 9 (2) a, provide that the *ad hoc* tribunal may allow for the retrial of a person who has already been tried by a national court if “the act for which he or she was tried was characterized as an ordinary crime.”

²¹⁰⁵ *Prosecutor v. Tadic*, Decision on the Defense Motion for Interlocutory Appeal on Jurisdiction, IT-94-AR72, 2 October 1995, para. 58.

statutes was proposed but met with resistance by participating states.²¹⁰⁶ The lack of such a provision in the Rome Statute has been interpreted by certain authors to entail that ordinary crimes are acceptable under the complementarity regime.²¹⁰⁷ Additionally, one must bear in mind not only the general principles of flexibility in international law in implementing methods, but also that the Rome Statute provides that a second prosecution of the accused is prohibited if he has been effectively prosecuted by another court “for conduct also proscribed under” the Statute.²¹⁰⁸ Arguably, this provision demonstrates that the characterisation of the crime as ordinary under domestic law is irrelevant in the context of determining the existence of double jeopardy, thereby implying that member states may not be obliged to classify the crimes as international in their national legislation.²¹⁰⁹

However, Jo Stigen argues that domestic provisions must adequately reflect the gravity of the crime and mirror the extraordinary nature of the crimes.²¹¹⁰ Jann Kleffner further notes that it may be difficult to find an ‘ordinary’ crime that is equivalent in nature to the international crimes.²¹¹¹ A difficulty lies in finding the components of the international crimes in most domestic criminal legislation, which could lead to state inaction because of an inability to find a corresponding violation to prosecute. Though killing as a crime against humanity may be designated as murder, other corresponding crimes are more difficult to envision, e.g. pillaging, a war crime in the Rome Statute, which could be characterised as the ordinary crime of theft. In many cases it may not be sufficient to rely on existing legislation since the discrepancies often are too significant between national law and the Rome Statute, primarily in the

²¹⁰⁶ Certain delegations held that the crimes must reflect the international character and grave nature of the crime, whereas others found that the prohibition of prosecution of ordinary crimes would run contrary to the principle of *ne bis in idem*. See Holmes, John T., *The Principle of Complementarity*, in *The International Criminal Court: The Making of the Rome Statute - Issues, Negotiations, and Results*, ed. Roy Lee, p. 58 and Stigen, Jo, *The Relationship between the International Criminal Court and National Jurisdictions, The Principle of Complementarity*, p. 335.

²¹⁰⁷ Stigen, Jo, *The Relationship between the International Criminal Court and National Jurisdictions, The Principle of Complementarity*, p. 321, Newton, Michael, *Comparative Complementarity: Domestic Jurisdiction Consistent with the Rome Statute of the International Criminal Court*, 167 *Mil. L. Rev.* 20, (2001), p. 71.

²¹⁰⁸ Art. 20 (3) of the Rome Statute.

²¹⁰⁹ Ferdinandusse, Ward N., *Direct Application of International Criminal Law in National Courts*, p. 205.

²¹¹⁰ Stigen, Jo, *The Relationship between the International Criminal Court and National Jurisdictions, The Principle of Complementarity*, p. 335.

²¹¹¹ Kleffner, Jann, *The Impact of Complementarity on National Implementation of Substantive International Criminal Law*, p. 96.

definitions of the crimes but also the penalties attached. The sentence for similar domestic crimes is not likely to be appropriate for the “most serious crimes of international concern” since they do not differentiate between a domestic “common” crime and an international crime. It, however, depends on the crime in question, since murder in most countries is considered the gravest of crimes. Other crimes would most likely warrant stricter penalties than already offered in the domestic legislation. Not only the severity of the punishment may be compromised when relying on domestic crimes, but the prosecution would be subject to the same restrictions that apply to ordinary offences such as statutes of limitation, mitigating circumstances and more extensive possibilities of defence, which could lead to a finding of unwillingness with a view to shielding the accused.

The prosecution of international crimes as ordinary domestic offences may thus trivialise the gravity of the offences and ignore important aspects of the crimes, such as the context and the intent of the offender. This fails to capture the true nature of the crime.²¹¹² In the words of Julio Bacio Terracino, national prosecutions based on ordinary crimes “would undermine the fundamental idea on which the international criminal justice system is founded”.²¹¹³ It is generally agreed that the rules governing criminal prosecution of international crimes must differ from that of common crimes, since they, apart from the interest of the individual victim, protect the interests of the international community and “humanity as a whole”.²¹¹⁴ Being classified as the crimes of the most serious concern to the international community entails that the crimes “transcend the individual because when the individual is assaulted, humanity comes under attack and is negated”.²¹¹⁵ Additionally, it may be of a symbolic value to reflect,

²¹¹² International Criminal Court, Manual for the Ratification and Implementation of the Rome Statute, 2nd ed., March 2003, International Centre for Human Rights and Democratic Development & The International Centre for Criminal Law Reform and Criminal Justice Policy, p. 125. Additionally, from a *practical* standpoint, it has been argued that the “ordinary offences” approach rather than implementation is implicitly incompatible with the Rome Statute and its requirements in Articles 17 and 20, since the application of the crimes of the ICC as ordinary crimes would significantly increase the number of admissible cases to the Court to the point of being overburdened. This is presuming that the ordinary offences generally are not considered sufficient. See Roscini, Marco, *Great Expectations: the Implementation of the Rome Statute in Italy*, 5 J. Int’l Crim. Just. 493, (2007), p. 498.

²¹¹³ Terracino, Julio Bacio, *National Implementation of ICC Crimes, Impact on National Jurisdictions and the ICC*, p. 19.

²¹¹⁴ Kleffner, Jann, *The Impact of Complementarity on National Implementation of Substantive International Criminal Law*, p. 98.

²¹¹⁵ *Prosecutor v. Erdemovic*, Case No. IT-96-22-T, Judgment of 29 November 1996, para. 28.

in national legislation, that the crimes are of concern to the international community and not solely the responsibility of the individual state, which often has initiated or condoned the violation.

Accordingly, prosecution of the core crimes as ordinary crimes in the domestic legal system may result in an inability determination.²¹¹⁶ However, this is not uncontested. Jann Kleffner argues that it is unlikely that a state will be considered “unwilling” or “unable” to investigate or prosecute, since there is no intent to shield suspects nor are the systems automatically so flawed as to fail in their proceedings.²¹¹⁷ Simply using already existing crimes on the domestic level would not lead to a finding that the state party was unable to carry out its proceedings. Darryl Robinson also argues that, hypothetically, states may fulfil the complementarity test by relying on existing national offences. However, such states risk a finding of unwillingness or inability if the penalties or stigma attached does not reflect the severity of the international crime. In cases where no national law equivalent exists, the state is clearly unable to prosecute.²¹¹⁸ Thus, it seems that the use of ordinary crimes *per se* does not lead to an admissibility finding. As stated, the ICC will review legislation solely in connection to a specific case and investigation/prosecution, and whether the law leads to e.g. inability with regard to those facts. A particularly restrictive domestic version, regardless of whether it is called “genocide”, “war crime”, “crime against humanity”, or assault and theft, may thus lead to an inability to prosecute if it precludes acts that are included in the definition of the ICC.

What is apparent is that, regardless of whether the crimes are classified as international or “ordinary”, laws containing gaps that lead to an inability to prosecute are insufficient. State parties must thus criminalise rape domestically since the offence is included in the *chapeau* of the three crimes. Certain states may rely on their already existing domestic laws on rape. No distinction would then be made between rape in the context of international criminal law and “regular” acts of rape. The question is whether such provisions would fully correspond to the particular nature and gravity of rape as an international crime. The particular context and nature of rape in armed conflicts or widespread attacks would not be reflected in the provisions. Rape, e.g. having occurred in an

²¹¹⁶ Zahar, Alexander & Sluiter, Göran, *International Criminal Law*, p. 489. Zahar and Sluiter in fact argue that it is *most likely* that it will lead to an inability finding.

²¹¹⁷ Kleffner, Jann, *The Impact of Complementarity on National Implementation of Substantive International Criminal Law*, p. 96.

²¹¹⁸ Robinson, Darryl, *The Rome Statute and its Impact on National Law*, p. 1861. See, also, Newton, Michael, *Comparative Complementarity: Domestic Jurisdiction Consistent with the Rome Statute of the International Criminal Court*, p. 71.

armed conflict, would thus be prosecuted and evidence provided according to the elements of the crime of rape as an “ordinary” offence.

Other states will implement rape as an international crime, possibly causing these states to have two parallel crimes of rape, depending on the circumstances, i.e. rape as an international crime and rape as an ordinary offence. Not accepting the application of ordinary crimes could lead to separate domestic categories and a higher level of stigma being attached to the same act, such as rape, depending on the context in which it has occurred. To a certain extent, this is the purpose of international criminal law, i.e. solely condemning crimes of the utmost gravity. It may, however, create practical problems in adjudicating two separate categories of the same crime, with different elements. It also creates a moral hierarchy between crimes of rape dependent on the conditions in which they occurred. Both solutions thus raise particular problems and it remains to be seen if this question will be examined by the ICC.

9.3.5 The Elements of the Definition of Rape

Subsequent to establishing an obligation to enact penal provisions on rape, the next step to examine is the question whether states must also adopt a particular definition of rape. The definition of the offence can be found in the document Elements of Crimes. The elements of the offence are defined in the provisions of rape as a crime against humanity and war crime in the Elements of Crimes:

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.”²¹¹⁹

During the negotiations primarily three legal models of defining rape were used as a basis; the common law definition of rape, which exists in many municipal laws, the definition set out by the ICTY in its *Furundzija* decision as well as the *Akayesu* case of the ICTR.²¹²⁰ The final definition most closely mimicked the elements of the *Furundzija* judgment, but is a combination of the

²¹¹⁹ Article 7 (1) (g)-1, Elements of Crimes.

²¹²⁰ Boon, Kristen, *Rape and Forced Pregnancy Under the ICC Statute: Human Dignity, Autonomy, and Consent*, p. 645.

case law from the *ad hoc* tribunals that existed at the time. The *Kunarac* judgment of the ICTY, which has since largely influenced also the case law of the ICTR and the ECtHR, had not been rendered and was therefore not considered.

The definition purposefully uses gender-neutral language, acknowledging the fact that both men and women can be victims of sexual violence. Thus, the language used is broad, noting sexual violence against “any person” and using terms such as “perpetrator” and “victim”, rather than “he” or “she”. Though the large majority of victims of sexual violence are women, it is important to remember the more frequent occurrences of male to male rape, or in limited circumstances of woman to male rape, e.g. seen in the cases of the *ad hoc* tribunals and the Special Court of Sierra Leone.

It is noted in the footnote to paragraph one that the concept of “invasion” is intended to be broad enough to be gender-neutral.²¹²¹ In an attempt to use wide and neutral terminology, the definition focuses on the “invasion” of another human being, reminiscent of the *Akayesu* case. The aim was to include also female perpetrators of rape as well as cases where the victim is forced to penetrate the perpetrator.²¹²² The term “invasion” is, however, coupled with the requirement of penetration, which is an obvious compromise among the delegates at the Rome Conference. Though there was considerable support for the inclusion of the concept “invasion”, as it was considered more neutral, a few influential delegates, including France, The Netherlands and the US found the term too vague and potentially in conflict with national laws.²¹²³ The definition therefore contains a reference to both invasion and penetration, which seems rather superfluous as “penetration” narrows the concept of invasion. Touching a person in a sexual manner without penetration is thereby excluded, e.g. forced masturbation.

The body parts subject to penetration are left flexible with the term “any part of the body”. Apart from vaginal, anal or oral penetration, this will most likely be interpreted to e.g. mean the ears or eyes of the victim.²¹²⁴ The vagina or anus may be also penetrated with an object or “any other part of the body”, which most likely refers to fingers or the tongue of the perpetrator.²¹²⁵ The definition is

²¹²¹ Footnotes 15 and 16 to the Article, Elements of Crimes.

²¹²² Dörmann, Knut, *Elements of War Crimes under the Rome Statute of the International Criminal Court, Sources and Commentary*, ICRC, Cambridge (2003), p. 327.

²¹²³ De Brouwer, Anne-Marie, *Supranational Criminal Prosecution of Sexual Violence: The ICC and the Practice of the ICTY and the ICTR*, p. 131. 24 states were clearly in favour of the concept “invasion”.

²¹²⁴ Ibid, p. 133.

²¹²⁵ Ibid, p. 133.

here slightly wider than in the *Furundzija* case since penetration can be performed with fingers and the tongue, and penetration with a sexual organ in other orifice is included than vaginal, anal or oral. Unlike the *Akayesu* decision, the subjective perception of whether a sexual violation has occurred is not defining in the establishment of rape, but rather a mechanical description of body parts has been chosen. Such a clear and specific definition of rape was most likely seen as a welcome development by many states.²¹²⁶ The question is whether it, in its clarity, is too restrictive. Many agree that a definition of rape must, in a sense, be exclusive to maintain the gravity of rape as opposed to other acts of sexual assault and that a concrete definition is a correct approach.²¹²⁷ Acts not immediately included in this definition can be prosecuted as sexual violence in general. Such may constitute “any other form of sexual violence of comparable gravity,”²¹²⁸ and could potentially include forced nudity, forced masturbation or forced touching of the body.²¹²⁹

As concerns the elements of force and non-consent, yet again we see an apparent mixture between the existing jurisprudence of the ICTY and ICTR at the time. In order for the invasion of a sexual nature to amount to rape, the types of circumstances mentioned are: 1) “force, or by threat of force or coercion”, which is reminiscent of the standard set in the *Furundzija* judgment, 2) “taking advantage of a coercive environment”, more similar to the *Akayesu* approach, and finally 3) “against a person incapable of giving genuine consent”. The latter element of non-consent does not refer to a general element of non-consent as in the *Kunarac* case, but refers to individuals who cannot give legal consent. The term “genuine consent” is explained in a footnote stating that it refers to a person “affected by natural, induced or age-related incapacity” and thereby is presumed not to be capable of consenting to sexual relations.²¹³⁰ Examples of categories of people in this group may include children, the elderly, disabled people and persons under the influence of drugs and alcohol.²¹³¹

The notion of non-consent is not a central element in the definition but rather an addition to the main elements of force and coercion. It aims to ensure that,

²¹²⁶ De Brouwer, Anne-Marie, *Supranational Criminal Prosecution of Sexual Violence: The ICC and the Practice of the ICTY and the ICTR*, p. 133.

²¹²⁷ Ibid, p. 133, *Furundzija*, Judgment of 10 December 1998, para. 186, where it is argued that it is important for sentencing purposes.

²¹²⁸ Rome Statute, Art. 7 (1) (g).

²¹²⁹ De Brouwer, Anne-Marie, *Supranational Criminal Prosecution of Sexual Violence: The ICC and the Practice of the ICTY and the ICTR*, p. 136.

²¹³⁰ Article 7 (1) (g)-1 Elements of Crimes, footnote 16, p.12.

²¹³¹ De Brouwer, Anne-Marie, *Supranational Criminal Prosecution of Sexual Violence: The ICC and the Practice of the ICTY and the ICTR*, p. 134.

with regard to certain categories of persons, where force or coercion may not be necessary to accomplish an act of rape because of their inability to form informed decisions as to their sexual autonomy, such persons are still protected. Whether other categories of individuals did not consent is not evaluated, beyond the forms of non-consent that would fall within “force” or “coercion”. The term “taking advantage of coercive circumstances” was included to recognise that in situations of armed conflicts or widespread violence, the perpetrator can accomplish rape without using direct force or threat of force.²¹³² Coercion is exemplified with e.g. duress and detention, providing a useful tool in understanding the concept. As viewed, force is not an inherent element of coercion, but coercion rather denotes situations where non-consent is automatically vitiated. Coercion also entails situations where the threat is extended to a third person and the rape victim experiences pressure to succumb because of this threat, which is referred to with the element “another person”. The fact that ‘force’ is merely *exemplified* by such things as a fear of violence or duress, evident from the term “such as”, leads certain authors to conclude that force is open to interpretation and may take into consideration e.g. economic and cultural constraints.²¹³³ It is apparent from the mix of concepts such as force and, to a limited extent, non-consent, that the definition and the rules on procedure and evidence are hybrids of common law and civil law systems, since the Rome Statute was negotiated by states from various legal traditions.

The issue of consent, particularly in cases of sexual violence, is further addressed in the Rules of Procedure and Evidence. Rule 70 provides that the Court “shall be guided by and, where appropriate, apply” the principle on consent, i.e. it is not obligatory. The issue of consent is here raised as a possibility of defence and the burden of proof rests with the Defence. Non-consent in the traditional sense is therefore still not a fundamental element of the definition.

“a) Consent cannot be inferred by reason of any words or conduct of a victim where force, threat or 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;

²¹³² Tonkin, Hannah, *Rape in the International Arena: The Evolution of Autonomy and Consent*, p. 259.

²¹³³ Viseur Sellers, Patricia, *The Prosecution of Sexual Violence in Conflict: The Importance of Human Rights as a Means of Interpretation*, OHCHR, p. 26, footnote 134.

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.”²¹³⁴

In order to establish whether the issue of consent is relevant, a procedural mechanism exists whereby the Court holds an *in camera* procedure when the defence has submitted a request to produce evidence of non-consent on the victim’s part. As for the procedure, it is detailed in Rule 72 (2):

“In deciding whether the evidence...is relevant or admissible, a Chamber shall hear in camera the views of the Prosecutor, the defence, the witness and the victim or his or her legal representative, if any, and shall take into account whether that evidence has a sufficient degree of probative value to an issue in the case and the prejudice that such evidence may cause.”

In this rule, the use of consent as a defence is explicitly excluded in enumerated situations. Delegates opposing the rule argued that it would unnecessarily restrict the introduction of evidence as to the witness’ consent. The argument was that not all sexual activity during periods of civil unrest or armed conflicts can be classified as coercive, especially in situations where civilians are free to carry out their normal lives. Arguably, though there is a general sense of coercion in an area, it may not have affected the particular victim. As a compromise, the defence of consent is allowed by the ICC, but first has to pass a relevance test.

²¹³⁴ Rule 70 of the Rules of Procedure and Evidence. An evidentiary provision of interest is Rule 71 of the Rules of Procedure and Evidence, stating: “In the light of the definition and nature of the crimes within the jurisdiction of the Court...a Chamber shall not admit evidence of the prior or subsequent sexual conduct of a victim or witness.” The reason for this is that it has no evidentiary value nor does it corroborate the facts of the present case but rather may prejudice and compromise a fair trial. Furthermore, in Rule 63 (4) it is stated that corroboration is not a legal requirement to prove any of the crimes within the jurisdiction of the Court, particularly sexual violence, e.g. requiring witness testimony or physical evidence. This follows the rules and practice of the ICTR where the Trial Chamber in several cases held the testimony of a single victim sufficient, if reliable and credible, e.g. in the Akayesu and Muhimana cases. Certainly, corroboration of evidence aids the credibility of the victim’s testimony but is not a legal requisite. *The Prosecutor v. Jean-Paul Akayesu*, Judgment of 2 September, 1998, *The Prosecutor v. Mikaeli Muhimana*, Case No. ICTR-95-1B-T, Judgment of 28 April, 2005.

The *mens rea* of the perpetrator is regulated in Article 30 of the Rome Statute in relation to all the core crimes:

1) "...a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court only if the material elements are committed with intent and knowledge.

2) For the purposes of this article, a person has intent where:

- a, In relation to conduct, that person means to engage in the conduct;
- b, In relation to a consequence, that person means to cause that consequence or is aware that it will occur in the ordinary course of events.

3) For the purposes of this article, 'knowledge' means awareness that a circumstance exists or a consequence will occur in the ordinary course of events. 'Know' or 'knowingly' shall be constructed accordingly.²¹³⁵

In relation to the crime of rape it means that the perpetrator *intended* to invade the body of the victim with the knowledge that the surrounding circumstances were such that the invasion was committed with force, threat of force or coercion, or that the victim was unable to give genuine consent.

The work of defining rape was a long process which was characterised by various standpoints from participants representing different legal traditions. Formulating the sexual offences proved to be among the most controversial provisions because of the delegates' various philosophical, legal and cultural

²¹³⁵ Art. 30, The Rome Statute. The various articles also contain specific requirements of *mens rea* as well as further elements. Crimes against humanity require that the rape was part of a widespread or systematic attack of a civilian population and war crimes that the rape took place in the context of an international armed conflict. Article 7 (1) (g) (3) Elements of Crimes. Article 8 (2) (b) (xxii) (3) Elements of Crimes. As mentioned, rape can also be a sub-category of genocide, albeit rape is not defined in this context. Genocide requires additional *mens rea* elements, such as the intent to destroy in part or in whole a particular group. In addition, further levels of *mens rea* are required depending on the crime for which the individual is charged, e.g. concerning crimes against humanity, knowledge that the rape took place in the context of a widespread or systematic attack. It does not entail that the perpetrator was fully aware of all the characteristics of the attack and details of the plan or policy. The degree of knowledge of the scale and nature of the attack will ultimately be left up to the judges to decide on a case by case basis. As for war crimes, the perpetrator must additionally be aware of the factual circumstances that established the existence of an armed conflict. Genocide requires the intent to destroy, in whole or in part, a national, racial or religious group. Art. 8 (2) (b) (xxii) (4), Art. 7, Intro (2) and Art. 6 (b) (2), The Elements of Crimes.

backgrounds.²¹³⁶ Certain states were hesitant owing to concern of the consequences on national legislation in e.g. criminalising sexual conduct within marriage. 11 Middle Eastern states proposed the exemption of certain crimes that could be classified as crimes against humanity, if conflicting with religious or cultural norms within the family. They also suggested that sexual crimes should be subject to such cultural norms and national laws.²¹³⁷ Such a provision would e.g. have excluded rape between husband and wife, which in certain countries is not considered a violation. The issue of non-consent proved a particularly difficult issue to gain consensus on, with various countries requiring higher standards of proof, such as physical or verbal resistance. Certain delegations argued that an explicit mention of non-consent should be included in the definition since it is often the key element with which the culpability of wrongful sexual activity between adults is measured.²¹³⁸ Other delegates opposed this view with the argument that a lack of consent can never be an element of rape in the context of an armed conflict or that non-consent is inherent in the elements of force or threat of force.²¹³⁹

The definition of rape in the Elements of Crimes has been both heralded and criticised. It does provide legal certainty in its specificity, while at the same time including more acts than the *Furundzija* case. It is not as broad as the *Akayesu* definition, which can be perceived as both negative and positive, in that it is mechanical yet clearly distinguishes rape from lesser degrees of sexual violence. An important step is that the definition of rape in the Rome Statute and the Elements of Crimes has moved away from the traditional understanding of rape as a crime against morality and honour. This signals a new shift in the international criminalisation of sexual crimes where there is an increased emphasis on principles such as human dignity and autonomy.²¹⁴⁰ However, though the definition of rape by the ICC purports to achieve a provision that reflects the goal of protecting sexual autonomy, it lacks in its effort in comparison to the ICTY, with its focus on force or coercion. The response has in

²¹³⁶ Boon, Kristen, *Rape and Forced Pregnancy Under the ICC Statute: Human Dignity, Autonomy, and Consent*, p. 637, Steains, Cate, *Gender Issues*, in *The International Criminal Court: The Making of the Rome Statute - Issues, Negotiations, and Results*, ed. Roy Lee, Kluwer, (1999), pp. 366-370.

²¹³⁷ PCNICC/1999/WGEC/DP.39, 3 Dec. 1999, proposal by Bahrain, Iraq, Kuwait, Lebanon, the Libyan Arab Jamahiriya, Oman, Qatar, Saudi Arabia, the Sudan, the Syrian Arab Republic, and the United Arab Emirates, Elements of Crimes, Annex III.

²¹³⁸ Boon, Kristen, *Rape and Forced Pregnancy Under the ICC Statute: Human Dignity, Autonomy, and Consent*, p. 639.

²¹³⁹ *Ibid.*

²¹⁴⁰ *Ibid.*, p. 631.

fact been mixed regarding particularly this element of the offence.²¹⁴¹ The definition has e.g. been described as misguided in its focus on force, in that it fails to consider the harm to the person's autonomy.²¹⁴² On the other hand, other authors have insisted that an evaluation of consent is inappropriate in these contexts.²¹⁴³ Much inspiration for the definition was drawn from the case law of the tribunals. However, at the time of promulgation of the Rome Statute, the *Kunarac* decision had not yet been promulgated by the ICTY. As such, the definition of rape in the Rome Statute was codified in the chronological middle of the development of the jurisprudence of the *ad hoc* tribunals and therefore leads to an awkward combination of elements from *Akayesu* and *Furundzija*.

The core question is whether the Court will take into account more recent jurisprudence, such as the *Kunarac* decision, when handling cases of rape. It is generally understood that the ICC will look to the jurisprudence of the *ad hoc* tribunals for assistance when needed.²¹⁴⁴ The impact of the case law of the ICTY and the ICTR on the Elements of Crimes is apparent and unsurprising. France even proposed the inclusion of commentaries to the Elements that would make more extensive references to the case law of the *ad hoc* tribunals and would bring the interpretations of the crimes in line with their jurisprudence.²¹⁴⁵ It has, however, been argued that the elements of the definitions promulgated by the *ad hoc* tribunals in *Akayesu* and *Furundzija* were suitable for the specific situations reviewed by the tribunals, but are not commonplace circumstances suitable for a general universal definition.²¹⁴⁶ However, it is unlikely that this would pertain to the elements of rape.

²¹⁴¹ De Brouwer, Anne-Marie, *Supranational Criminal Prosecution of Sexual Violence: The ICC and the Practice of the ICTY and the ICTR*, p. 136. Boon argues that the definition in a satisfactory manner draws on three legal principles: firstly, the notion of human dignity, since the ICC links gross infringements of dignity to violations of bodily security and privacy. Secondly, the concept of individual autonomy is reflected in the idea that individuals should not be forced to engage in sexual relations, which is closely connected to the third principle of consent. Boon, Kristen, *Rape and Forced Pregnancy Under the ICC Statute: Human Dignity, Autonomy, and Consent*, p. 634.

²¹⁴² Cryer, Friman, Robinson & Wilmschurst, *An Introduction to International Criminal Law and Procedure*, p. 210, arguing that most domestic laws simply require a lack of consent of the victim.

²¹⁴³ See discussion Chapter 9.2.3.

²¹⁴⁴ Stigen, Jo, *The Relationship between the International Criminal Court and National Jurisdictions, The Principle of Complementarity*, p. 8.

²¹⁴⁵ PCNICC/1999/WGEC/DP.1.

²¹⁴⁶ Hunt, David, *The International Criminal Court, High Hopes, 'Creative Ambiguity' and an Unfortunate Mistrust in International Judges*, *Journal of Int'l Criminal Justice* 2, p. 60.

Some indication exists that the definition of rape in the Elements of Crimes is not generally accepted by other adjudicatory bodies. The ICTY e.g. promulgated its *Kunarac* decision after the Elements of Crimes was drafted, which was similarly followed by the ICTR in their later cases. The Special Court for Sierra Leone has, however, adopted the definition of the ICC. According to Cryer, Friman, Robinson and Wilmshurst, though the Elements should be given weight as a consensus instrument, the definition of rape may be one of the instances where the Court finds that it does not correspond with the Rome Statute. Thus, it is not unlikely that the ICC will be inspired by the *Kunarac* approach, considering its increased following e.g. by both *ad hoc* tribunals and since it is more compatible with the notion of sexual autonomy and the ICC Rules of Procedure and Evidence.²¹⁴⁷

9.3.6 The Elements of Crimes and its Status for Member States

The fact that a definition of rape in international criminal law was developed through the judicial process of the *ad hoc* tribunals has been criticised as a violation of the principle of legality.²¹⁴⁸ The choice to construct an Elements of Crimes as well as define the crimes in a detailed manner was therefore a result of the importance attached to the principle of legality during the Rome conference. A strong inclination towards legal precision and predictability was evident in the discussions.²¹⁴⁹ During the PrepCom meetings there was a general consensus that the crimes should “be defined with the clarity, precision and specificity required

²¹⁴⁷ Cryer, Friman, Robinson & Wilmshurst, *An Introduction to International Criminal Law and Procedure*, p. 210. Hypothetically, could the definition of rape contained in the Elements of Crimes be altered? Such a change can be made. However, it requires the approval of a two-thirds majority of the Assembly of States Parties and any amendments must be consistent with the Statute. See Article 9 (2), the Rome Statute.

²¹⁴⁸ De Brouwer, Anne-Marie, *Supranational Criminal Prosecution of Sexual Violence: The ICC and the Practice of the ICTY and the ICTR*, p. 104.

²¹⁴⁹ McGoldrick, Dominick, Rowe, Peter, Donnelly, Eric, *The Permanent International Criminal Court: Legal and Policy Issues*, p. 44. Certain states were prominent in the discussions on the principle of legality, e.g. the United States which proposed the introduction of the Elements of crimes and intended for it to be binding on the judges. However, most states preferred a shorter list of crimes in the Statute, following the structure of the statutes for the ICTY and ICTR. See Lee, Roy, *The International Criminal Court: The Making of the Rome Statute - Issues, Negotiations, and Results*, p. xivi.

for criminal law in accordance with the principle of legality”.²¹⁵⁰ This was partly due to the uncertainty as to the definitions of the crimes in customary international law. The participants sought a Court whose subject-matter was clearly defined in its instruments.²¹⁵¹ It is an example of the influence on human rights law on this area, in ensuring the accused’s due process rights. As such, the rules must be as clear and specific as possible and, as stated by Antonio Cassese, whereas gray areas often are encountered in public international law, such uncertainty cannot be allowed in the area of international criminal law.²¹⁵² As noted, the principle of legality is specifically mentioned in Article 22 (2) of the Statute which states that “the definition of the crime shall be strictly construed and shall not be extended by analogy”.

During the Rome Conference, concern was raised as to the possibilities of reaching an agreement on the details of the elements of crimes, considering the distinctly different approaches by civil and common law countries.²¹⁵³ As a compromise, it was agreed that the elements should be contained in a separate document from the Statute and merely serve to *aid* the Court. This is specified in Article 9 (1) of the Statute: “Elements of Crimes shall assist the Court in the interpretation and application of Articles 6, 7 and 8”, i.e. the definitions of the crimes.

In Article 21 of the Rome Statute, a provision largely inspired by Article 38 of the Statute of the International Court of Justice, the hierarchy of the rules of law to be applied by the Court is specified. Primarily, the Elements of Crimes must be applied, secondly, applicable treaties, principles and rules of international law, including the international law of armed conflict. Thirdly, general principles of law derived from national laws, including, if appropriate, the laws of the states that would normally have exercised jurisdiction over the case can be applied.

²¹⁵⁰ Report of the preparatory committee on the establishment of an international criminal court, UN G.A.O.R., 51st Sess. Supp. No. 22, UN Doc. A/51/22 (1996), paras. 52, 180 and 185. Early suggestions included annexing the Elements to the Rome Statute to “provide clarity and precision” and uphold the principle of legality but such limits to judicial interpretation were not well-received. Politi, Mauro, *Elements of Crimes*, in A. Cassese, Gaeta and John R.W.D. Jones, *The Rome Statute of the International Criminal Court: A Commentary. Volume II*, Oxford University Press, (2002), p. 445.

²¹⁵¹ Broomhall, Bruce, *International Justice & The International Criminal Court*, p. 31, McGoldrick, Dominick, Rowe, Peter, Donnelly, Eric, *The Permanent International Criminal Court: Legal and Policy Issues*, p. 44.

²¹⁵² Cassese, Antonio, *International Criminal Law*, p. 21, Evans, Malcolm, *International Law*, (2003), p. 725.

²¹⁵³ Lee, Roy, *The International Criminal Court: The Making of the Rome Statute - Issues, Negotiations, and Results*, p. 31. As Lee notes, while not all definitions are perfect, to be able to reach an agreement was in itself an important contribution.

Additionally, the ICC *may* draw inspiration from its own jurisprudence in previous case law. Notably, applicable law must also be consistent with internationally recognised human rights. Though the language of Article 21 indicates a binding nature of the elements, stating that “the Court *shall* apply” the elements in the first place, such an interpretation was clearly not intended. However, it is understood that the judges of the ICC will treat the document with considerable deference, considering its multilateral foundation.²¹⁵⁴

Though the question if state obligations exist to enact legislation on the crimes is ambiguous, obligations pertaining to the *definitions* of the crimes are thus clear. Since the Elements of Crimes is not obligatory for the Court in its adjudicatory role, such an obligation clearly does not exist for member states. However, the definitions may still have a considerable impact on domestic legislation. In fact, the Elements of Crimes is generally believed to be “a watershed in international law and it will have a profound effect on the interpretation and status of sexual crimes in both domestic and international tribunals”.²¹⁵⁵

An implicit obligation may exist, again, through the principle of complementarity. Restrictive definitions of rape could preclude the possibility of prosecuting rape as an international crime. Hypothetically, this could lead to a finding of unwillingness or inability. In a report by the UN Commission on Human Rights on the administration of justice, rule of law and democracy, it is declared that “to the greatest extent possible the national court would need to apply the same definition of the crime, the same rules of evidence and, in general, be in conformity with other procedures of ICC that might affect the substantive outcome of the proceedings”.²¹⁵⁶ An example of an anomaly in national legislation that could potentially lead to a finding of ‘unwillingness’ or ‘inability’ are laws on rape requiring eyewitness evidence, or rules considering male eyewitnesses as more valuable than that of women. Francoise Hampson of the UN Sub-Commission of Human Rights, states that in such extreme cases, it could be argued that the national system is fundamentally flawed and open the way for an international trial.²¹⁵⁷ Hampson further argues that a failure on a state’s part could lead to acquittals which would not have arisen before the court. The complementary regime would then lead to a weakened system of

²¹⁵⁴ McGoldrick, Dominick, Rowe, Peter, Donnelly, Eric, *The Permanent International Criminal Court: Legal and Policy Issues*, p. 44.

²¹⁵⁵ Boon, Kristen, *Rape and Forced Pregnancy Under the ICC Statute: Human Dignity, Autonomy, and Consent*, p. 631.

²¹⁵⁶ UN Doc. E/CN.4/Sub.2/2004/6, para. 13.

²¹⁵⁷ *Ibid.*

international protection.²¹⁵⁸ She asserts that differences in national substantive law or rules of procedures when implementing international criminal law could lead to inconsistent outcomes in cases with identical facts. This would "...have serious implications for the rights of the accused, the rights of victims and the effectiveness of the international criminal law system".²¹⁵⁹ The effect of national laws not being in conformity with the definition in international law is that a defendant could receive a lesser sentence at the national level. Such inconsistencies therefore need to be identified and harmonised. This would mean that by becoming a party to the Rome Statute, an evaluation of the domestic laws in member states regarding the definition of and procedural laws pertaining to rape to a certain extent will be carried out.

The Elements of Crimes could possibly also add to an emerging definition of rape in customary international law. Though the crimes included in the Rome Statute already constituted customary international law, the same cannot be said for the definitions of the crimes. Considering the over-whelming acceptance, albeit at times through compromise at the PrepCom, and the willingness of states to be bound by the regulations, the Elements of Crimes might also constitute evidence of the *opinio iuris* element of customary law.²¹⁶⁰ There was indeed a general agreement that the definitions of the crimes of the ICC should reflect customary international law in order to garner wide acceptance and avoid creating new law.²¹⁶¹

Beyond such possible obligations, the document may also serve as inspiration for domestic law reform. A representative from the Women's Initiatives for Gender Justice and the International Criminal Court, Brigid Inder, assures that creative implementation of the international crimes can provoke legislative reform and a review of the definition of rape, despite the fact that the Elements of Crimes is non-binding. Adopting the definitions of the Elements of Crimes can simultaneously influence the domestic definition of rape as an ordinary crime.²¹⁶² Several countries have provided for requirements in their domestic legislation that its domestic courts apply the Elements of Crimes, e.g. the United

²¹⁵⁸ UN Doc. E/CN.4/Sub.2/2004/12, para. 8.

²¹⁵⁹ UN Doc. E/CN.4/Sub.2/2004/6, para. 14.

²¹⁶⁰ Kress, Claus, *The Crime of Genocide and Contextual Elements, A Comment on the ICC Pre-Trial Chamber's Decision in the Al-Bashir Case*, Journal of International Criminal Justice, (2009), p. 6.

²¹⁶¹ Kirsch, Philippe, *Foreword*, in *Elements of War Crimes under the Rome Statute of the International Criminal Court, Sources and Commentary*, ed. Knut Dörmann, ICRC, Cambridge University Press, (2003), p. xiii.

²¹⁶² On Women's Initiatives for Gender Justice and the International Criminal Court: An Interview with Brigid Inder, WHRnet, August 2004.

Kingdom, which also has a provision obliging its courts to take into account relevant case law from the ICC.²¹⁶³ In New Zealand, the Elements of Crimes has been given status in domestic proceedings.²¹⁶⁴ Nevertheless, various organisations have raised concern over the fact that many member states are failing in implementing the Rome Statute or are adopting narrow definitions of the crimes.²¹⁶⁵ Examples of this include a lack of incorporating all crimes against humanity, defined in Article 7, particularly regarding crimes of sexual violence or adopting restrictive definitions of e.g. rape. An example is Bosnia-Herzegovina which still requires that the sexual violence occurs following “force or by threat of immediate attack upon her life or limb or the life or limb of a person close to him”.²¹⁶⁶ Such a definition disregards the evolution in international criminal law through the jurisprudence of the *ad hoc* tribunals. Thus, though the Elements of Crimes is not explicitly binding on member states, it may still create certain obligations for states or, at a minimum, serve as inspiration for domestic legal reform.

The response to the promulgation of the Elements of Crimes has been varied. Though the document provides specificity and legal certainty and in many ways endorses existing customary international law, it also circumvents judges’ ability to develop the law. It has been criticised for restricting the role of the judges to a substantially mechanical function in applying the principles and definitions, a result of the mistrust of the states at the PrepCom. This could restrain the efficiency of the judges and the mandate of the Court.²¹⁶⁷ As Hon. David Hunt, former judge of the ICTY points out, because international criminal law was an imprecise and fairly undeveloped body of law at its inception, it has been dependent on judges to receive its precision and has developed slowly and allowed to adapt to new circumstances. As such, “if it is to fulfil its goals efficiently, international criminal law must be given space to grow, rather than kept in a straitjacket imposed by a rigid code” or it risks becoming obsolete.²¹⁶⁸ According to Hunt, though there is value in the codification of

²¹⁶³ The United Kingdom International Criminal Court Act 2001, Article 50 (5): “In interpreting and applying the provisions of the articles referred to in subsection (1) the court shall take into account any relevant judgment or decision of the ICC.”

²¹⁶⁴ International Crimes and International Criminal Court Act 2000, Public Act 2000 No. 26, article 12 (4) (a).

²¹⁶⁵ International Criminal Court: The Failure of States to Enact Effective Implementing Legislation, Amnesty USA, 7 Sept. 2004.

²¹⁶⁶ Article 172(1)(h) (persecution) of the Criminal Code of BiH (CC BiH).

²¹⁶⁷ Hunt, David, *The International Criminal Court, High Hopes, ‘Creative Ambiguity’ and an Unfortunate Mistrust in International Judges*, Journal of Int’l Criminal Justice 2, (2004), p. 56.

²¹⁶⁸ Ibid, p. 58.

previous practices, the minute detail of the crimes in the instrument can stultify further growth in the law.²¹⁶⁹ As regards rape, the elements of crimes are an important step in clarifying possible customary elements of the crime. However, in certain regards it prevents the development of the definition and the acknowledgement of more recent understandings of rape, e.g. from the jurisprudence of the *ad hoc* tribunals. Considering the rather conservative definition of rape of the ICC, such freedom would have been useful in this regard.

9.3.7 Situations Investigated by the Court

The current situations being investigated by the ICC pertaining to sexual-based violations include charges of rape as crimes against humanity and war crimes against individuals in the DRC, the Central African Republic, Uganda and Darfur, Sudan.²¹⁷⁰ The cases have not concerned gaps or lacking domestic legislation, but rather failure to capture the accused, deficient procedures in the

²¹⁶⁹ Hunt, David, *The International Criminal Court, High Hopes, 'Creative Ambiguity' and an Unfortunate Mistrust in International Judges*, pp. 59-60. Many delegations also expressed fear during the negotiations that the Elements of Crimes would unnecessarily restrict the interpretation of the scope of the crimes in the Rome Statute. Hebel, Herman von and Kelt, Maria, *Some Comments on the Elements of Crimes for the Crimes of the ICC Statute*, Yearbook of Intl Humanitarian Law, vol. 3, (2000), p. 288. In many situations the Preparatory Commission adopted broader definitions of the crimes than those proposed by the tribunal judges, indicating that the judges of the ICC may have acted with more caution without such a document. Robinson, Darryl & Hebel, Herman von, *Reflections on the Elements of Crimes*, in *The International Criminal Court, Elements of Crimes and Rules of Procedure and Evidence*, ed. Roy Lee, Transnational Publishers, (2001), p. 229.

²¹⁷⁰ DRC: Germain Katanga/Mathieu Ngudjolo Chui, date of charges 12 June, 2008, CAR: Jean-Pierre Bemba Gombo, Date of charge 23 May 2008, Uganda: Joseph Kony: date of charge: 27 Sept 2007, Vincent Otti: date of charge 8 July 2005, Sudan: Ahmad Muhammad Harun, date of charge 27 April 2007, Ali Muhammad Ali Abd-Al-Rahman, date of charge 27 April 2007. All situations except the Darfur case were initiated by the member states themselves. The Ugandan conflict is primarily restricted to the northern region, marked by a 20-year old civil war noted for its use of child soldiers abducted from their families. The conflict in DRC involves over ten militia groups and several national armed forces groups, causing approximately over 3 million people dead and thereby constituting one of the deadliest conflicts in Africa. The situation in CAR investigated by the ICC concerns the *coup d'état* in 2003 where thousands of individuals were executed or tortured. The OTP of the ICC collected evidence indicating that at least 600 rapes were perpetrated in a 5-month period. *ICC-OTP-BN-20070522-220-A_EN, The Hague, 22 May 2007*. A vast amount of the population has been murdered, thousands have been raped and millions live displaced in camps in Darfur, Sudan. See e.g. *ICC-02/05-01/09, 4 March 2009*.

legal systems or an unwillingness to prosecute assailants, e.g. by being complicit in the execution of the crimes.²¹⁷¹

The conflicts all feature sexual violence as a common fixture, be it sexual enslavement, rape, mutilation or forced marriage.²¹⁷² Katanga and Ngudjolo, the first suspects charged with gender-based crimes by the ICC were commanders of two militia groups and suspected of orchestrating mass-rapes in the DRC. The manner in which it was performed again confirms the structured form of sexual violence in armed conflicts. The Prosecutor of the ICC described the sexual violence in the following terms:

“Women, who were captured at Bogoro and spared because they hid their ethnicity, were raped and forcibly taken to military camps. Once there, they were sometimes given as a ‘wife’ to their captors or kept in the camp’s prison, which was a hole dug in the ground. The women detained in these prisons were repeatedly raped by soldiers and commanders alike and also by soldiers who were punished and sent to prison. The fate reserved to captured women was widely known.”²¹⁷³

The charges based on sexual violence against commanders and leaders in all situations investigated by the ICC is an affirmation that such crimes are given a prominent role in the work of the Court. However, the fact that only a limited number of individuals have been charged with rape or other gender-based violations in the face of evidence of mass rapes, has been criticised.²¹⁷⁴ Brigid Inder, of the Women’s Coalition for Gender Justice, an umbrella organisation responsible for promoting the inclusion of gender-based violations in the Rome Statute holds that the shortage of more comprehensive indictments is a result of the “lack of understanding of gender-based violence at the policy level...[which] is limiting the effectiveness of the ICC to prosecute these crimes”.²¹⁷⁵ A wider range of charges could therefore have been expected to “reflect the purpose and impact of sexualised violence...” and the work of the ICC so far does not “signal any real progress in the field of international criminal

²¹⁷¹ See e.g. regarding Uganda: Pre-Trial Chamber II, Warrant of Arrest for Joseph Kony Issued on 8 July 2005, No. ICC-02/04-01/05, 27 September 2005, the DRC: Pre-Trial Chamber I, Decision on the Prosecutor’s application for a warrant of arrest, Article 58 (ICC-01/04-01/06-8), 10 February 2006, paras. 35-36, CAR: Prosecutor Opens Investigation in the Central African Republic, ICC-OTP-20070522-220, Sudan: Pre-Trial Chamber I, Warrant of Arrest for Ahmad Harun, No.: ICC-02/05-01/07, 27 April 2007.

²¹⁷² Women’s Coalition for Gender Justice, Making a Statement, June 2008, p. 3.

²¹⁷³ ICC-01/04-01/07-584-Anx1A, para. 89.

²¹⁷⁴ Women’s Coalition for Gender Justice, Making a Statement, June 2008, p. 9.

²¹⁷⁵ *Ibid*, p. 14.

law”.²¹⁷⁶ The Coalition e.g. mentions that sexual violence only receives a cursory mention in reports by the Prosecutor of the ICC to the UN Security Council and is not considered important enough to obtain a prominent role.²¹⁷⁷ Is the critique valid? In several of the cases gender-based crimes, be it rape or sexual enslavement, have been one of the main charges.²¹⁷⁸ Such offences have thus been consistently acknowledged by the prosecutor. What remains to be seen is to what extent the Court applies e.g. the definition of rape contained in the Elements of Crimes.

9.3.8 Impact of the ICC

The adoption of the Rome Statute and the subsequent establishment of the ICC represent a vast advancement of gender aspects in international criminal law, but also IHL and international human rights law. As the first permanent international criminal court it has a unique opportunity to develop the international jurisprudence as regards sexual violence through its acknowledgement of rape as an element of genocide, war crimes or crimes against humanity. An international consistency of the definitions of the crimes will thereby develop through its case law and the national implementation of the crimes in ratifying states. The degree to which states will need to replace its existing laws to fulfil its obligations under the Rome Statute depends on its existing laws and legal system, but it is presumed that all state parties need a certain level of modification. It appears that states must adopt legislation implementing the international crimes, and it is also encouraged that the member states apply the definitions of the crimes found in the Elements of Crimes. Restrictive definitions of rape could plausibly lead to a finding of admissibility by the Court. An incentive therefore exists to adopt this definition. Ultimately, the Court will act as a standard-setting mechanism in the interpretation and application of international law and provide a model for national authorities in the administration of criminal justice, influencing domestic interpretations.²¹⁷⁹ The offences listed in the Rome Statute will “take on a life of their own as an authoritative and largely customary statement of international humanitarian and criminal law, and may thus become a model for national laws to be enforced under the principle of universality of

²¹⁷⁶ Women’s Coalition for Gender Justice, Making a Statement, p. 14.

²¹⁷⁷ Ibid, p. 20.

²¹⁷⁸ In CAR the main priority was gender-based violence. See ICC-OTP-BN-20070522-220-A_EN. See e.g. ICC-01/04-01/07, 2 July 2007, Warrant of arrest for Germain Katanga, ICC-01/04-02/07, 6 July 2007, Warrant of arrest for Mathieu Ngudjolo Chui, ICC-01/05-01/08, 23 May 2008, Warrant of arrest for Jean-Pierre Bemba Gombo.

²¹⁷⁹ Nill, David, *National Sovereignty: Must it be Sacrificed to the International Criminal Court?*, p. 127.

jurisdiction”.²¹⁸⁰ The Rome Statute has in fact already served to codify customary rules, with some modification.

The review of the jurisprudence of the *ad hoc* tribunals and the Elements of Crimes provides divergent understandings of how to define rape in international law. As argued by Patricia Viseur Sellers, there is no overall legal hierarchy providing guidance as to which definition has primacy over another, rather, each definition has authority in the particular jurisdiction of that tribunal/court.²¹⁸¹ Sellers raises concern over the legitimacy of such a multitude of definitions and whether it may undermine the equal access to justice, depending on the jurisdiction to which a case may apply.²¹⁸² As argued, “with the growing number of national and supra-national courts enforcing international law, this could pose a threat to the system as different standards evolve in different courts. Even though the ICC may handle only a few cases, it seems likely that national courts will defer to its decisions on key points of international criminal law...”²¹⁸³ The various approaches to defining rape thus lead to a fragmentation of international criminal law.

An objective of the Court, which is obvious in the adoption of its complementarity principle, is the harmonisation of national laws, which is occurring through the transposition of the Rome Statute into national law. Harmonisation is essential in order to provide coherence and thereby legal certainty for the individual, a fundamental precept of criminal law. As Ward Ferdinandusse argues, the need for coherence in the interpretation of the international crimes is particularly important since, as viewed in the chapters detailing the jurisprudence of the ICTY and ICTR, there is no principle of *stare decisis* in international law in the same manner as national law.²¹⁸⁴ The decisions of international criminal tribunals are not binding precedents for the tribunals themselves nor for domestic courts, hence the divergent conclusions on defining rape. For a consistent international approach, there is hope that the jurisprudence of the ICC will provide this in the matter of sexual violence. Such uniformity is important for the legitimacy of the international adjudicatory system and the faith in public international law, as well as the effectiveness of the same. Though

²¹⁸⁰ Report of the 69th Conference, p. 406.

²¹⁸¹ Viseur Sellers, Patricia, *The Prosecution of Sexual Violence in Conflict: The Importance of Human Rights as a Means of Interpretation*, p. 27.

²¹⁸² *Ibid*, p. 27.

²¹⁸³ Burke-White, William, *The International Criminal Court and the Future of Legal Accountability*, p. 204.

²¹⁸⁴ Ferdinandusse, Ward N., *Direct Application of International Criminal Law in National Courts*, p. 113. See, also, Leathley, Christian, *An Institutional Hierarchy to Combat the Fragmentation of International Law: Has the ILC Missed an Opportunity?*.

consistency is important, it is unfortunate that the definition of rape chosen by such an influential court centres on the element of force and coercion.

Is the law developed by the ICC solely relevant for its ratifying members? Not only does the Rome Statute place direct obligations on its member states but it may also influence penal codes in third states, i.e. non-member states, since the Statute in large parts is considered customary international law.²¹⁸⁵ Support for the notion that the Statute reflects customary international law includes the fact that a vast majority of the states that participated in the Rome Conference supported and adopted the Statute.²¹⁸⁶ The Statute elucidates previously developed customary law and contributes to its further development. Both international and national courts have in fact referred to the Rome Statute as further proof of the customary status of the crimes and general principles contained in the Statute, including the ICTY.²¹⁸⁷ Also the *ad hoc* tribunal for East Timor largely based its definitions on the Rome Statute.²¹⁸⁸

Further, third states may still be affected by the Court's jurisdiction if their citizens have commit a crime on a member state's territory as well as in cases where the Security Council refers the situation to the Court, which may occur also for non-member states and does not require consent of the state.²¹⁸⁹ As such, the Court is empowered to complement domestic jurisdictions of states that have not ratified the Rome Statute nor has agreed to be bound on an *ad hoc* basis. It is therefore encouraged that all states implement the provisions of the Statute in order to avoid examination by the Court.²¹⁹⁰ The influence of the Court is therefore much wider than solely affecting member states, both through the flexible concept of jurisdiction as well as the influence on customary law.

²¹⁸⁵ Danilenko, Gennady, *ICC Statute and Third States*, in A. Cassese, Gaeta and John R.W.D. Jones, *The Rome Statute of the International Criminal Court: A Commentary*. Volume II, Oxford University Press, (2002), p. 1872, Kleffner, Jann, *The Impact of Complementarity on National Implementation of Substantive International Criminal Law*, p. 110. As mentioned, the ICC also has the possibility of prosecuting individuals from non-member states.

²¹⁸⁶ 120 voted in favour, 7 against and 21 abstained. See Chronology of the International Criminal Court, www.icc-cpi.int/Menus/ICC/Home.

²¹⁸⁷ *Prosecutor v. Tadic*, Case No. IT-94-1-T, Judgment of 7 May 1997, para. 223, *Prosecutor v. Furundzija*, Judgment of 10 December 1998, para. 227. See also *Regina v. Bartle. ex parte Pinochet*, 38 I.L.M. 581 (House of Lords, 1999).

²¹⁸⁸ Kleffner, Jann, *The Impact of Complementarity on National Implementation of Substantive International Criminal Law*, p. 100.

²¹⁸⁹ Article 12, The Rome Statute.

²¹⁹⁰ Clark, Roger, *Crimes Against Humanity and the Rome Statute of the International Criminal Court*, in *The Rome Statute of the International Criminal Court. A Challenge to Impunity*, ed. Mauro Politi, Giuseppe Nesi, Aldershot: Ashgate, (2001), p. 101.

It is also believed that the *ad hoc* tribunals and the ICC will have an impact beyond international criminal law. The *ad hoc* tribunals have developed and specified the content of both international humanitarian law and human rights law through its jurisprudence. The resonance may thus be wide as it is likely that it will impact also the decisions of human rights courts and national courts adjudicating matters concerning these bodies of laws. Since the tribunals at times interpret customary international law and survey national laws in a particular matter to evince general principles, it is believed the assessment will have a ripple effect also on the development of e.g. international human rights, since e.g. the ICTY with regularity refers to human rights instruments for interpretation, such as the ICCPR and the ECHR. As such, interpretations of those documents may in the future take into consideration the reasoning of the tribunals, which we have already seen in the European Court of Human Rights.²¹⁹¹ Fausto Pocar, judge of the ICTY, predicts that the definition of and interpretation of the rights and prohibitions in the Rome Statute concerning human rights will influence their application also outside the scope of the ICC. As such, it may influence both the formation of customary norms but also treaty provisions.²¹⁹²

This is of particular interest for the prohibition of rape and torture, which find their equivalents in international human rights law. The question is to what extent the interpretation of such crimes, primarily occurring in armed conflicts, can influence the human rights law equivalent. Will it be appropriate to interchangeably use definitions of rape or torture that do not contain elements of a state nexus? These are questions to be answered by human rights treaty bodies and regional and domestic courts. Fausto Pocar e.g. encourages the adoption of the definition of torture in the Rome Statute to be applied by the UN Human Rights Committee in relation to Article 7 of the ICCPR.²¹⁹³ Furthermore, the ECtHR e.g. referred to the *Kunarac* case in *M.C. v. Bulgaria* in defining rape. As will be discussed below, though international human rights law in a sense constitutes the ethics that underpin international criminal law, it is generally understood that one must tread with caution when applying a human rights lens to criminal law provisions.²¹⁹⁴ In conclusion, the impact of the Rome Statute and

²¹⁹¹ Murphy, Sean, *Progress and Jurisprudence of the International Criminal Tribunal for the Former Yugoslavia*, AJIL, vol 93:57, January 1999, p. 96.

²¹⁹² Pocar, Fausto, *The Rome Statute of the International Criminal Court and Human Rights*, in *The Rome Statute of the International Criminal Court. A Challenge to Impunity*, ed. Mauro Politi, Giuseppe Nesi, Aldershot: Ashgate, (2001), p. 69.

²¹⁹³ Ibid, p. 69.

²¹⁹⁴ Bagaric, Mirko & Morss, John, *In Search of Coherent Jurisprudence for International Criminal Law: Correlating Universal Human Responsibilities with Universal Human Rights*, p. 200.

the ICC will hopefully have a substantial impact on the criminal laws on rape in member states, but also in a wider perspective in influencing other states and bodies as well as customary norms.

9.4 Universal Jurisdiction for the Crime of Rape?

Though the impact and the law developed by the ICC concerns the criminal law jurisdiction of a large number of member states and may indirectly influence also non-member states, the concept of universal jurisdiction must also be briefly discussed since its reach, per definition, is universal. Both the system of the ICC and universal jurisdiction pursue similar goals, i.e. offering jurisdiction over certain acts of particular gravity, primarily corresponding to international crimes. In fact, the establishment of the ICC and the process of implementing the crimes of the Rome Statute in domestic laws by member states has encouraged the codification of universal jurisdiction rather than the opposite.²¹⁹⁵ The importance in discussing whether international crimes incur universal jurisdiction is due to the fact that rape is a sub-crime of such crimes, leading to the possibility or obligation for states to adopt legislation prohibiting rape and to prosecute such offences on the basis of such jurisdiction.

Jurisdiction can be defined as “the limits of the legal competence of a State or other regulatory authority to make, apply, and enforce rules of conduct upon persons”.²¹⁹⁶ Universal jurisdiction allows states to prosecute persons that are suspected of committing offences that are viewed as universal concerns by the international community, even if the state lacks the traditional forms of jurisdiction, such as territoriality or nationality.²¹⁹⁷ Whereas the traditional forms of jurisdiction rest upon a nexus between the state and the offence, universality is based on the *nature* of the offense which is deemed to affect the interests of all states.²¹⁹⁸ The Princeton Principles on Universal Jurisdiction, created by a working group consisting of universities and interest groups such as the

²¹⁹⁵ Broomhall, Bruce, *International Justice & The International Criminal Court*, p. 106.

²¹⁹⁶ Evans, Malcolm, *International Law*, (2006), p. 336.

²¹⁹⁷ Meron, Theodor, *The Humanization of International Law*, p. 118, Bassiouni, Cherif, *Crimes against Humanity in International Criminal Law*, p. 227. Territoriality as a jurisdictional principle entails that the state may prosecute offences committed on its territory and stems from the obvious idea that states may regulate what takes place on their territory. Jurisdiction based on nationality allows states to regulate the acts of its citizens even when occurring outside of its territory. Passive personality is based on the notion of states protecting its citizens and extends jurisdiction to offences perpetrated against citizens of that state. Protective jurisdiction also exists, which is based on the national interests affected.

²¹⁹⁸ Bassiouni, Cherif, *Crimes against Humanity in International Criminal Law*, p. 229.

International Commission of Jurists (ICJ), is one of few attempts to define universal jurisdiction.²¹⁹⁹ The definition of the term is stated in Principle 1:

“...criminal jurisdiction based solely on the nature of the crime, without regard to where the crime was committed, the nationality of the alleged or convicted perpetrator, the nationality of the victim, or any other connection to the state exercising such jurisdiction”.

While it is generally considered preferable for practical reasons to reserve prosecution to states where the offence occurred, it is at times deemed necessary to expand the traditional scope of national jurisdictions in order to eradicate impunity. The exercise of universal jurisdiction is a controversial matter since a state's jurisdiction is linked to its sovereignty and a claim to universality may potentially cause dispute between states.²²⁰⁰

The authority of the principle of universal jurisdiction arises from the understanding that every state has an interest in bringing to justice the perpetrators of particularly egregious crimes of international concern.²²⁰¹ In a sense, the individual state becomes a surrogate for international adjudicatory bodies. What is the incentive to extend the traditional scope of a state's domestic jurisdiction to a universal application? According to Cherif Bassiouni, the rationale can be described in three points: 1) no other state can exercise

²¹⁹⁹ Princeton University Program in Law and Public Affairs, *The Princeton Principles on Universal Jurisdiction* 28 (2001).

²²⁰⁰ Bassiouni, Cherif, *The History of Universal Jurisdiction and Its Place in International Law*, in *Universal Jurisdiction: National Courts and the Prosecution of Serious Crimes Under International Law*, ed. Stephen Macedo, p. 39, Brownlie, Ian, *Principles of Public International Law*, (2008), p. 297. Bassiouni warns that the jurisdictional principle must not be allowed to become like a wildfire, uncontrolled in its application since it could be destructive to international law. A widespread use of the principle could arguably lead to misuse such as politically motivated harassment, abuse of the due process rights of the accused, or even in the words of Bassiouni, threaten world order and in the long run, the denial of justice. Likewise, the practice of universal jurisdiction may also be perceived as another example of the Western states exerting their power against individuals from developing countries in a manner reminiscent of cultural imperialism. The general fear is that universal jurisdiction will become a politicised tool. Countries have also been reluctant in embracing the policy for fear of causing political embarrassment and strained relations with the country in question. Practical concerns are also frequently raised since an investigation into acts that have occurred on foreign territory with foreign victims and witnesses, will be both time-consuming and require extensive resources. See Bassiouni, Cherif, *Universal Jurisdiction for International Crimes: Historical Perspectives and Contemporary Practice*, p. 154.

²²⁰¹ Evans, Malcolm, *International Law*, (2006), p. 348.

jurisdiction on the basis of the traditional doctrines, 2) no other state has a direct interest, and 3) there is an interest of the international community to enforce.²²⁰²

The nature of the principle is illusive and has in practice been interpreted in different manners by states due to the lack of a cohesive understanding in international treaties. The practice of states has also been sparse, further impeding the progress of the concept. As such, it is an appealing concept in theory that has not fully developed in practice and much of the discussion is still in the form of *de lege ferenda*.²²⁰³ As David Scheffer argues: “universal jurisdiction is not a broadly adhered to standard. Everyone talks about universal jurisdiction, but almost no one practices it. It has been a mostly rhetorical exercise since World War Two”.²²⁰⁴ It has been described as a principle “for whom the bell tolls”²²⁰⁵ and as subject to neglect.²²⁰⁶ At times the principle of universal jurisdiction has been confused with other theories on extraterritorial criminal jurisdiction, further muddling the issue, e.g. evident in military laws, emergency laws or customs duties.²²⁰⁷ However, the aspiration for developing a fully functioning principle in practice is increasing and it is therefore important to analyse this venue of prosecuting individuals for sexual violence.

The principle of universal jurisdiction finds its support both in treaty law and customary international law. Universal jurisdiction is generally permissive, i.e. no obligation to prosecute exists but states may do so. However, at times it overlaps with the *aut dedere aut judicare* principle, leading to a *mandatory* form of jurisdiction, e.g. regarding the grave breaches regime of the Geneva

²²⁰² Bassiouni, Cherif, *Universal Jurisdiction for International Crimes: Historical Perspectives and Contemporary Practice*, p. 96.

²²⁰³ According to Cherif Bassiouni, advocates of international criminal law frequently hold that universal jurisdiction is accepted law and a common practice, and tend to cross the line between *lex lata* and *de lege ferenda*. See discussion in Bassiouni, Cherif, *Universal Jurisdiction for International Crimes: Historical Perspectives and Contemporary Practice*, p. 95.

²²⁰⁴ Scheffer, David J, *Symposium: Universal Jurisdiction: Myths, Realities, and Prospects: Opening address*, 35 New Eng. L. Rev. 233, (2001), p. 233.

²²⁰⁵ Cassese, Antonio, *Is the Bell Tolling for Universality? A Plea for a Sensible Notion of Universal Jurisdiction*, 1 J. Int'l Crim. Just. 589, (2003).

²²⁰⁶ Broomhall, Bruce, *International Justice & The International Criminal Court*, p. 105.

²²⁰⁷ Extraterritorial Criminal Jurisdiction, European Committee on Crime Problems, Council of Europe, Strasbourg 1990, p. 16.

Conventions and possibly torture in the UN Convention against Torture.²²⁰⁸ Arguments for a mandatory jurisdiction in relation to *ius cogens* norms also exist.²²⁰⁹

There is presently an overlap between crimes that incur universal jurisdiction and *aut dedere aut judicare* obligations, i.e. a duty to prosecute or surrender a suspect of a certain grave crime. Universal jurisdiction is certainly related to the principle but is of a wider scope. These principles must remain distinct since universal jurisdiction does not in general entail such a duty to prosecute but is a voluntary exercise.²²¹⁰ The *aut dedere* regime is also predicated on the presence of the accused on the enforcing state's territory. Certain authors, however, hold that the acceptance of the dictum *aut dedere aut judicare* has advanced the principle of universal jurisdiction.²²¹¹ The duty to prosecute or extradite persons accused of international crimes naturally entails an increased acceptance of universal jurisdiction as a means in achieving these goals. As the Committee on Crime Problems of the Council of Europe has held, the maxim *aut dedere aut*

²²⁰⁸ On grave breaches: Broomhall, Bruce, *Towards the Development of an Effective System of Universal Jurisdiction for Crimes Under International Law*, 35 New Eng. L. Rev. 399 (2000-2001), p. 401. Dörmann, Knut, *Elements of War Crimes under the Rome Statute of the International Criminal Court, Sources and Commentary*, ICRC, Cambridge University Press, (2003), p. 129, Gilbert, Geoff, *Responding to International Crime*, Brill, (2006), p. 91, Shelton, Dinah, *Encyclopedia of Genocide and Crimes against Humanity*, Vol. 1, Macmillan, (2005), p. 339. See also *Prosecutor v. Tadic*, Case IT-94-1-T, Decision on Jurisdiction, 2 October 1995, para. 79, on the 1949 Geneva Conventions: "the Conventions create universal mandatory criminal jurisdiction among Contracting States". On torture: UN Doc. A/HRC/4/33, 15 January 2007, para. 41. Bassiouni, Cherif, *Universal Jurisdiction for International Crimes: Historical Perspectives and Contemporary Practice*, p. 56. *Aut dedere aut judicare* entails a duty found in a number of multilateral treaties to extradite or prosecute individuals for certain crimes, e.g. in the 1949 Geneva Conventions regarding grave breaches. See more in Bassiouni, Cherif, & Wise, Edward, *Aut Dedere Aut Judicare: The Duty to Extradite or Prosecute in International Law*, Martinus Nijhoff, (1995).

²²⁰⁹ Cryer, Friman, Robinson & Wilmschurst, *An Introduction to International Criminal Law and Procedure*, p. 61, Damgaard, Ciara, *Individual Criminal Responsibility for Core International Crimes: Selected Pertinent Issues*, Springer, (2008), p. 60, von Sternberg, Mark, *A Comparison of the Yugoslavian and Rwandan War Crimes Tribunals: Universal Jurisdiction and the "Elementary Dictates of Humanity"*, 22 Brook. J. Int'l L. 111, (1996), Shaw, Malcolm, *International Law*, (2008), p. 673, Bassiouni, Cherif, *Universal Jurisdiction for International Crimes: Historical Perspectives and Contemporary Practice*, p. 104, Askin, Kelly, *Women and International Human Rights Law*, p. 7.

²²¹⁰ Bottini, Gabriel, *Universal Jurisdiction after the Creation of the International Criminal Court*, p. 516. The principle of universal jurisdiction is also separate from obligations *erga omnes*, the latter entailing that all states may have a legal interest in the state's fulfilment of its obligation to exercise criminal jurisdiction over a specific crime, however, it does not mean that all such states have jurisdiction over the crime.

²²¹¹ Bassiouni, Cherif, *Universal Jurisdiction for International Crimes: Historical Perspectives and Contemporary Practice*, p. 153.

judicare is increasingly referred to in international treaties but as with universal jurisdiction, the manner in which it is implemented varies among countries.²²¹²

Several different interpretations have been given to the principle in practice and doctrine. Luc Reydams has divided these into three categories. The “co-operative general universality principle” establishes jurisdiction for international and common crimes in cases where extradition of the alleged offender is not possible. These regulations frequently contain *aut dedere aut judicare* obligations.²²¹³ The “co-operative limited universality principle” concerns solely international crimes and provides for jurisdiction where the offender is present on the territory.²²¹⁴ Lastly, the “unilateral limited universality principle” is truly universal in character, allowing any state to investigate, even in cases of *in absentia*, based on the nature of the crime.²²¹⁵ This last form of universality is rarely seen in municipal laws and unknown in treaty law.²²¹⁶ Most states do not require that the offender cannot be extradited but that he/she is present on the territory.²²¹⁷

The issue has been briefly touched upon by the ICJ. In the case of *the Democratic Republic of Congo v. Belgium*, the Court came across as divided on the issue of universal jurisdiction.²²¹⁸ Similarly, the understanding and practical application of the jurisdiction has been haphazard among states. Whereas certain countries have introduced the jurisdiction in their domestic legislation where an

²²¹² Extraterritorial Criminal Jurisdiction, European Committee on Crime Problems, Council of Europe, Strasbourg 1990, p. 15. See e.g. various UN Conventions on terrorism such as the 1997 International Convention for the Suppression of Terrorist Bombings

²²¹³ Reydams, Luc, *Universal Jurisdiction, International and Municipal Legal Perspectives*, Oxford University Press, (2003), pp. 28-35.

²²¹⁴ *Ibid*, pp. 35-38.

²²¹⁵ *Ibid*, p. 38.

²²¹⁶ *Ibid*, p. 223.

²²¹⁷ *Ibid*, p. 221.

²²¹⁸ *Arrest Warrant of 11 April 2000 (DRC v. Belgium)*, Preliminary Objections and Merits, Judgment, ICJ Reports, 2002. The DRC initiated proceedings before the ICJ, opposing the arrest warrant by a Belgian court against the Congolese Minister of Foreign Affairs for crimes against humanity. Though the question mainly regarded the issue of immunity of heads of State and ministers, the judges of the ICJ discussed the issue of universal jurisdiction in the separate and dissenting opinions. Although the judges disagreed on the issue of whether the accused needs to be present on the territory of the prosecuting state, the majority did not question the possibility of trying suspected war criminals based on the principle of universal jurisdiction. The overall implication of the case is that universal jurisdiction is neither confirmed nor rejected and the majority opinion would in theory approve of the principle, if not exercised *in absentia*. Judges Guillaume and Rezek held that international law does not support universal jurisdiction, apart from possibly piracy. Higgins, Kooijmans, Buergenthal and Van den Wyngaert stated that there was no law prohibiting such jurisdiction.

authorisation or obligation exists in international law, other states have implemented universal jurisdiction regardless of such indications in international treaties. An even smaller number of states have introduced the concept for crimes not covered by any agreement.²²¹⁹ The fear that states will rampantly prosecute at a whim has not been fulfilled, but quite the opposite, with legislators and judges practicing constraint in the application of the jurisdiction.

9.4.1 Which Crimes Incur Universal Jurisdiction?

The list of which crimes may incur universal jurisdiction is as illusive as the concept itself and has varied in domestic practice. Drawing on custom and treaty law, certain acts are traditionally mentioned in this context. The concept has largely developed in the area of customary international law.²²²⁰ Universal jurisdiction is also increasingly provided for in treaties, such as in the UN Convention against Torture.²²²¹ The underpinning rationale for the crimes that generally are considered to incur universal jurisdiction is either morality or convenience; the first group traditionally connected to international crimes which “shock the conscience” of man and the latter crimes which cross borders and may therefore incur jurisdiction in several states simultaneously.²²²² Piracy and slave-trading are frequently held as the two crimes that developed the idea of universal jurisdiction since these crimes occurred across borders and no state could establish a traditional jurisdiction.²²²³ Nations had a common interest in protecting themselves against the threat of piracy. Both the prohibition of piracy and slavery have developed on the customary level though various treaties also exist pertaining to slavery, albeit not all allowing universal jurisdiction.²²²⁴

²²¹⁹ Extraterritorial Criminal Jurisdiction, European Committee on Crime Problems, Council of Europe, Strasbourg 1990, p. 15.

²²²⁰ Cassese, Antonio, *International Criminal Law*, p. 294.

²²²¹ Zahar, Alexander & Sluiter, Göran, *International Criminal Law*, p. 498.

²²²² Evans, Malcolm, *International Law*, (2006), p. 348. Brownlie draws a distinction between international crimes, which appear to incur universal jurisdiction as an international breach: “It is increasingly recognized that the principle of universal jurisdiction is an attribute of the existence of crimes under international law”, Brownlie, Ian, *Principles of Public International Law*, (2003), p. 565, and such acts that international law gives liberty to all states to punish, but does not declare criminal. See p. 303. Bassiouni holds that the basis of universal jurisdiction is that the crimes constitute violations against mankind. Bassiouni, Cherif, *Crimes against Humanity in International Criminal Law*, p. 229.

²²²³ Broomhall, Bruce, *Towards the Development of an Effective System of Universal Jurisdiction for Crimes Under International Law*, 35 New Eng. L. Rev. 399 (2000-2001), p. 402.

²²²⁴ See e.g. Article 4, UDHR, Article 8 ICCPR, Article 4 ECHR, Article 5 African Charter, Article 6 American Convention.

Certain authors argue that once a crime rises to the level of *ius cogens*, it is automatically subject to universal jurisdiction and that states have an obligation to prevent impunity for such crimes.²²²⁵ Peremptory norms that also are international crimes would, according to this opinion, invoke a concrete option, if not obligation, under a regime of universal jurisdiction to prosecute. In e.g. the opinion of Lord Browne-Wilkinson in the *Pinochet* case it was held that “[t]he *ius cogens* nature of the international crime of torture justifies States in taking universal jurisdiction over torture wherever committed”.²²²⁶ Furthermore, “crimes prohibited by international law attract universal jurisdiction under customary international law if two criteria are satisfied. First, they must be contrary to a peremptory norm of international law so as to infringe *ius cogens*. Secondly, they must be so serious and on such a scale that they can justly be regarded as an attack on the international legal order”.²²²⁷ As discussed above, there is a general consensus that the prohibition against genocide, slavery, torture, war crimes and crimes against humanity has attained the status of *ius cogens*.²²²⁸ These peremptory norms are binding upon all legal systems and all persons regardless of treaty provisions.²²²⁹ However, opponents argue that though the *ius cogens* norms often constitute the same violations for which universal jurisdiction is raised, the two concepts are separate. Conceptually, *ius cogens* norms regard the responsibility of states and not individual criminal responsibility.²²³⁰ Accordingly, universal jurisdiction does not automatically

²²²⁵ von Sternberg, Mark, *A Comparison of the Yugoslavian and Rwandan War Crimes Tribunals: Universal Jurisdiction and the “Elementary Dictates of Humanity”*, 22 Brook. J. Int’l L. 111, (1996), Shaw, Malcolm, *International Law*, (2008), p. 673. Bassiouni, Cherif, *Universal Jurisdiction for International Crimes: Historical Perspectives and Contemporary Practice*, p. 104, Askin, Kelly, *Women and International Human Rights Law*, p. 7, Burchard, Christoph, *Torture in the Jurisprudence of the Ad Hoc Tribunals*, 6 J. Int’l Crim. Just. 159, May 2008, p. 162.

²²²⁶ *Regina v. Bartle* (24 March 1999), Opinion of Lord Browne-Wilkinson. It should be noted that The House of Lord’s opinions are that of each Lord and the opinions have been criticised for leaving a vague contradictory impact. The relationship between *jus cogens* and universal jurisdiction has e.g. been criticised in Jennings, Robert, *The Pinochet Extradition Case in the English Courts*, in *The International Legal System in Quest of Equity and Universality*, eds. Laurence Boisson de Chazournes & Vera Gowlland-Debbas, Martinus Nijhoff, (2001), p. 683.

²²²⁷ *Ibid.* Opinion of Lord Millett.

²²²⁸ Copelon, Rhonda, *Surfacing Gender: Reconceptualizing Crimes Against Women in Time of War*, p. 197.

²²²⁹ Askin, Kelly, *War Crimes Against Women; Prosecution in International War Crimes Tribunals*, p. 240.

²²³⁰ Boot, Machteld, *Genocide, Crimes against Humanity, War Crimes: Nullum Crimen Sine Lege and the Subject Matter Jurisdiction of the International Criminal Court*, p. 56.

exist upon the conclusion that a norm is *ius cogens*²²³¹ and crimes beyond the scope of *ius cogens* norms may also incur universal jurisdiction.²²³²

The Princeton Principles list seven crimes that are considered “serious crimes under international law” and may incur universal jurisdiction: 1) piracy, 2) slavery, 3) war crimes, 4) crimes against peace, 5) crimes against humanity, 6) genocide, and 7) torture.²²³³ The list is reminiscent of the violations traditionally held as *ius cogens* norms. There is certainly a general willingness to afford universal jurisdiction to states for genocide, war crimes and crimes against humanity.²²³⁴ The possible basis for universal jurisdiction of the ICC crimes varies depending on the violation. As for *war crimes*, a basis for universal

²²³¹ Bottini, Gabriel, *Universal Jurisdiction after the Creation of the International Criminal Court*, 36 N.Y.U.J. Int’l L. & Pol. 503 (2003-2004), p. 518, Damrosch, Lori, *Comment: Connecting the Threads in the Fabric of International Law*, in *Universal Jurisdiction: National Courts and the Prosecution of Serious Crimes Under International Law*, ed. Stephen Macedo, University of Pennsylvania Press, (2003), p. 94, Inazumi, Mitsue, *Universal Jurisdiction in Modern International Law: Expansion of National Jurisdiction for Prosecuting Serious Crimes under International Law*, Intersentia, (2005), p. 125

²²³² For example the 1963 Tokyo Hijacking Convention, 1988 Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms Located on the Continental Shelf, 1954 Hague Convention for the Protection of Cultural Property, 1997 International Convention for the Suppression of Terrorist Bombings.

²²³³ Principle 2. See also discussion on the list of crimes in Broomhall, Bruce, *Towards the Development of an Effective System of Universal Jurisdiction for Crimes Under International Law*, 35 New Eng. L. Rev. 399 (2000-2001). The Council of Europe also lists various crimes over which virtually all of its member states have established universal jurisdiction, including counterfeiting, piracy, hijacking and endangering the safety of civil aviation. *Extraterritorial Criminal Jurisdiction, European Committee on Crime Problems*, Council of Europe, Strasbourg 1990, p. 15. Other attempts to construct a list of crimes that engender universal jurisdiction has been made through the adoption of the Cairo-Arusha Principles on Universal Jurisdiction which, though not a multilateral treaty but a proposal for African states by Africa Legal Aid (AFLA), also contributes to the “progressive development of international law”. The Cairo-Arusha Principles were prompted by a concern for the lack of prosecution of offences with “particular resonance in Africa”, including apartheid. Importantly, the principles, without defining the concept of universal jurisdiction, make a reference to the Rome Statute in Principle 3, assuring that states must include but not limit its universal jurisdiction to such crimes which have been recognised by international law. A mention is also made of gender crimes, such as rape and other forms of sexual violence, as recognised crimes subject to universal jurisdiction. Importantly, the Principles mention that “[u]niversal jurisdiction applies to gross human rights offences committed even in peacetime”. *The Cairo-Arusha Principles on Universal Jurisdiction in Respect of Gross Human Rights Offences: An African Perspective* (21 Oct., 2002), principle 1 and 7.

²²³⁴ Meron, Theodor, *The Humanization of International Law*, p. 120, The fact that a crime is considered international does not *per se* entail that it incurs universal jurisdiction but due to their grave nature, these crimes are deemed to reach such a level. See, also, Shaw, Malcolm, *International Law*, (2008), pp. 668-671.

jurisdiction arguably exists to a certain extent. The Geneva Conventions of 1949 have been raised as an example that would permit such a wide use of jurisdiction though it is not explicitly mentioned.²²³⁵ The duty to enforce the provisions through the penal system could implicitly entail a right for state parties to apply universal jurisdiction, evident in Article 1 common to all four Geneva Conventions, obliging states to “respect and to ensure respect for the ...Convention”. However, not all parties to the conventions have established such a general jurisdiction in their domestic legislation on the provisions. The grave breaches regime, on the other hand, would *require* such prosecution or extradition. Though it in fact entails *aut dedere aut judicare* obligations, it has led to a general assumption that it also affords mandatory universal jurisdiction.²²³⁶ However, is it only the grave breaches provision that warrants universal jurisdiction in the 1949 Geneva Conventions? Theodor Meron argues that “just because the Geneva Conventions created the obligation of *aut dedere aut judicare* only with regard to grave breaches does not mean that other breaches of the Geneva Convention may not be punished by any state party to the convention”.²²³⁷ The principle can be applied to e.g. Common Article 3 to the Conventions and Additional Protocol II. The question is whether the same *obligation* to prosecute exists.

Unlike war crimes, *crimes against humanity* are not regulated in a specific convention, though incorporated in the Rome Statute. Provisions are included in the domestic legislation of several states but the jurisprudence has been minimal. Support for the application of universal jurisdiction for crimes against humanity, however, exists. Since crimes against humanity have not been the focus of a specific treaty, the application of universal jurisdiction in this case rather stems

²²³⁵ Bassiouni, Cherif, *Universal Jurisdiction for International Crimes: Historical Perspectives and Contemporary Practice*, p. 103.

²²³⁶ Dörmann, Knut, *Elements of War Crimes under the Rome Statute of the International Criminal Court, Sources and Commentary*, p. 129, Zahar, Alexander & Sluiter, Göran, *International Criminal Law*, p. 498, Sassòli, Marco & Bouvier, Antoine, *How Does Law Protect in War?*, p. 247. The ICRC in its study on Customary International Humanitarian law lists several countries that have tried suspected war criminals for grave breaches, on the basis of universal jurisdiction. Bassiouni, however, argues that universal jurisdiction for war crimes has not reached customary status as of yet, considering the lack of consistent state practice. See ICRC Customary Law Study, p. 607 and Bassiouni, Cherif, *Universal Jurisdiction for International Crimes: Historical Perspectives and Contemporary Practice*, p. 51. Though collective enforcement mechanisms have or do exist, such as the Yugoslavia, Rwanda or Nuremburg trials, these were established based on traditional jurisdictional theories such as territoriality or passive personality, i.e. the victim's nationality.

²²³⁷ Meron, Theodor, *International Criminalization of Internal Atrocities*, AJIL, Vol. 89, (1995), p. 569.

from customary international law, evident in the prosecutions of the Nuremberg trials and the *ad hoc* tribunals as well as the inclusion in the Rome Statute.²²³⁸

As concerns *genocide*, the 1948 UN Convention on the Prevention and Punishment of the Crime of Genocide states in its Article 1 that “genocide, whether committed in time of peace or in time of war, is a crime under international law which they [Contracting Parties] undertake to prevent and to punish”. As such, states have to enact domestic criminal legislation allowing for the prosecution of the crime. As for jurisdiction, Article 6 specifies that “persons charged with genocide...shall be tried by a competent tribunal of the State in the territory of which the act was committed, or by such international penal tribunal as may have jurisdiction with respect to those Contracting Parties which shall have accepted its jurisdiction”. Thus, the jurisdiction is territorial rather than providing for a universal jurisdiction. The ICTY and the ICTR have tried cases of genocide, both based on the territoriality principle.

Despite the fact that there is no mention of such jurisdiction in the Genocide Convention, commentators tend to consistently argue that customary international law has recognised universal jurisdiction for genocide, support which can also be found in the judgments of both the ICTY and the ICTR.²²³⁹ In the *Tadic* case, the Appeals Chamber of the ICTY held in relation to genocide that “universal jurisdiction [is] nowadays acknowledged in the case of international crimes” and the ICTR similarly stated in the *Prosecutor v. Ntuyahaga* judgment that universal jurisdiction exists for the crime of genocide, crimes against humanity and other grave violations of international humanitarian law.²²⁴⁰ The ICJ in a case concerning the application of the Genocide Convention

²²³⁸ Zahar, Alexander & Sluiter, Göran, *International Criminal Law*, p. 498.

²²³⁹ Meron, Theodor, *The Humanization of International Law*, p. 125, Bottini, Gabriel, *Universal Jurisdiction after the Creation of the International Criminal Court*, 36 N.Y.U.J. Int'l L. & Pol. 503, (2003-2004), p. 537, Bassiouni, Cherif, *Universal Jurisdiction for International Crimes: Historical Perspectives and Contemporary Practice*, p. 54, Zahar, Alexander & Sluiter, Göran, *International Criminal Law*, p. 498, Broomhall, Bruce, *Towards the Development of an Effective System of Universal Jurisdiction for Crimes Under International Law*, p. 404. Lauterpacht has argued that parties are entitled “to assume universal jurisdiction over the crime of genocide” under the Genocide Convention. See *Application of the Convention on the Prevention and Punishment of the Crime of Genocide & Bosn. & Herz. V. Serb. & Mont.* Order of 13 September 1993, Separate Opinion of Judge *ad hoc* Lauterpacht, p. 443. However, Judge Kreca stated that the Convention “does not contain the principle of universal repression”. Preliminary Objections, Dissenting Opinion of Judge Kreca, para. 102, Kamminga, Menno, *Lessons Learned from the Exercise of Universal Jurisdiction in Respect of Gross Human Rights Offenses*, 23 Hum. Rts. Q. 940 (2001), p. 945. However, see Schabas, William, *National Courts Finally Begin to Prosecute Genocide, The ‘Crime of Crimes’*, JCIJ1 (2003) for the opposite view.

²²⁴⁰ *The Prosecutor v. Bernard Ntuyahaga*, Case No. ICTR-98-40-T, Decision on the Prosecutor’s Motion to Withdraw the Indictment, 18 March 1999.

emphasised that genocide entails *erga omnes* obligations and that “the obligation each state thus has to prevent and to punish the crime of genocide is not territorially limited by the Convention”.²²⁴¹

Despite the unclear status in respect to the three main international crimes, other treaties oblige states to provide for universal jurisdiction. This includes the UN Convention against Torture which in its Article 5 (2) obliges states to “take such measures as may be necessary to establish its jurisdiction over [torture] offences in cases where the alleged offender is present in any territory under its jurisdiction and it does not extradite him”. Though it similarly to the grave breaches provision refers to obligations of *aut dedere aut judicare*, it has been interpreted to constitute an obligation to establish universal jurisdiction, further supported by the *travaux préparatoires*.²²⁴² The jurisdiction is, however, qualified by the requirement of the presence of the individual. The only alternative for a state which has an alleged perpetrator present on its territory is to extradite the individual to other appropriate states.²²⁴³ A few cases have discussed the applicability of universal jurisdiction with regard to the prohibition of torture. In the case of *Suleymane Guengueng et al. v. Senegal*, the UN Committee against Torture examined the failure by Senegalese authorities to charge former Chad dictator Hissène Habré.²²⁴⁴ It was well-established, e.g. by a Truth and Reconciliation Commission, that the Habré regime had systematically used torture in the 1980s. A criminal complaint was filed in Senegal where Habré resided but the Senegalese courts held that its legal system was not competent to apply universal jurisdiction. The Committee against Torture found a violation of Article 5 (2) on the ground that the Senegalese authorities had failed to take the necessary legislative measures to establish the possibility to practice universal jurisdiction.²²⁴⁵ The ICTY also affirmed the status of torture as a *ius cogens* norm in its *Furundzija* case as well as the possibility of universal prosecution. It stated:

²²⁴¹ *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (Bosnia-Herzegovina v. Serbia-Montenegro), Preliminary Objections, 11 July 1996, ICJ Reports 1996, p. 616. The International Law Commission has also confirmed that universal jurisdiction exists as “a matter of customary law for those states that are not parties to the [Genocide] Convention”. Draft Code of Crimes against Peace and Security of Mankind, Commentary of the ILC on Art. 8, para. 8. Report of the International Law Commission on the work of its forty-eighth session, UN Doc. A/51/10 (1996), p. 29.

²²⁴² UN Doc. A/HRC/4/33, 15 January 2007, para. 41. Bassiouni, Cherif, *Universal Jurisdiction for International Crimes: Historical Perspectives and Contemporary Practice*, p. 56.

²²⁴³ See Article 7 of the UN Convention against Torture.

²²⁴⁴ *Suleymane Guengueng et al. v. Senegal*, Communication No. 181/2001, UN.Doc. CAT/C/36/D/181/2001, 17 May 2006, (HRC).

²²⁴⁵ *Ibid*, paras. 9.5-9.6 & 9.8.

“every State is entitled to investigate, prosecute and punish or extradite individuals accused of torture, who are present in a territory under its jurisdiction...This legal basis for States’ universal jurisdiction over torture bears out and strengthens the legal foundation for such jurisdiction found by other courts in the inherently universal character of the crime. It has been held that international crimes being universally condemned wherever they occur, every State has the right to prosecute and punish the authors of such crimes.”²²⁴⁶

All the crimes mentioned as creating either a mandatory or permissive form of universal jurisdiction - war crimes (especially grave breaches), crimes against humanity, genocide and torture, include the prohibition of rape. Kelly Askin in fact argues that rape crimes may be subject to universal jurisdiction in their own right, what with already constituting an element of all international crimes. Sexual violence, at least in the form of rape and sexual slavery, has reached the level of *ius cogens*.²²⁴⁷ As such:

“Rape is likely among the crimes over which there is now considered to be universal jurisdiction, a conclusion supported by language recognizing these crimes as threatening the international public order in the ICTY and ICTR Statutes and decisions, in notable UN Security Council and General Assembly resolutions, in recent human rights conference documents, and by the express inclusion of multiple forms of sexual violence within the jurisdiction of the ICC statute.”²²⁴⁸

States thus either must, or have the option, to establish jurisdiction over the crime of rape in their domestic law, depending on the contextual elements.

An issue that arises particularly in the domestic implementation of the Rome Statute by member states, but which can also cause concern as regards universal jurisdiction, is the question whether states may prosecute violations of the core crimes as “ordinary crimes”, i.e. can universal jurisdiction be applied in jurisdictions where e.g. genocide is prosecuted as murder, or the crime against humanity of rape as a “regular” rape under national criminal law? Commentators agree that it is generally presumed that international law solely grants states

²²⁴⁶ *Prosecutor v. Furundžija*, Judgment of 10 December 1998, para. 156.

²²⁴⁷ Askin, Kelly, *Prosecuting Wartime Rape and Other Gender-Related Crimes Under International Law: Extraordinary Advances, Enduring Obstacles*, p. 349.

²²⁴⁸ Askin, Kelly, *Women and International Human Rights Law, International Criminal Law and the ICC Statute*, p. 9.

universal jurisdiction to prosecute core crimes but not ordinary crimes.²²⁴⁹ There is therefore an additional incentive to fully implement the international crimes and their definitions domestically since the possibilities for applying universal jurisdiction otherwise will be severely limited. Practically, this entails that universal jurisdiction cannot be attached to the crime of rape unless implemented in the context of an international crime.

In conclusion, it appears that universal jurisdiction has a basis in treaty law regarding grave breaches and the prohibition of torture including *aut dedere aut judicare* obligations, thus a mandatory form of jurisdiction. Furthermore, universal jurisdiction may be developing on the customary level concerning genocide, crimes against humanity and other war crimes, which would be *permissive*.²²⁵⁰ Some even hold that the customary development entails an obligation concerning these crimes, stemming from their *ius cogens* nature and related *erga omnes* obligations.²²⁵¹ One can here apply the Kirgis approach of a sliding scale of customary international law, plausibly finding support for custom based on the particularly severe nature of certain international crimes or human rights violations.²²⁵² Many authors, however, find no customary basis for universal jurisdiction as of yet for genocide and crimes against humanity.²²⁵³ The lack of consistent state practice would support this. Though the *prohibition* of the crimes themselves has developed into customary law, this is not equated with universal jurisdiction as a customary obligation. The above demonstrates that the exercise of universal jurisdiction is not automatically evident in relation to the international crimes despite their customary status, due to a lack of explicit mention in treaty law and state practice.

9.4.2 Domestic Application - Various Solutions

The rules, or for that matter, the practice of universal jurisdiction are not uniform among states. For example, a Report of the Committee on Crime Problems of the Council of Europe holds that “[t]here are considerable differences of opinion

²²⁴⁹ Ferdinandusse, Ward N., *Direct Application of International Criminal Law in National Courts*, p. 204.

²²⁵⁰ Broomhall, Bruce, *Towards the Development of an Effective System of Universal Jurisdiction for Crimes Under International Law*, p. 405, Kamminga, Menno, *Lessons Learned from the Exercise of Universal Jurisdiction in Respect of Gross Human Rights Offenses*, 23 Hum. Rts. Q. 940, (2001), p. 965.

²²⁵¹ Bassiouni, Cherif, *Crimes against Humanity in International Criminal Law*, p. 220.

²²⁵² Kirgis, Frederic, *Custom on a Sliding Scale*.

²²⁵³ Hawkins, Darren, *Universal Jurisdiction for Human Rights: From Legal Principle to Limited Reality*, Global Governance 9, (2003), pp. 347-365. Bassiouni. Schabas, William, *National Courts Finally Begin to Prosecute Genocide, the ‘Crime of Crimes’*.

among member states concerning the purpose of the principle of universality, according to which criminal jurisdiction is exercised over offences committed abroad, without the requirements underlying the previously mentioned principles of jurisdiction necessarily being present”.²²⁵⁴ Bassiouni resembles universal jurisdiction to a checkerboard in that certain conventions recognise it and limited national practice supports its existence beyond theory, and the application is “uneven and inconsistent”.²²⁵⁵ The inconsistency largely arises from the different approaches and interpretations by countries and adjudicatory bodies of the meaning of universal jurisdiction. Though states may purport to embrace the application of universal jurisdiction, its regulations may be coupled with such major restrictions as to actually negate the universality of the jurisdiction, e.g. linking it with traditional forms of jurisdiction, such as territoriality. In certain countries, the presence of the accused on state territory may be required, evident also in certain conventions which expressly require such presence, e.g. concerning terrorist crimes.²²⁵⁶ The International Criminal Court Act of the United Kingdom e.g. aims to extend universal jurisdiction to the crimes contained in the Rome Statute but restricts it to offences committed by UK nationals or individuals residing in the country.²²⁵⁷ The French courts have held, in relation to their universal jurisdiction, that while it can be exercised in cases of

²²⁵⁴ Extraterritorial Criminal Jurisdiction: Report of the European Committee on Crime Problems, Council of Europe (1990).

²²⁵⁵ Bassiouni, Cherif, *Universal Jurisdiction for International Crimes: Historical Perspectives and Contemporary Practice*, p. 152.

²²⁵⁶ Bottini, Gabriel, *Universal Jurisdiction After the Creation of the International Criminal Court*, p. 522. The muddled understanding of the concept of universal jurisdiction has been evident in several domestic judgments, including the *Eichmann* case in Israel in 1962. As the Israeli Supreme Court stated: “it is the universal character of the crimes in question which vests in every State the authority to try and punish those who participated in their commission...The State of Israel...was entitled, pursuant to the principle of universal jurisdiction and in the capacity of a guardian of international law and an agent for its enforcement, to try the appellant.” The Court relied on a law passed in 1950 that allowed for the adjudication of genocide and crimes against humanity wherever committed against the Jewish people and as such relied on the nationality requirement of the victim. However, though the court claimed validity of jurisdiction based on universality, it also relied on a passive personality jurisdiction in that the victims were of Israeli descent. See *Attorney-General of the Government of Israel v. Adolf Eichmann*, 36 I.L.R 298, Israel Supreme Court, 1962 and discussion in Zahar, Alexander & Sluiter, Göran, *International Criminal Law*, p. 497.

²²⁵⁷ The International Criminal Court Act 2001, United Kingdom, Articles 67-68.

torture, this can only be applied in situations where the accused is present on French territory.²²⁵⁸

In most claimed instances of universal jurisdiction, there has in fact existed a connection between the crime and the enforcing state, due to the nationality of the victim or perpetrator, or the impact of the crime on the country in question.²²⁵⁹ These types of applications of universal jurisdiction coupled with traditional forms of jurisdiction, such as territoriality or nationality, have by certain authors been dubbed universal jurisdiction “plus”.²²⁶⁰ Such approaches are generally considered to be more pragmatic and appropriate for political reasons.²²⁶¹

²²⁵⁸ Article 689-2 of the Criminal Procedure Code. It has also established such jurisdiction for crimes committed in Rwanda and Yugoslavia. See Butler, A. Hays, *The Growing Support for Universal Jurisdiction in National Legislation*, p. 74.

²²⁵⁹ Bassiouni, Cherif, *Universal Jurisdiction for International Crimes: Historical Perspectives and Contemporary Practice*, p. 104. Most states claiming to practice universal jurisdiction have merely extended their jurisdiction to crimes committed extraterritorially but restrict the application to cases where the crime in question affect the interests of the enforcing state or the accused is present on the territory. *Ibid*, p. 136. See e.g. Italy’s Criminal Code Article 7, Canadian Criminal Code § 7 (3.71). Both Amnesty International and Human Rights Watch have conducted reviews of states’ legislation and practice concerning universal jurisdiction, demonstrating the extensive possibilities for states to apply universal jurisdiction provided for in their domestic laws. A limited number of countries interpret universal jurisdiction in the broad sense, allowing prosecution for violations of humanitarian law without any nexus at all to the country, e.g. that the suspect is not even on the territory. In the large majority of cases in domestic courts where universal jurisdiction has been applied, the accused has had a certain connection to the state in question. *Amnesty International, Universal Jurisdiction: The Duty of States to Enact and Implement Legislation*, London, 2001, AI Index: IOR 53/004/2001 & *Universal Jurisdiction in Europe, The State of the Art*, June 2006, vol. 18, No 5 (D), Human Rights Watch.

²²⁶⁰ Slaughter, Anne-Marie, *Defining the Limits: Universal Jurisdiction and National Courts*, in *Universal Jurisdiction: National Courts and the Prosecution of Serious Crimes Under International Law*, ed. Stephen Macedo, University of Pennsylvania Press, (2003), p. 172.

²²⁶¹ It is often argued that an unrestricted version of universality may easily lead to international disputes. On the other hand, a conditional universality may severely hamper the possibilities for investigation of the state in that it may not be allowed even anticipating an arrival of a suspect, until the individual is present on the territory. Cassese, Antonio, *International Criminal Law*, pp. 289-90. Are we concerned with the true essence of universal jurisdiction in countries with a universal jurisdiction “plus”? The puritanical approach to interpreting universal jurisdiction is that it can be exercised where no connection to the enforcing state exists. Arguments have, however, been raised that the principle of universality does not *require* that states pursue investigations where a suspect is not on their territory, but that international law does not preclude states from seeking extradition of foreign suspects on another state’s territory. As such, a requirement of a presence on the territory would be at the discretion of the state. See e.g. discussion in *ICJ, Arrest Warrant Case*, Judgment of 14 February 2002.

Despite the independent authority of a principle such as universal jurisdiction, states tend to require that universal jurisdiction can only be exercised if it has been implemented domestically. As of yet, no state has resorted to the application of universal jurisdiction without national provisions allowing such exercise, despite the existence of international conventions allowing this.²²⁶² In order to exercise universal jurisdiction, states must thus adopt the necessary domestic legislation, criminalising the appropriate violations. As for domestic regulations on jurisdiction, states either adopt specific legislation providing them with the possibility of universal jurisdiction, e.g. for the crime of genocide, or may use their general criminal law and regulations on jurisdiction for this purpose.²²⁶³ Few countries provide for such possibilities in their domestic legislation.²²⁶⁴ The Princeton Principles on Universal Jurisdiction radically state that “national judicial organs may rely on universal jurisdiction even if their national legislation does not specifically provide for it”.²²⁶⁵ However, it is doubtful that such a rule will be followed in practice.

The most extensive domestic regulation allowing universal jurisdiction was the Act on the Punishment of Grave Breaches of Humanitarian Law of 1993 and the amendment of 1999, which allowed Belgian courts to try cases of the three international crimes: genocide, war crimes and crimes against humanity committed by non-nationals abroad, against non-nationals. It did not require the presence of the accused on its territory. Belgium, however, revised its law, introducing a requirement of the presence by the accused on the territory of the country in the form of primary residence.²²⁶⁶ Prior to the revision of the law, the Belgian courts prosecuted several individuals, including the 2001 conviction of four Rwandan citizens for war crimes, the so-called “Butare Four” case as well as “The Two Brothers” case, all involving the participation in the Rwandan

²²⁶² Bassiouni, Cherif, *The History of Universal Jurisdiction and Its Place in International Law*, p. 46.

²²⁶³ Meron, Theodor, *The Humanization of International Law*, p. 120.

²²⁶⁴ Bassiouni, Cherif, *Universal Jurisdiction for International Crimes: Historical Perspectives and Contemporary Practice*, p. 106.

²²⁶⁵ Principle 3 of the Princeton Principles.

²²⁶⁶ Or if the victim is Belgian, has lived in Belgium for at least 3 years. This was in part due to pressure by the US fearing prosecutions threatening to remove NATO Headquarters from Brussels and partly due to the tremendous acceleration of complaints against various foreign high-ranking officials. See discussion in e.g. Moghalu, Kingsley Chiedu, *Global Justice: The Politics of War Crimes Trials*, Greenwood Publishing, (2006), p. 93.

genocide of 1994.²²⁶⁷ Such a liberal application of the principle as the previous law has been heavily criticised.²²⁶⁸

In Spain, the Organic Law on the Judicial Power “provides for Spanish jurisdiction over acts committed by Spaniards or foreigners outside the national territory that can be defined, under the criminal law of Spain, as any of the offenses that it lists, beginning with genocide...and followed by terrorism...including lastly, any other offense which under international treaties or conventions, should be prosecuted in Spain”.²²⁶⁹ This possibility led to the investigation of the former president of Chile, Pinochet.²²⁷⁰ The investigation led to an extradition order from the United Kingdom, where Pinochet was present, albeit such an extradition did not take place due to ill-health. However, the case was the initiation of several subsequent cases based on universal jurisdiction, including a case against military officer Adolfo Scilingo of Argentina, who was convicted for attempted genocide during the “dirty war” in the 1970s.²²⁷¹ Presence on Spanish territory is not required for initiating an investigation but to

²²⁶⁷ La Cour d’Assises de L’arrondissement Administratif de Bruxelles-Capitale, verdict of June 8, 2001. See discussion in Reydam, Luc, *Belgium’s First Application of Universal Jurisdiction: the Butare Four Case*, Journal of International Criminal Justice 2003, (1).

²²⁶⁸ Cryer, Robert, *Prosecuting International Crimes: Selectivity and the International Criminal Law Regime*, p. 95.

²²⁶⁹ Article 23 (4). See translation in Butler, a. Hays, *The Growing Support for Universal Jurisdiction in National Legislation*, p. 73. However, in the Guatemalan generals case, the High Court interpreted universal jurisdiction in a restrictive manner, emphasising that universal jurisdiction only may be exercised as a subsidiary recourse, i.e. if another state with territorial or nationality jurisdiction fails to act, and solely in cases where there is a link between the foreign offence and Spain. Audiencia Nacional, Madrid, Diligencias Previas 331/99, 27 March, 2000 (Spain). This was subsequently overturned: STC 237/2005, 26 September, 2005, (Spain). Arrest warrants were also issued in 2006 against former presidents Rios Montt and Oscar Mejía Victores, the extradition requests were dismissed by the Guatemalan Constitutional Court in December 2007, stating that Spain’s exercise of universal jurisdiction was unacceptable and an attack on Guatemala’s sovereignty. See regarding the arrest warrants Orden Captura Rios Montt, Audiencia Nacional, Diligencias Previas 331/1999-10, (7 July 2006) (Spain). Documento-Guatemala: Fallo Inconsistente de la Corte de Constitucionalidad Rechaza Extradiciones Solicitadas por España, Amnesty Int’l, 21 Dec., 2007.

²²⁷⁰ *Pinochet Arrest Warrant*, (Auto por el que se decreta la prisión provisional incondicional de AUGUSTO PINOCHET y se cursa orden de captura internacional contra el mismo), Audiencia Nacional, Madrid, 16 October, 1998, confirming jurisdiction over genocide and terrorism during the dictatorship in Chile.

²²⁷¹ Adolfo Scilingo, Manuel Cavallo. National Court, Criminal Chamber, April 19 2005, see [://www.derechos.org/nizkor/espana/juicioral/doc/sentencia.html](http://www.derechos.org/nizkor/espana/juicioral/doc/sentencia.html). Article 23.4 of the Organic Law 6/1985 was applied.

conduct a trial. Most investigations in Spain and Belgium have been initiated by private parties, including in the arrest warrant case against Pinochet.²²⁷²

The German Code of Crimes against International Law came into force in 2002 and provides for universal jurisdiction over the three international crimes.²²⁷³ Germany has prosecuted several suspects involved in the Yugoslavia conflict.²²⁷⁴ Extensive discretion is given to the federal prosecutor and despite complaints against several high-ranking officials, including US Defense Secretary Donald Rumsfeld, investigations have been declined. Prior to the law of 2002, German courts held that the exercise of universal jurisdiction could only be performed if the suspect was present on German territory or other connections existed. However, the new law does not retain such a requirement, though the prosecutor is provided with the discretion to refrain from initiating an investigation where the suspect is not present. The Courts have emphasised the link between the defendant and Germany, e.g. residency or employment in Germany.²²⁷⁵

Other states also provide for universal jurisdiction in cases where the alleged perpetrator is present on the territory.²²⁷⁶ France has universal jurisdiction over torture and requires the presence of the accused to initiate proceedings but can hold trials *in absentia*, which led to the conviction of Ely Ould Dah, a Mauretanian officer that tortured members in the military.²²⁷⁷ The Netherlands provides for universal jurisdiction for war crimes, crimes against humanity and genocide if the individual is present.²²⁷⁸ This has led to several convictions.²²⁷⁹

²²⁷² Human Rights Watch, Universal Jurisdiction in Europe, The State of the Art, Volume 18, No. 5 (D), June 2006, p. 8.

²²⁷³ VStGB [CCIL], June 26, 2002, Bundesgesetzblatt [BGBl] 2254, §1. ("This Act shall apply to all criminal offences against international law designated under this Act, to serious criminal offences designated therein even when the offence was committed abroad and there exists no relation to Germany.").

²²⁷⁴ See e.g. Nikola Jorgic, Bundesgerichtshof [BGH] [Federal Court of Justice] Apr. 30, 1999, 1999 Neue Zeitschrift fuer Strafrecht 396 (F.R.G.).

²²⁷⁵ *Prosecution v. Novislav Djajic*, Bayerisches Oberstes Landesgericht, 23 May 1997, *Prosecution v. Nikola Jorgic*, Oberlandesgericht Düsseldorf, 26 Sept. 1997.

²²⁷⁶ Denmark: Straffeloven 1930, section 8 (5), leading to a conviction of a Ugandan national.

²²⁷⁷ Article 222-1 of the Criminal Code, code penal of 1994. Ely Ould Dah: Cour de Cassation, 23 October, 2002, No. 02-85379.

²²⁷⁸ International Crimes Act of June 19, 2003.

Denmark convicted Refik Saric for partaking in murder and torture at a concentration camp in Bosnia, basing its jurisdiction on the grave breaches provision in the 1949 Geneva Conventions.²²⁸⁰

What is the future of universal jurisdiction? As a concept, it has received increasing support among scholars but the practice of states has yet to follow. Only a few cases exist where universal jurisdiction has been applied to a full extent without a link to such principles as territoriality. The relevance of the jurisdiction can be questioned, considering the establishment of the ICC, and the rather tepid attempts by states to apply the principle. However, as a theory it is still valuable if the practice by states follow suit. Despite the scepticism of universal jurisdiction, the application of the principle in domestic courts can

²²⁷⁹ Sebastien Nzapali, Rotterdam District Court, 7 April, 2004, *Judgment of the The Hague District Court in the Case of Public Prosecutor's Office Number 09/751005-04* (Afghanistan), The Netherlands, The Hague District Court, 14 October 2005, Prosecutor/Knesevic, Hoge Raad der Nederlanden, [Supreme Court of the Netherlands], 11 November 1997, NJ 1998, 463 (Neth.).

²²⁸⁰ *Prosecution v. Refik Saric*, Third Chamber of the Eastern Division of the Danish High Court, 25 Nov. 1994. See also Switzerland, which has convicted a Rwandan national for war crimes in Rwanda: *Fulgence Niyonteze*, Tribunal Militaire D'Appel 1A, Audience du 15 Mai au 26 Mai 2000, Palais de Justice, Geneve. Swiss courts are obligated to exercise jurisdiction over crimes prohibited by international treaties under Article 6bis (6a) of the Swiss Criminal Code.

In *Regina v. Finta* the Canadian Supreme Court examined its jurisdiction in connection to crimes committed in Hungary in 1944 and stated: "the principle of universality permitted a state to exercise jurisdiction over criminal acts committed by non-nationals against non-nationals wherever they took place if the offence constituted an attack on the international legal order." Supreme Court of Canada, 1994 1 S.C.R. 701.

See also *Demjanjuk v. Petrovsky*, which also applied the passive personality principle albeit discussing the universality principle as support. The US Circuit Court of Appeals affirmed that the US could extradite an alleged guard of a Nazi concentration camp to Israel based on universal jurisdiction. The court stated that the acts committed by the Nazis were "crimes universally recognized and condemned by the community of nations." 776 F.2d 571, 6th Cir., US (31 October, 1985). See also the Swedish legislation which allows for a quite liberal application of universal jurisdiction in cases there is "a considerable interest" and is "appropriate": BrB 2:3. However, problems have still arisen concerning the immunity principle in attempted prosecutions.

constitute an important complement to the adjudication by regional human rights courts and the ICC.²²⁸¹

²²⁸¹ There are concerns that the use of universal jurisdiction will become outdated with the introduction of the ICC since the willingness to initiate a costly investigation and prosecution will decrease because of the existence of the Court as an alternative prosecutorial forum. The establishment of the ICC to a certain extent has limited the necessity of developing and exploring universal jurisdiction since it entails that the majority of the states in the world have jurisdiction over the international crimes, as member states. However, universal jurisdiction is still seen as an important complement to the ICC in filling the impunity gap. A large number of states are still not parties to the Rome Statute, and the question would remain pertinent for these countries. Similarly, in cases where the ICC does in fact have jurisdiction over the crimes, but where the case does not meet the requisite gravity threshold or the ICC cannot investigate because of the workload, such a jurisdiction may be of relevance. Because of the limited abilities of the ICC to prosecute but a few cases due to its jurisdiction and resources, universal jurisdiction could fill a broader role in eradicating impunity. See discussion e.g. in Boot, Machteld, *Genocide, Crimes against Humanity, War Crimes: Nullum Crimen Sine Lege and the Subject Matter Jurisdiction of the International Criminal Court*, p. 56, Burke-White, William, *Proactive Complementarity: the International Criminal Court and National Courts in the Rome System of International Justice*, p. 63, Kleffner, Jann, *The Impact of Complementarity on National Implementation of Substantive International Criminal Law*, p. 25, Bottini, Gabriel, *Universal Jurisdiction after the Creation of the International Criminal Court*, p. 14. The Prosecutor of the ICC, Luis Moreno-Ocampo, has himself stated that despite the establishment of the ICC there will remain an “impunity gap unless national authorities, the international community and the (ICC) work together to ensure that all appropriate means for bringing other perpetrators are used”. Paper on Some Policy Issues before the Office of the Prosecutor, ICC-OTP, 2003, p. 3. The ICC is therefore not intended nor predicted to adjudicate an extensive load of cases. Several authors argue that the complementarity regime of the ICC will in fact encourage and make states more willing to exercise universal jurisdiction. (Burke-White, William, *The International Criminal Court and the Future of Legal Accountability*, p. 202, Arbour, Louise, *Will the ICC have an Impact on Universal Jurisdiction?*, 1 J. Int’l Crim. Just. 585, (2003), Butler, A. Hays, *The Growing Support for Universal Jurisdiction in National Legislation*, p. 68, Broomhall, Bruce, *Towards the Development of an Effective System of Universal Jurisdiction for Crimes Under International Law*, 35 New Eng. L. Rev. 399 (2000-2001), p. 408.) There is, however, no obligation stemming from the Rome Statute. See discussion in Boot, Machteld, *Genocide, Crimes against Humanity, War Crimes: Nullum Crimen Sine Lege and the Subject Matter Jurisdiction of the International Criminal Court*, p. 57. Though the Rome Statute has jurisdiction on the basis of territory and personality, certain implementing member states have taken a broader approach and established universal jurisdiction for the crimes mentioned in the Statute, a few countries even arguing that the Statute establishes a legal obligation to provide for such jurisdiction. Kleffner, Jann, *The Impact of Complementarity on National Implementation of Substantive International Criminal Law*, p. 107.

Several commentators agree that international law is moving towards a general obligation for states to prosecute the perpetrators of the international crimes if present within their jurisdiction.²²⁸² As such, a modest version of universal jurisdiction may become an obligatory norm in international law. To avoid excessive *in absentia* trials, the general opinion among scholars and the international community seems to be a minimum requirement of a presence by the accused on the territory.²²⁸³ However, it is emphasised that the norm is under development and has yet to result in positive law.²²⁸⁴ It is apparent that the principle needs to be clarified and a common approach undertaken to determine its scope and application.

9.4.4 Conclusion on Universal Jurisdiction and the Prohibition of Rape

What is then the relevance of the application of universal jurisdiction for the prohibition of rape? Though rape in its own right still has to be considered a crime that incurs universal jurisdiction, as an element of several of the crimes considered eligible for such jurisdiction including genocide, war crimes, crimes against humanity and torture, rape in such contexts can also be prosecuted not only through the means of the ICC, but also domestically with the application of universal jurisdiction. This may in fact be *mandatory* for certain crimes, leading to state obligations to criminalise rape as an international crime. Citizens of states reluctant to become contracting parties to the Rome Statute could thereby, hypothetically, be prosecuted for rape in other states based on universal jurisdiction. The possibility of universal jurisdiction certainly creates further demands on states to prohibit and prosecute the crime domestically, for fear of prosecution in another state. Though a globalising principle such as universal jurisdiction carries sensitive political considerations and is under formation as a well-accepted principle, it could potentially become an important tool. Universal jurisdiction could, if structured, fill the prosecutorial gaps of the ICC. It appears that, in order for states to exercise such a wide jurisdiction, some form of legislation would need to be enacted domestically extending its jurisdictional scope. It also appears that states, most likely, cannot rely on solely “ordinary” crimes as a basis. This entails that legislation must be enacted for such

²²⁸² Ferdinandusse, Ward N., *Direct Application of International Criminal Law in National Courts*, p. 193, Cassese, Antonio, *International Criminal Law*, p. 302.

²²⁸³ Meron, Theodor, *The Humanization of International Law*, p. 123, Kamminga, Menno, *Final Report on the Exercise of Universal Jurisdiction in Respect of Gross Human Rights Offences*, International Law Association, London Conference, (2000), p. 2.

²²⁸⁴ Ferdinandusse, Ward N., *Direct Application of International Criminal Law in National Courts*, p. 193.

jurisdiction pertaining to rape as an international crime and it would not be sufficient to rely on the ordinary penal codes proscribing rape. Though much of the discussion on universal jurisdiction is still at the *de lege ferenda* stage, and few states have recognised a mandatory form of jurisdiction, if this principle develops further, it could thus lead to additional obligations for states to criminalise rape, under the *chapeau* of the international crimes. The question of a definition of the crimes has not, however, been raised in the discussions on universal jurisdiction. States must thus be granted wide flexibility in the formulation of domestic provisions. However, the crimes in question must be of an international character rather than an ordinary crime.

Part V: The Prohibition of Rape - Closing the Gap between International Human Rights Law and International Humanitarian Law?

10. The Interplay between International Human Rights Law and International Humanitarian Law

10.1 The Concepts of Harmonisation and Humanisation in International Law

The harmonisation and humanisation of international law are two concepts that are interconnected when discussing the symbiotic relationship between international human rights law and IHL and will be explained in the following chapter.²²⁸⁵ The question whether international law is increasingly becoming a fragmented area of law has chiefly been discussed in the context of the multitude of international adjudicatory bodies.²²⁸⁶ However, as viewed in ILCs study on the matter, it also generally concerns the proliferation of new areas of law within the field of international law, as well as distinct interpretations of similar subjects that have developed in different areas.²²⁸⁷ This is of practical importance for the topic at hand, since it concerns the question whether fragmentation should be maintained between different areas of public international law or if the goal should be to strive to increase harmonised interpretations of concepts such as the definition of rape or torture. As seen throughout the thesis, the same matters are frequently dealt with in IHL, international criminal law and international human rights law, at times with highly diverse results. These divergences have occurred despite the fact that the adjudicatory bodies in the matter of both the prohibition of rape and torture to a great extent have evinced general principles from respective bodies of law as well as domestic legislation. Are distinct definitions

²²⁸⁵ Since international criminal law has its foundation in both of these areas and can be seen as a result of the humanisation process, discussed below, this chapter will mainly discuss the areas of human rights law and IHL. The discussion hence directly pertains also to ICL.

²²⁸⁶ Yearbook of the International Law Commission 2000, UN Doc. A/CN.4/SER.A/2000, Summary Records, p. 359. See also Joost, Pauwelyn, *Bridging Fragmentation and Unity: International Law as a Universe of Inter-Connected Islands*, 25 Mich. J. Int'l L. 903, Summer 2004.

²²⁸⁷ Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law, Report of the Study Group of the International Law Commission, finalized by Martti Koskeniemi, UN Doc. A/CN.4/L.682, 2006.

of norms a necessity or solely an unfortunate result of such fragmentation? To what extent should the international community strive towards a *harmonisation* of separate areas of law?

The *humanisation* process refers to a term primarily coined by Theodor Meron which describes the increased influence by international human rights law on international humanitarian law, e.g. evident in the promulgation of international criminal law.²²⁸⁸ Though the division in international law of IHL and human rights law is highly deliberate and certainly not created on an *ad hoc* basis, the two systems are complementary: while advances in international human rights law enhance IHL, principles of IHL have influenced certain areas of human rights law. Both areas of law certainly aim to protect the individual from the perspective of humanitarian concerns. However, major differences also exist between them. With the proliferation of adjudicatory bodies interpreting both human rights law and IHL, to the extent it is referenced in international criminal law, a lack of coherence has also developed in the interpretation of similar norms. To a certain degree, this inconsistency has been due to the divergent nature of the separate regimes. Thus, the question of a possible convergence in relation to a specific norm becomes even more pertinent.²²⁸⁹

The issues of harmonisation and humanisation are linked in that they both raise the question whether the same concept should be dealt with in a distinct or harmonised fashion, i.e. if the nature of the separate branches is such that harmonisation, e.g. in the form of humanisation, is conducive. The increasing realisation of a need for harmonisation between IHL and human rights law has in part been due to the changing nature of warfare, which has moved from international conflicts to mainly intra-state conflicts. This excludes the application of certain IHL regulations such as the 1949 Geneva Conventions and Additional Protocol I to the conventions. The reliance on international human rights law for the protection of civilians has therefore increased in order to fill such gaps, which is also an example of the humanisation process.

Harmonisation would facilitate both international and domestic adjudication in e.g. cases of sexual violence, in that a consistent approach and interpretation

²²⁸⁸ Meron, Theodor, *The Humanization of International Law*, Jinks, Derek, *Protective Parity and the Laws of War*, 79 Notre Dame L. Rev. 1493, (2004).

²²⁸⁹ According to Quénivet, the arguments for complementarity between the two regimes generally concern three forms of influence and will be raised in the following chapter: 1) human rights law may fill in gaps where IHL rules are unclear or does not cover a specific situation, 2) human rights law can provide implementation mechanisms and supervision of norms since there is a general failure of adjudication of IHL rules and 3) the humanisation of IHL. However, IHL is usually deemed the *lex specialis*, thereby filling in the gaps of human rights law. Quénivet, Noëlle, *The History of the Relationship Between International Humanitarian Law and Human Rights Law*, p. 9-10.

would be applied. Patricia Viseur Sellers in fact notes an increased conscious cross-fertilisation between these areas of law, particularly with respect to gender-based violence including sexual violence, as a result of the broadened focus on this subject, as well as the focus on the common ground of human dignity in both areas.²²⁹⁰ However, the two regimes are of such distinct nature, with partly divergent goals and processes, that a harmonisation may not be desirable. That the two regimes both conflict and converge at intervals is evident and the extent of this interplay in the context of sexual violence will therefore be discussed. It is apparent that a prohibition of rape exists in both areas of law. The question is thus if a mutual definition of rape is a possibility and something to aim for?

10.2 The Nature of International Human Rights and International Humanitarian Law

In order to analyse the extent to which harmonisation is occurring, the nature of the two regimes must first be discussed in order to evince similarities and distinctive characteristics. The bodies of international human rights law and IHL share a common ideal of protecting human dignity and several of the protected rights are similar, such as the prohibition of torture, the protection of family rights and certain economic and social rights.²²⁹¹ They are, however, dissimilar in that international human rights law aims to protect individuals against the state's abuse at all times, whereas the protection of the latter only applies in times of armed conflict and does not primarily concern the protection of the individual against the abuse of the state. Under humanitarian law, different rules apply depending on how the armed conflict is characterised, e.g. as an international or non-international armed conflict. Human rights regulations on the other hand constitute a single body of law that does not contain different levels of protection depending on the context in the same manner.²²⁹² Furthermore, human rights law traditionally regulates the relationship between states and individuals, whereas humanitarian law mainly concerns the correlation

²²⁹⁰ Viseur Sellers, Patricia, *The Prosecution of Sexual Violence in Conflict: The Importance of Human Rights as a Means of Interpretation*, p. 28.

²²⁹¹ For example the right to food and medical supplies, the protection of public health (e.g. Article 23 4th Geneva Convention). Family rights are mentioned e.g in Article 27 of the 4th Geneva Convention and exists in a multitude of human rights treaties.

²²⁹² Apart from derogations in times of public emergencies.

between belligerent states and certain groups of protected people.²²⁹³ IHL contains rules on e.g. the conduct of hostilities and treatment of prisoners and civilians, whereas human rights law applies to every individual simply because of his/her status as a human being.²²⁹⁴

Additionally, IHL aims to achieve and govern primarily two concurrent precepts - military necessity and humanitarian treatment.²²⁹⁵ The inevitability of military combat is thereby restrained by humanitarian and human rights concerns. IHL developed early as a part of public international law, since it principally regulates inter-state relations. It was primarily based on reciprocal behaviour between two parties at war and the notions of civilised conduct even in the face of conflict, rather than the rights-based approach of international human rights.²²⁹⁶ As noted by Leslie Green: “The main purpose of...[IHL] is to minimise the horrors of conflict to the extent consistent with the economic and efficient use of armed force, while not inhibiting the military activities of the parties in their endeavour to achieve victory...”²²⁹⁷ Doswald-Beck and Vité of the ICRC in short differentiate between the two separate regulatory frameworks, stating that international humanitarian law “indicates how a party to a conflict is to behave in relation to people at its mercy, whereas human rights law

²²⁹³ Because of the state-centric approach that existed at the time of creation of the Geneva Conventions, the primary implementation mechanism was deemed to be state responsibility. Through e.g. the Grave Breaches-regime, duties are placed on states to create domestic possibilities for individual responsibility. See e.g. Green, Leslie, *The Contemporary Law of Armed Conflict*, pp. 44-45, Lopes, Cátia & Quénivet, Noëlle, *Individuals as Subjects of International Humanitarian Law and Human Rights Law*, in *International Humanitarian Law and Human Rights Law: Towards a New Merger in International Law*, ed. by Roberta Arnold and Noëlle Quénivet, Martinus Nijhoff, (2008), p. 215.

²²⁹⁴ It should, however, be pointed out that certain groups have also been singled out in the human rights regime as needing additional protection, e.g. women, children, refugees.

²²⁹⁵ Jinks, Derek, *Protective Parity and the Laws of War*, p. 1494. See also Best, Geoffrey, *War & Law Since 1945*, Oxford University Press, (1994), p. 242, and A.P.V Rogers, *Law on the Battlefield*, Manchester University Press, (2004), p. 3, who notes that military necessity, humanity, distinction and proportionality are principles of customary law in IHL. Meron, Theodor, *The Humanization of International Law*, Martinus Nijhoff, (2006), p. 2, holds: “Chivalry and principles of humanity are a competing inspiration for the law of armed conflict, creating a counterbalance to military necessity.”

²²⁹⁶ Droege, Cordula, *The Interplay Between International Humanitarian Law and International Human Rights Law in Situations of Armed Conflict*, p. 313, Green, Leslie, *The Contemporary Law of Armed Conflict*, p. 54, Meron, Theodor, *The Humanization of International Law*, Martinus Nijhoff, (2006), pp. 1-2.

²²⁹⁷ Green, Leslie, *The Contemporary Law of Armed Conflict*, Manchester University Press, (2000), p. 348. According to Green: “The demands of military necessity are limited by legal and moral, as well as military or political considerations and it should be remembered that the laws of war have been drawn up with knowledge of the needs and the realities of armed conflict...” See p. 348.

concentrates on the rights of the recipients of a certain treatment”.²²⁹⁸ The very foundation and underpinning ethics are therefore necessarily opposed and though both regimes strive to protect the individual, “international human rights law and international humanitarian law have historically provided different answers to similar question...”²²⁹⁹

Certain authors maintain that the humanitarian concern is the connecting factor between IHL and human rights law, though with different objectives, e.g. that IHL “evolved as a result of humanity’s concern for the victims of war, whereas human rights law evolved as a result of humanity’s concern for the victims of a new kind of internal war - the victims of the Nazi death camps.”²³⁰⁰ That humanity is a guiding principle in IHL, is evident e.g. in the Martens Clause and Common Article 3 of the 1949 Geneva Conventions, which create limits on military necessity.²³⁰¹ However, one must not forget the military’s influence on the rules whose interests it partly serves, which according to some has been “camouflaged” by humanitarian concerns.²³⁰² The specific objectives of warfare may thus be somewhat diminished. In fact, the UN was at first reluctant to include the laws of war in its work, since it was considered the expertise of the ICRC, but also because it might undermine its *jus contra bellum* contention.²³⁰³

Though the birth of international human rights law was spurred by the Second World War, its origins lie in domestic law, with a widespread implementation on the national level, therefore generating a more effective scheme of supervision and monitoring. The aim of the visionaries during the Enlightenment was to

²²⁹⁸ Doswald-Beck, Louise & Vité, Sylvain, *International Humanitarian Law and Human Rights Law*, IRRC, No. 293, March- April 1993.

²²⁹⁹ Feinstein, Barry, *The Applicability of the Regime of Human Rights in Times of Armed Conflict and Particularly to Occupied Territories: The Case of Israel’s Security Barrier*, 4 Nw. U. J. Int’l Hum. Rts. 238, Dec. 2005, p. 17.

²³⁰⁰ Cerna, Christina, *Human Rights in Armed Conflict: Implementation of International Humanitarian Law Norms by Regional Intergovernmental Human Rights Bodies*, in *Implementation of International Humanitarian Law* 31, 34, ed. Frits Kalshoven & Yves Sandoz, (1989), p. 34.

²³⁰¹ Rogers, A.P.V., *Law on the Battlefield*, Manchester University Press, (2004), p. 7. See also the preamble of Hague Convention IV which refers to the “desire to serve the interests of humanity and the ever increasing requirements of civilisation”.

²³⁰² Gardam, Judith & Jarvis, Michelle, *Women, Armed Conflict and International Law*, Kluwer International Law, (2001), p. 254.

²³⁰³ Quéniwet, Noëlle, *The History of the Relationship Between International Humanitarian Law and Human Rights Law*, in *International Humanitarian Law and Human Rights Law: Towards a New Merger in International Law*, ed by Roberta Arnold and Noëlle Quéniwet, Martinus Nijhoff, (2008), p. 3.

create a more just relationship between the government and its citizens.²³⁰⁴ The mechanisms of the two regimes are therefore somewhat different - IHL predominantly aims to have a preventative function, to be used promptly and be implemented immediately in conflicts with assistance from the Protecting Powers or the ICRC. IHL is thus primarily transitional in nature, since its application solely is required during the course of an armed conflict. Human rights regulations also function through promotion and prevention, but further as means of political negotiations, reconciliation mechanisms and judicial adjudication, at times requiring long-term effects.

IHL and human rights law further differ in that the international human rights law regime provides individuals with rights that can be claimed in various institutions, whereas humanitarian law in general instead promotes “objective public order standards”.²³⁰⁵ While the main objective of IHL also is the protection of individuals, this protection has not been expressed in the form of rights for the victim but rather through obligations on states and other armed groups in warfare with the aim of protection.²³⁰⁶ Though certain provisions in the 1949 Geneva Conventions and Additional Protocols I and II make references to rights, no procedural possibilities exist for individual claims due to the inherent limitations in connection with armed conflicts.²³⁰⁷ Particular restrictions also exist as to which persons the rights befall. The wide protection of non-combatants in the Fourth Geneva Convention is directed solely at “protected persons”, excluding a state’s own nationals, nationals of co-belligerents and

²³⁰⁴ Droege, Cordula, *The Interplay Between International Humanitarian Law and International Human Rights Law in Situations of Armed Conflict*, 40 *Isr. L. Rev.*, (2007), p. 312.

²³⁰⁵ Provost, Rene, *International Human Rights and Humanitarian Law*, p. 33. The most serious violations, the grave breaches of the 1949 Geneva Conventions, oblige states to prosecute domestically. This venue of prosecution was, however, used in a limited manner until the 1990’s, when certain states began prosecuting suspected war criminals from the Yugoslavia and Rwanda conflicts. The lack of a remedy in IHL is also mirrored in the process of incorporation into domestic law. Byron, Christine, *A Blurring of the Boundaries: The Application of International Humanitarian Law by Human Rights Bodies*, 47 *Va. J. Int’l L.* 839, p. 845. Provost, Rene, *International Human Rights and Humanitarian Law*, p. 48. The most common form of incorporation is in the shape of field manuals issued to armed forces, which do not explicitly provide rights to combatants and civilians, but rather consist of rules of conduct.

²³⁰⁶ Sassoli, Marco & Bouvier, Antoine, *How Does Law Protect in War?*, p. 264.

²³⁰⁷ Until the recent establishment of the *ad hoc* tribunals and the ICC, their normative framework in parts built on IHL norms, the traditional enforcement mechanisms in IHL treaty law consisted of primarily the ICRC, who may visit prisoners of war and detained civilians. An International Humanitarian Fact-Finding Commission that may inquire into allegations of serious violations of the Geneva Conventions was also introduced by the Additional Protocols in 1977, but has yet to be called upon. See Geneva Convention III, Arts. 125, 126, Geneva Convention IV Arts. 142-143 and Art. 90, Additional Protocol I.

those of neutral third states.²³⁰⁸ As such, many individuals fall outside the scope of protection. The ICTY has, however, in its jurisprudence widened the scope of interpretation of the concept of “protected persons”.²³⁰⁹ Additional Protocol I of 1977 further grants protection to “all those affected by” an armed conflict, meaning any civilian, i.e. not a combatant, which is also reflected in international criminal law.²³¹⁰ According to René Provost, this is an example of the humanisation process of IHL, which increasingly focuses on the humanitarian concern of the individual unrelated to his/her status of a particular group.²³¹¹

In conclusion, IHL consists of regulations on the acts of states and combatants, whereas human rights law aims to protect individuals from the arbitrary invasions by the state. The development of international criminal law has therefore been an important progress to allow individual claims of IHL violations meanwhile the existence of human rights law has provided an important structure to make claims against the state.

10.3 Fragmentation and Specialisation of Public International Law

10.3.1 General Remarks

Fragmentation of international law entails the division of international law into various blocks, e.g. into separate regimes such as IHL and international human rights law as well as universal, regional and bilateral protection systems.²³¹² Another example is the increased construction of issue-specific tribunals, e.g. the ICTY and the ICTR.²³¹³ As such, the concept refers both to substantive rules and the various protection systems. International law is not a homogenous system

²³⁰⁸ Article 4, 1949 Geneva Convention IV.

²³⁰⁹ In *Tadic and Celebici*, the Tribunal focused on the feelings of allegiance of victims toward the enemy state rather than nationality. See *Prosecutor v. Tadic*, Case No. IT-94-1-A, Appeal Judgment of 15 July 1999, paras. 165-168, *Prosecutor v. Mucic, Delic, Zenga, Delalic, (Celebici Camp)*, Case No. IT-96-21-A, Appeal Judgment, 20 February 2001, para. 73.

²³¹⁰ Article 9, AP I.

²³¹¹ Provost, René, *The International Committee of the Red Widge? The Diversity Debate and International Humanitarian Law*, p. 634. An example of this view is the adoption of the “Basic Principles and Guidelines on the Rights to Reparation for Victims of Gross Violations of Human Rights and Humanitarian Law” by the UN General Assembly in 2005, which affirms the right to remedies for the individual victim and refers to both human rights treaties as well as the Hague and Geneva Conventions. See GA Resolution 60/147 of 16 December 2005. This hints at a similar treatment of IHL and human rights law in terms of individual claims.

²³¹² ILC Study, UN Doc. A/CN.4/L.682, 13 April 2006, p. 11.

²³¹³ Leathley, Christian, *An Institutional Hierarchy to Combat the Fragmentation of International Law: Has the ILC Missed an Opportunity?*, 40 N.Y.U.J. Int'l L. & pol. 259, p. 261.

since it contains these various sections of law and multiple international courts. Norm creation is to a large extent performed at a decentralised level since there is no central legislator. Normative conflicts are therefore highly probable. The ILC study “Fragmentation of International Law” analyses the content of international law and how it creates a hierarchy of norms, e.g. *ius cogens*, *lex specialis* to solve the increasing proliferation of categories of international law and similar subject matter.²³¹⁴ It will therefore provide a valuable indication of how to approach the decentralised area of international law.

Each regime has its distinct characteristics and legal rationale as well as institutional and normative framework. Though each system is part of the wide category of public international law, its relation to other regimes within this framework is not clear. A result is that each area of law frequently reaches different solutions to similar legal issues. A fear is that this will lead to conflicts between systems and inconsistencies in the interpretation of international law.²³¹⁵ However, fragmentation is simply a natural development due to the distinct values and purposes of the particular area. It is therefore not a technical problem resulting from a lack of coordination, but rather a result of specialisation. Malcolm Evans holds that the proliferation of autonomous normative regimes is unavoidable and may even be a “beneficial prologue to a pluralistic community”.²³¹⁶ Several factors have contributed to the fragmentation process; the lack of centralised organs, specialisation of law, parallel regulations and an enlargement of the scope of international law. Also globalisation has encouraged the trend of fragmentation.²³¹⁷ International law has never, in fact, been in a solid state, but rather always a fluid body of shifting inter-relationships.²³¹⁸

According to Michael Bothe, the sporadic history of creating international law is the reason for its fragmentation, with the international community

²³¹⁴ ILC Study, UN Doc. A/CN.4/L.682, 13 April 2006, p. 30, 166 ff.

²³¹⁵ Shaw, Malcolm, *International Law*, (2008), p. 66.

²³¹⁶ Evans, Malcolm, *International Law*, (2006), p. 77.

²³¹⁷ Leathley, Christian, *An Institutional Hierarchy to Combat the Fragmentation of International Law: Has the ILC Missed an Opportunity?*, p. 262.

²³¹⁸ Ibid, p. 261. Lindroos explains the nature of international law in relation to domestic legal systems: “The international legal system is...a decentralised and fragmented legal system, in which creation, application, and implementation of norms is built on a structure and logic that differs from domestic law...Where national law is strongly based on hierarchy and institutional structures, the international normative order may be viewed from the perspective of bilateral state relations, something that does not easily lend itself to the establishment of systemic relations between norms. This lack of systemic relations and a centralised law-making process are essential differences between the domestic and the international legal order.” Lindroos, Anja, *Addressing Norm Conflicts in a Fragmented Legal System: The Doctrine of Lex Specialis*, 74 Nordic J. Int’l L. 27 (2005), p. 28.

promulgating new areas of law in response to world events, such as human rights law subsequent to the Second World War. Accordingly:

“triggering events, opportunities and ideas are key factors in the development of international law. This fact accounts for the fragmentation of international law into a great number of issue related treaty regimes established on particular occasions, addressing specific problems created by certain events. But as everything depends on everything, these regimes overlap. Then, it turns out that the rules are not necessarily consistent with each other, but that they can also reinforce each other. Thus, the question arises whether there is a conflict and tension or synergy between various regimes.”²³¹⁹

Naturally, each tribunal or court will look at the specific issue at hand rather than view itself as a global judge, with the intention of creating internationally coherent and harmonised decisions. International tribunals are in general not bound by their own previous practice, let alone the practice of other adjudicatory bodies, though they frequently refer to prior case law for purposes of consistency. This will of course lead to divergent judgments on similar issues by different bodies. Naturally, tribunals may still take into consideration the decisions of other international courts as a subsidiary means, which has been commonly done on the issue of the definition of rape in the various regional human rights courts and *ad hoc* tribunals. However, despite the increased fragmentation through the development of new areas of law and adjudicatory bodies, the harmonisation process of international law is in fact increasing. The previously “tight legal compartments” are “gradually tending to influence one another...and international courts are coming to look upon them as parts of a whole”.²³²⁰

10.3.2 *Lex Specialis v. Lex Generalis*

The current state of public international law has to a certain extent raised expectations of harmonisation in order to bring coherence to the regime. The fragmentation within international law is arguably both a positive and negative attribute. An obvious drawback is the contradiction between rules governing similar situations, e.g. sexual violence, and mutual state obligations for states under separate regimes. In this sense, the credibility of international law is threatened as well as its reliability when different rules may be applied to similar circumstances. This lack of specificity in resolving a conflict may in part be

²³¹⁹ Bothe, Michael, *The Historical Evolution of International Humanitarian Law, International Human Rights Law, Refugee Law and International Criminal Law*, in *Crisis Management and Humanitarian Protection* 37, (H. Fischer etc ed. 2004), p. 37 ff.

²³²⁰ Cassese, Antonio, *International Law*, (2001), p. 45.

solved by rules such as *lex specialis v. lex generalis*.²³²¹ The *lex specialis* concept stems from a Roman law principle of interpretation and functions as a process of interpreting law. It entails that more specific provisions or fields of law shall be applied rather than more general regulations on the matter. Naturally, a more specific regulation will generally be more effective in its application than a broad rule.²³²² The concept is not included in the Vienna Convention on the Law of Treaties but has been used frequently both domestically and internationally. The ICJ has e.g. on several occasions applied the principle to analyse the relationship between IHL and international human rights law in relation to specific rights. However, this rule of interpretation does not fully determine the relationship between IHL and human rights law, which is evident in the application of the rule by international and regional tribunals, as well as UN treaty bodies.

Lex specialis regimes tend to be denoted as clear, efficient and relevant.²³²³ The increased referral to *lex specialis* is in fact a result of fragmentation, where more specialised regulations are continuously created. *Lex specialis* as a conflict-solving mechanism in this context has primarily been utilised to promote the primacy of IHL over human rights law in cases where no convergence is possible.²³²⁴ The *lex specialis* rule has been interpreted by several authors as an automatic application of IHL in times of armed conflict, setting aside the application of human rights law.²³²⁵ Christopher Greenwood also presumes that *lex specialis* entails that human rights law is applied with reference to IHL.²³²⁶ Why has there been such an overwhelming deference to the use of IHL in situations of armed conflict even though human rights law also applies simultaneously? Not only the historical background and objectives of the two regimes are different, but also the construction of its regulations. Because of the function of IHL to typically be utilised by military commanders, the regulations are for practical purposes generally more specific than the broad wording of human rights regulations, e.g. concerning the right to life and treatment of

²³²¹ ILC Study, UN Doc. A/CN.4/L.682, 13 April, 2006, p. 30.

²³²² Ibid, p. 35.

²³²³ Ibid, p. 36.

²³²⁴ Prud'homme, Nancie, *Lex Specialis: Oversimplifying a More Complex and Multifaceted Relationship?*, 40 Isr. L. Rev. (2007), p. 369.

²³²⁵ Quéniwet, Noëlle, *The History of the Relationship Between International Humanitarian Law and Human Rights Law*, p. 8.

²³²⁶ Greenwood, Christopher, *Scope of Application of Humanitarian Law*, p. 75.

prisoners of war.²³²⁷ Human rights norms tend to be considered rather vague and their realisation unspecified.²³²⁸ Arguably, the UN has traditionally been reluctant to address issues related to armed conflict, because it has been viewed as within the confines of the ICRC.²³²⁹ This has clearly impeded the development and interpretation of human rights law in conflict situations.

However, the automatic application of IHL in armed conflicts to the detriment of human rights law is not self-evident. There is no indication that IHL shall always be held as the *lex specialis* in any given situation. As will be viewed in the following, the parallel application of both has been analysed in a variety of international and regional contexts, emphasising the continued application of human rights law also in times of armed conflict. The ILC study, while recognising the *lex specialis* principle, also states that the role of the principle should be “limited” as it is but “one factor among others in treaty interpretation”.²³³⁰ Furthermore, the *lex specialis* concept may be interpreted either as a more *specific interpretation* of a rule or as an *exception* to the general law. According to Koskenniemi:

“There are two ways in which a law takes account of the relationship of a particular rule to general rule (often termed a principle or a standard). A particular rule may be

²³²⁷ Abresch, William, *A Human Rights Law of Internal Armed Conflict: The European Court of Human Rights in Chechnya*, 16 Eur. J. Int’l. 741, Sept. 2005, p. 743, Best, Geoffrey, *War & Law Since 1945*, pp. 247-248, Green, Leslie, *The Contemporary Law of Armed Conflict*, p. 49. This dichotomy between the two fields of law has arguably led to numerous anomalies and inconsistencies. Charlesworth, Hilary, *Feminist Methods in International Law*, 36 Stud. Transnat’l Legal Pol’y 169, (2004), p. 169.

²³²⁸ Odello, Marco, *Fundamental Standards of Humanity: A Common Language of International Humanitarian Law and Human Rights Law*, in *International Humanitarian Law and Human Rights Law: Towards a New Merger in International law*, ed. by Roberta Arnold and Noëlle Quénivet, Martinus Nijhoff, (2008), p. 28. Are really human rights law and IHL so profoundly conflicting that clashes between the general and the specific will often occur? According to Jean-Marie Henckaerts, such discrepancies are in fact not very common and gives as a sole example the issue of the deprivation of liberty of prisoners of war. Instead, Henckaerts argues that in practice a conflict rarely arises but the issue will rather concern the imprecision of either human rights or humanitarian law. The main question will therefore be a matter of when and in what form to interpret one regime in the light of the other. See Henckaerts, Jean-Marie, *Concurrent Application: A Victim Perspective*, in *International Humanitarian Law and Human Rights Law: Towards a New Merger in International Law*, ed. Roberta Arnold and Noëlle Quénivet, Martinus Nijhoff, (2008), p. 262. Conflicts may naturally arise also concerning the right to life.

²³²⁹ Gardam, Judith & Jarvis, Michelle, *Women, Armed Conflict and International Law*, p. 174.

²³³⁰ ILC Study, UN Doc. A/CN.4/L.682, 13 April, 2006, p. 38.

considered an application of the general rule in a given circumstance. That is to say, it may give instructions on what a general rule requires in the case at hand. Alternatively, a particular rule may be conceived as an exception to the general rule. In this case, the particular derogates from the general rule. The maxim *lex specialis derogate les generalis* is usually dealt with as a conflict rule. However, it need not be limited to conflict.”²³³¹

In short, beyond the role of solving a conflict, the principle may also indicate the more specific interpretation of a general rule. In the context of IHL and human rights law, the principle has been applied in both manners. Conflicts may still arise when concluding which rule is more specific. Though IHL is generally held as more specific in nature, human rights norms have been interpreted through the proliferation of adjudicatory bodies and its content has thus become more detailed. Greenwood also emphasises that the *lex specialis* principle should not be construed as applying to the general relationship between the two branches of law, but relates to specific rules in specific circumstances.²³³²

10.3.3 Case Law of the ICJ

The ICJ in the *Nuclear Weapons case* discussed the applicability of human rights law in times of armed conflict, debating whether the use of nuclear weapons violated the right to life as stated in Article 6 of the ICCPR. The ICJ declared held that “[t]he protection of the International Covenant of Civil and Political Rights does not cease in times of war, except by operation of Article 4 of the Covenant whereby certain provisions may be derogated from in a time of national emergency”.²³³³

However, the Court concluded that while the right not to be arbitrarily deprived of your life does not cease to exist in times of war, the determination of what constitutes an *arbitrary* deprivation of life thus had to be drawn from an application of *lex specialis*, i.e. humanitarian law, in this situation.²³³⁴ The case thereby clarified that human rights law does indeed apply in situations of armed conflict, but cannot automatically be applied without restrictions. The rules of IHL thus serve to expound on the broad rights contained in human rights treaties. The ICJ, however, implies that in certain contexts, even during armed conflicts, the protection offered by human rights law is more appropriate. It depends on the right in question as well as the factual circumstances. Rather than adopting IHL

²³³¹ Koskenniemi, Martti, *Study on the Function and Scope of the Lex Specialis Rule and the Question of Self-Contained Regimes*, UN DOC. ILC(LVI)/SG/FIL/CRD.1 and Add.1 2004, p. 4.

²³³² Greenwood, Christopher, *Scope of Application of Humanitarian Law*, p. 75.

²³³³ *Nuclear Weapons Case*, ICJ, Advisory Opinion, para. 25.

²³³⁴ *Ibid*, para. 926.

as a permanent *lex specialis*, the language of the ICJ seems to suggest a reinterpretation of the law of armed conflict with "...a new-found emphasis on promoting humanitarian considerations".²³³⁵ IHL is in this case employed to interpret human rights rules but in other factual circumstances, e.g. concerning judicial guarantees, human rights may instead prevail because of its specificity. Yet another reading of the judgment is that the ICJ will use both bodies of law as interpretative devices, in this case interpreting the right to life in the context of IHL but without dismissing human rights law.²³³⁶

In its *Advisory Opinion of July 9, 2004 on Legal Consequences of the Construction of the Wall in the Occupied Palestinian Territory*, the ICJ examined the legality of a wall built by the Israeli government on Palestinian territory and its consequences, e.g. the restriction of the freedom of movement, requisition of property, restriction of access to water. Relying on its reasoning in the *Nuclear Weapons Case*, the ICJ stated generally that "the protection offered by human rights conventions does not cease in case of armed conflict" save through the provisions on derogation, indicating that both humanitarian and human rights law were applicable in the case.²³³⁷ The Court held that applicable conventions in this case were such human rights treaties as the Convention on the Rights of the Child, the ICCPR and the ICESCR.²³³⁸ On the relationship between the two bodies of law, the ICJ stated:

"there are thus three possible solutions: some rights may be exclusively matters of international humanitarian law; others may be exclusively matters of human rights law; yet others may be matters of both these branches of international law. In order to answer the question put to it, the Court will have to take into consideration both these branches of international law, namely human rights law and, as *lex specialis*, international humanitarian law".²³³⁹

Though IHL is generally denoted as the *lex specialis*, the Court did accept the simultaneous application of both regimes. The difficulty of this approach is to

²³³⁵ Stephens, Dale, *Human Rights and Armed Conflict - The Advisory Opinion of the International Court of Justice in the Nuclear Weapons Case*, 4 Yale Hum. Rts. & Dev. L.J. 1, 15, (2001), p. 15.

²³³⁶ Prud'homme, Nancie, *Lex Specialis: Oversimplifying a More Complex and Multifaceted Relationship?*, p. 374.

²³³⁷ *The Legal Consequences of the Construction of a Wall in the Occupied Palestine Territory*, Advisory Opinion of 9 July 2004, ICJ, para. 106, concerning the occupation by the Israeli government on Palestinian territory.

²³³⁸ Ibid, paras. 107-114.

²³³⁹ Ibid, para. 106.

determine beforehand the outcome in a particular situation, since it does not clarify which situation falls into which category of law. Also, what is the outcome when a particular issue is dealt with in both areas of law? If a situation occurs in an armed conflict, is IHL always the *lex specialis* even when the human rights provision may be more specific? Certain critics have called the judgment “utterly unhelpful” and solely further sparking the discussion on separation or coherence of the regimes.²³⁴⁰

Another question may be whether, when determining which body of law is *specialis* and which *generalis*, one should take into consideration the jurisprudence concerning the specific question at hand. The more general law, in this case, human rights law, may have dealt with issues in a more elaborate manner because of its more advanced enforcement mechanisms, as opposed to IHL which may be specifically tailored to the particular scenario. Perhaps, as Conor McCarthy suggests, the ruling allows for an appreciated flexibility that allows for a more nuanced legal analysis and a less categorical application of the two areas. Each situation would then require a process of analysis apart from the most obvious situations.²³⁴¹ Also Marco Sassòli and Laura Olson argue that the principle of *lex specialis* does not necessarily entail that IHL continuously prevails over human rights. Instead, “the principle does not indicate an inherent quality in one branch of law, such as humanitarian law, or one of its rules. Rather, it determines which rule prevails over another in a particular situation”.²³⁴² One therefore has to determine which set of rules is more specific and adapted to the situation at hand. As Sassoli and Olson caution, however, *lex generalis* “still remains present in the background. It must be taken into account when interpreting the *lex specialis* norm; an interpretation of the *lex specialis* that creates a conflict with the *lex generalis* must be avoided as far as possible and an attempt made to harmonise the two norms”.²³⁴³ The *lex specialis* principle is thus provided with more flexibility in that it is tried on a case by case basis.

²³⁴⁰ Quénivet, Noëlle, *The History of the Relationship Between International Humanitarian Law and Human Rights Law*, p. 12 & Prud’homme, Nancie, *Lex Specialis: Oversimplifying a More Complex and Multifaceted Relationship?*, p. 378.

²³⁴¹ McCarthy, Conor, *Legal Conclusion or Interpretative Process? Lex Specialis and the Applicability of International Human Rights Standards*, in *International Humanitarian Law and Human Rights Law: Towards a New Merger in International Law*, ed. Roberta Arnold and Noëlle Quénivet, Martinus Nijhoff, (2008) p. 110.

²³⁴² Sassòli, Marco and Olson, Laura, *The Legal Relationship Between International Humanitarian Law and Human Rights Law Where it Matters: Admissible Killing and Internment of Fighters in Non International Armed Conflict*, *International Review of the Red Cross*, vol. 870, Sept. 2008, p. 603.

²³⁴³ *Ibid*, p. 605.

Moreover, in the *Case Concerning Armed Activities on the Territory of the Congo*, the ICJ reviewed the occupation not only through the lens of IHL but also through human rights law.²³⁴⁴ The occupying power in DRC's Ituri region, Uganda, was held to violate not only rules of IHL, but also norms in the ICCPR, the CRC, and its Optional Protocol on the Involvement of Children in Armed Conflict as well as the African Charter on Human and People's Rights in killing and torturing the Congolese civilian population.²³⁴⁵ The ICJ did not make a general statement as to the relationship between the two regimes, but rather concluded that violations had occurred of both areas of law in relation to the same acts of violence.²³⁴⁶ The specific acts, such as torture and killing, and the scope thereof were therefore not interpreted in accordance to any one body of law but were rather summarily applied simultaneously without conflict.

The International Commission of Inquiry on Darfur, established by the UN to investigate the scope and legal consequences of the violence in Darfur, Sudan and led by Professor Antonio Cassese, also discussed the relationship between the two regimes in connection to the violence occurring in Sudan. The Commission stated:

"The two main bodies of law apply to the Sudan in the conflict in Darfur: international human rights law and international humanitarian law. The two are complementary. For example, they both aim to protect human life and dignity, prohibit discrimination on various grounds, and protect against torture or other cruel, inhuman and degrading treatment. They both seek to guarantee safeguards for persons subject to criminal justice proceedings, and to ensure basic rights including those related to health, food and housing. They both include provisions for the protection of women and vulnerable groups, such as children and displaced persons. The difference lies in that whilst human rights law protects the individual at all times, international humanitarian law is the *lex specialis* which applies only in situations of armed conflicts."²³⁴⁷

²³⁴⁴ *Case Concerning Armed Activities on the Territory of the Congo, Democratic Republic of the Congo v. Uganda* (19 December, 2005), ICJ.

²³⁴⁵ *Ibid*, paras. 217-220.

²³⁴⁶ *Ibid*, para. 220.

²³⁴⁷ Report of the International Commission of Inquiry on Darfur to the United Nations Secretary-General (25 January 2005), para. 143.

These cases are generally considered significant steps in the convergence between IHL and human rights law.²³⁴⁸ The fact that human rights treaties also regulate behaviour in times of armed conflict is therefore quite uncontroversial. The more interesting issue is the *extent* of the concurrent application.

10.3.4 A Complementary Approach

It should be mentioned that the *lex specialis* principle has been criticised for its ambiguity, since it does not clearly denote which areas of law are *lex specialis* or *generalis* prior to a specific situation. Also, the principle tends to oversimplify the complex relationship between IHL and human rights.²³⁴⁹ An increasingly accepted approach is that IHL and international human rights law are “complementary and mutually reinforcing”, i.e. a simultaneous application of both sets of rules is possible and also increasingly encouraged.²³⁵⁰ Varying terminology has been used to describe this concept, e.g. “pragmatic theory of harmonisation”, “cross-fertilisation” or “cross-pollination”, which all imply a

²³⁴⁸ Gross, Aeyal, *Human Proportions: Are Human Rights the Emperor’s New Clothes of the International Law of Occupation?*, 18 Eur. J. Int’l L.1, (2007), p. 2. The language of the derogation regulations in human rights conventions moreover speak of an application of human rights law in situations of armed conflict. For example Art. 15 of the ECHR, Art. 4 of the ICCPR, Art. 5 of the ICESCR, Art. 27 of the American Convention on Human Rights.

²³⁴⁹ Prud’homme, Nancie, *Lex Specialis: Oversimplifying a More Complex and Multifaceted Relationship?*, p. 383.

²³⁵⁰ Droege, Cordula, *The Interplay Between International Humanitarian Law and International Human Rights Law in Situations of Armed Conflict*, p. 337, Lindsey, Charlotte, *The Impact of Armed Conflict on Women*, p. 30. See also Gardam, Judith, *Women and Armed Conflict: The Response of International Humanitarian Law*, p. 120, who argues: “The nature of the relationship alleged to exist between the two regimes varies, depending on the context, but the trend is well developed to treat IHL and human rights as sharing common values and as directed to the same ends.” It is argued that complementarity is primarily important in non-international armed conflicts, in which civilians do not receive the same level of protection. See below, however, for criticism of the increasing complementarity. In the writings of scholar Draper as early as in the 1970s, IHL was described in terms of being the exception but connected to human rights rules: “The law of war may take its place within the general system of international law not as an alternative to the law of peace, the old and classic positioning, but seen as an exceptional and derogating regime from that of human rights, contained, controlled and fashioned by the latter at every point possible.” See Draper, Gerald, *The Relationship Between the Human Rights Regime and the Law of Armed Conflict*, I IYHR 191, (1971), p. 198.

need for harmonisation.²³⁵¹ Cordula Droege suggests that the term *lex specialis* should be supplanted with “complementarity” in cases where one norm constitutes the more specific interpretation of the general rule, signalling situations where the norms can be harmonised.²³⁵² Harmonisation is generally understood, not as entailing a merger or integration of the two areas, but rather an acknowledgment of similarities in approaches. It should be noted that the complementarity approach often is raised as a policy rather than a legal theory and does not always provide us with a practical legal tool of interpretation.²³⁵³ It simply tells us that because of similarities in values and rights protected, certain principles may influence each other in interpretation and scope. Though different terminologies are used, a harmonisation approach may also be included in the application of *lex specialis*.²³⁵⁴

An increasing number of human rights treaty bodies comment on the interplay between the two areas, and rather than accepting a pre-determined categorisation of *lex specialis*, tend to advocate a complementary approach. The Human Rights Committee has e.g. stated in its General Comment No. 31:

“The Covenant applies also in situations of armed conflict to which the rules of international humanitarian law are applicable. While, in respect of certain Covenant rights, more specific rules of international humanitarian law may be specifically relevant

²³⁵¹ Droege, Cordula, *The Interplay Between International Humanitarian Law and International Human Rights Law in Situations of Armed Conflict*, p. 339. The harmonisation model also in part finds support in the Vienna Convention on the Law of Treaties, which holds that a treaty shall be interpreted in good faith and: “There shall be taken into account, together with the context:...any relevant rules of international law applicable in the relations between the parties”. Article 31 (3) (c) of the Vienna Convention on the Law of Treaties. The relevance of the provision was discussed in the ILC report on fragmentation, stating that the provision helps to place the problem of treaty relations in the context of treaty interpretation and “it expressed what could be called a principle of ‘systemic integration’, that is to say, a guideline according to which treaties should be interpreted against the background of all the rules and principles of international law - in other words, international law *understood as a system*.” ILC, Report on the Work of its Fifty-seventh Session (2005), UN Doc. ILC A/60/10 (2005), ch. XI: Fragmentation of International Law, para. 467. Emphasis added. An increased recourse to the principle has been noted but the exact operationalisation of the article is rather unclear, in particular in cases of overlapping treaty obligations.

²³⁵² Droege, Cordula, *The Interplay Between International Humanitarian Law and International Human Rights Law in Situations of Armed Conflict*, p. 340.

²³⁵³ *Ibid*, p. 337.

²³⁵⁴ *Ibid*, p. 389.

for the purposes of the interpretation of Covenant rights, both spheres of law are complementary, not mutually exclusive.”²³⁵⁵

This approach does not mention the terms *lex specialis* or *generalis*, avoiding a rigid hierarchy, but rather views IHL and human rights law as two regimes with a common goal of protecting individuals. Accordingly, the two branches are expected to stimulate and reinforce each other and, at times, IHL will contain the more specific regulation to the situation at hand and in other situations, human rights law will be more appropriate. While the ICJ has couched the relationship between the two bodies of law in different terms, both approaches seem to accept that an interplay exists and that, depending on the circumstances, either or both fields can provide an answer. The ICJ may more clearly denote IHL as the generally more specific area, but is also open to a mutual application.

The work of the UN further speaks of a simultaneous application. The UN primarily began considering the application of human rights law in armed conflicts in the 1960s, evident in several resolutions.²³⁵⁶ For example, at the Teheran Conference in 1968, the resolution declared that human rights law must also be taken into account in situations of armed conflict, i.e. where IHL applies. It was stated that “peace is the underlying condition the full observance of human rights and war is their negation”.²³⁵⁷ The Conference did, however,

²³⁵⁵ CCPR General Comment No. 31, CCPR/C/21/Rev.1/Add.13 (26 May 2004), para. 11. This has been noted as an important development for the specification of Fundamental Standards of Humanity. See UN Doc. E/CN.4/2006/87, para. 22.

²³⁵⁶ The Security Council Resolution 237 concerning the Middle East Conflict in 1967 called on the involved governments to respect the Third and Fourth Geneva Conventions, all the while “considering that essential and inalienable human rights should be respected even during the vicissitudes of war”. See SC Res. 237, on the Situation in the Middle East, U.N. Doc. S/RES/237, 14 June, 1967.

²³⁵⁷ Resolution XXIII “Human Rights in Armed Conflicts” adopted by the International Conference on Human Rights, Tehran, 12 May, 1968. Subsequent to the conference, the UN General Assembly in its Resolution 2444 called on states to ratify the 1899 Hague Conventions as well as the four 1949 Geneva Conventions, although named “Respect for Human Rights in Armed Conflicts.” *Declaration on Respect for Human Rights in Armed Conflicts*, G.A. Res. 2444 (XXIII), U.N. GAOR, 23rd Sess., Supp. No. 18, at 164, U.N. Doc. A/7433 (1968). The clearest language supporting the interplay between the two regimes is found in UN General Assembly Resolution 2675 on basic principles for the protection of civilian populations in armed conflicts from 1970. It is stated: “fundamental human rights, as accepted in international law and laid down in international instruments, continue to apply in situations of armed conflict.” *General Assembly Resolution 2675 (XXV), Basic Principles for the Protection of Civilian Populations in Armed Conflicts*, 9 December 1970, §1.

suggest further developments in humanitarian law for the increased protection of victims of war, thereby acknowledging the necessity of humanitarian regulations. The Conference has been described as the turning point where humanitarian law and human rights law began to gradually merge, since it was the first time that the United Nations considered human rights law in the context of armed conflict.

The UN Security Council increasingly refers to both IHL and human rights law on matters that concern threats to the international peace and security. This is partly due to an awareness that human rights violations often are precursors to armed conflicts and threaten the rebuilding of states. In fact, in a reform proposal in 2005, the UN High Commissioner for Human Rights is provided a more active role in the deliberations of the Security Council.²³⁵⁸ In Resolution 2005/63 on the “Protection of the Human Rights of Civilians in Armed Conflicts”, the Office of the High Commissioner for Human Rights emphasised the need to implement human rights standards in times of armed conflicts and mentioned the Geneva Convention relative to the Protection of Civilian Persons as an example.²³⁵⁹ Importantly, the resolution acknowledged that “human rights law and international humanitarian law are complementary and mutually reinforcing” and that “the protection provided by human rights law continues in armed conflict situations, taking into account when international humanitarian law applies as *lex specialis*”.²³⁶⁰ The resolution also asserted that “conduct that violates international humanitarian law...may also constitute a gross violation of human rights”. Similarly, the UN Security Council in a resolution in 2008 concerning the condemnation of sexual violence in armed conflicts specifically admonished states to respect and ensure the human rights of its citizens and all

In the 1974 UN Declaration on the Protection of Women and Children in Emergency and Armed Conflict, the Assembly fully uses a dual application of both fields of law, yet again calling on states to respect both the Geneva Conventions but also relevant human rights conventions, in times of armed conflict. *Declaration on the Protection of Women and Children in Emergency and Armed Conflict, Resolution 3318 (XXIX) of 14 December 1974*. Mentioned conventions: ICCPR, ICESCR, The Declaration of the Rights of the Child.

²³⁵⁸ In Larger Freedom: Towards Development, Security and Human Rights for All, Report of the Secretary-General, UN Doc. A/59/2005, 21 March 2005, para. 144.

²³⁵⁹ Office of the High Commissioner for Human Rights, Protection of the Human Rights of Civilians in Armed Conflicts, Human Rights Resolution 2005/63, UN Doc. E/CN.4/RES/2005/63, 20 April 2005. See also OAS Resolution, AG/RES 2433, Promotion of and Respect for International Humanitarian Law, 3 June 2008, OAS, which states that human rights must always be respected, also in armed conflicts and calls for the simultaneous application of human rights and IHL.

²³⁶⁰ Ibid, paras. 6-7.

individuals on its territory, further indicating the self-evident parallel application of both areas of law.²³⁶¹

Several Special Rapporteurs in the UN system further investigate both regimes simultaneously. The Special Rapporteur on the Iraqi occupation of Kuwait e.g. clearly stated that his mandate “should be understood in a broad sense as to include all violations of all guarantees of international law for the protection of individuals relevant to the situation”.²³⁶² Furthermore, he claimed that “there is a consensus with the international community that the fundamental human rights of all persons are to be respected and protected both in times of peace and during periods of armed conflict”.²³⁶³ Country mandates on e.g. Afghanistan, Iraq, and the Sudan have referred to both IHL and human rights law and to such violations as torture, arbitrary detention and sexual violence.²³⁶⁴ Specifically sexual violence in times of armed conflict has been the subject of special reports to the Commission on Human Rights.²³⁶⁵

²³⁶¹ Security Council Resolution UN Doc. S/RES/1820 (2008). The UN Sub-commission on the Promotion and Protection of Human Rights in a report from 2005 in fact suggests that thematic special procedures pay attention to armed conflicts and that human rights treaty bodies may request state reports addressing human rights in internal and international armed conflicts. UN Doc. E/CN.4/sub.2/2005/14, paras. 32-33. The new UN Human Rights Council also performs a more holistic review, since it collects reports of varying mandates for its Universal Periodic Review. See UN General Assembly Resolution 60/251 of 15 March 2006, which established the procedure.

²³⁶² Report on the Situation of Human Rights in Kuwait under Iraqi Occupation, UN Doc. E/CN.4/1992/26, para. 12.

²³⁶³ *Ibid*, para. 33.

²³⁶⁴ Report of the Special Rapporteur on the Situation of Human Rights in Afghanistan, UN Doc. A/49/650, 8 November 1994, Report of the Independent Expert on the Question of the Protection of Human Rights and Fundamental Freedoms While Countering Terrorism, UN Doc. E/CN.4/2005/103, 7 February 2005, Report of the Special Rapporteur on Iraq, The Situation of Human Rights in Iraq, UN Doc. E/CN.4/1993/45, 19 February 1993, UN Doc. A/HRC/11/14, June 2009, Report of the Special Rapporteur on the Situation of Human Rights in the Sudan.

²³⁶⁵ See e.g. UN Doc. A/HRC/Sub.1/58/23, 11 July 2006, UN Doc. E/CN.4/Sub.2/2005/33, July 2005, UN Doc. E/CN.4/Sub.2/2004/35, UN Doc. E/CN.4/Sub.2/2003/27, UN Doc. E/CN.4/sub.2/2002/28, UN Doc. E/CN.4/Sub.2/2001/29, UN Doc. E/CN.4/sub.2/2000/20, Systematic Rape, Sexual Slavery and Slavery-Like Practices During Armed Conflicts, E/CN.4/2001/73, 23 January 2001, Violence Against Women Perpetrated and/or Condoned by the State During Armed Conflict (1997-2000). Furthermore, the Human Rights Committee in its General Comment on States of Emergency states that Article 4 (1) of the ICCPR requires that no derogation measure shall contravene with a State party’s “other obligations under international law”, in particular the rules of international humanitarian law. General Comment No. 29, States of Emergency (Article 4), para. 9. When restricting rights in times of public emergency, states must therefore bear in mind the rules of IHL. The HRC has also in various Concluding Observations commented on state action from the perspective of IHL. For example, CCPR/CO/78/ISR, 21 August 2003 on Israel, CCPR/CO/81/SEMO, 12 July 2004 on Serbia and Montenegro.

10.3.5 Fundamental Standards of Humanity - A Step towards Harmonisation

One of the most obvious examples of the movement towards an increased cross-reference is the work in developing minimum standards of humanitarian and human rights law.²³⁶⁶ As viewed, these areas of law are witnessing a definite trend of convergence. However, gaps still exist where protection of the individual falls short of each area, because of thresholds of applicability.²³⁶⁷ International humanitarian law consists of rules that differ depending on the nature of the conflict. As such, the classification of the conflict is important for the level of protection provided to the individual. The 1949 Geneva Conventions as well as the Additional Protocols primarily protect victims in international conflicts, albeit extending to internal conflicts in limited circumstances.²³⁶⁸ Though human rights law applies both in times of peace as well as in armed conflict, certain rights can be derogated from in times of a state of emergency. Thus, in situations falling short of an armed conflict, but reaching the level of a public emergency and thereby allowing derogations, the protection of civilians is diminished. In addition to this, in states that have not ratified Additional Protocol II or important human rights treaties, individuals within their jurisdictions risk being void of essential protection in the all too common internal armed conflicts or unrest.

Furthermore, the distinction between peace and armed conflict is at times difficult to confirm and many atrocities are committed in periods in between the regulated dichotomies of war and peace, such as civil unrest.²³⁶⁹ The UN Secretary-General has stressed the difficulty in defining domestic turmoil in terms of international law, where there often tends to be a mixture between

²³⁶⁶ UN Doc. E/CN.4/1998/87, UN Doc. E/CN.4/1999/92, UN Doc. E/CN.4/2000/94, UN Doc. E/CN.4/2001/91, UN Doc. E/CN.4/2002/103, UN Doc. E/CN.4/2004/90, 25 February 2004, UN Doc. E/CN.4/2006/87, 3 March 2006, UN Doc. A/HRC/8/14, 28 May 2008.

²³⁶⁷ Though there is an increased awareness and acceptance in the international community of a convergence between the two areas of law, an advanced interplay has yet to be realised and according to the UN Commission on Human Rights, “an unexploited potential of complementarity” exists. See UN E/CN.4/sub.2/2005/14, para. 5.

²³⁶⁸ Additional Protocol II concerns non-international conflicts and Common Article 3 applies to both international and non-international conflicts.

²³⁶⁹ UN Doc. E/CN.4/1998/87, para. 8.

political violence and “regular” criminal acts.²³⁷⁰ Armed groups may e.g. engage in theft and extortion on a mass scale that is unrelated to the conflict. As discussed, the nature of conflicts has also changed in the past decades, necessitating new regulations or clarifications of existing rules for an adaptation to the current type of conflicts. Current conflicts are characterised by new methods and new actors, with an increased privatisation e.g. with the support of corporations or armed rebel groups, with conflicts often financed by national or international actors e.g. through arms and drugs trade.²³⁷¹ As such, the distinction between international and internal conflicts and civilians and combatants, is diminishing. There is therefore a need to re-evaluate the state-centred international law pertaining to these situations in order to better accommodate the current circumstances.²³⁷² One of the main questions of the project in defining fundamental standards of humanity is why a lower standard of protection of individuals should be accepted in internal disturbances as opposed to in armed conflicts or peace.²³⁷³ Reviewing the work on fundamental standards is useful, since it further confirms the interplay between the two regimes and further strengthens the protection of the individual against sexual violence.

In order to bridge the void, a Declaration was produced in 1990, affirming a set of non-derogable regulations inspired both by humanitarian and human rights

²³⁷⁰ UN Doc. E/CN.4/1998/87, para. 23. The Declaration of Minimum Humanitarian Standards has identified several problematic areas that it aimed to elucidate with the establishment of the standards, including 1) *the threshold problem*; where the rules of humanitarian law have not been reached, e.g. for Common Article 3 or Article 1 of the Additional Protocol of the Geneva Conventions, 2) *the ratification problem*; i.e. states have failed to ratify relevant international law treaties such as Additional Protocol II and the ICCPR, 3) *derogations*; certain standards will still need to apply in times of public emergency when states may derogate from human rights treaties, e.g. according to article 4 of the ICCPR and finally, 4) *non-state actors*; the role for non-state actors and whether they are obliged to abide by human rights regulations is a controversial matter. In general, apart from a limited number of provisions in regional human rights treaties, non-state actors have yet to be acknowledged as subjects of human rights law that incur obligations. Common article 3 of the 1949 Geneva Conventions applies to all parties to the conflict as well as Additional Protocol II, which, however, only applies to organised armed groups in control over certain territories. These issues will hopefully be resolved through the adoption of the standards.

²³⁷¹ See also UN Doc. E/CN.4/2001/91, para. 7, UN Doc. E/CN.4/1999/92, para. 13, UN Doc. E/CN.4/1998/87, para. 59.

²³⁷² UN Doc. E/CN.4/2001/91, para. 4.

²³⁷³ Letter Dated 30 March 2000 from the Head of the Delegation of Sweden to the Fifty-Sixth Session of the Commission on Human Rights Addressed to the Chairman of the Commission on Human Rights, UN Doc. E/CN.4/2000/145, 4 April 2000.

law, also called the Turku Declaration.²³⁷⁴ The project has since changed names. The standards in the declaration would be applicable regardless of the designation of the conflict, and non-derogable. As such, it identified humanitarian and human rights norms that must be respected by all states at all times, also pertaining to situations in between war and peace, such as domestic turmoil, which may not reach the level of an armed conflict. The rules would apply to all parties, such as states and non-state actors, including private individuals. The Declaration noted that international law has failed in providing adequate protection in situations of internal violence, disturbances, tensions and public emergencies.²³⁷⁵ The standards therefore constitute an amalgam of both law regimes, yet again pointing towards an increased convergence.

Not intending to create new rules or principles, the standards aim to clarify and highlight already existing provisions and how they can function as a tool of interpretation for national and international courts.²³⁷⁶ Rather than acknowledging a gap in the coherent scheme of humanitarian law and human rights law, the term “grey area” has been preferred when describing situations which currently appear to be unregulated. Arguably, this better reflects the lack of clarity as to the scope of existing regulations as well as the, at times, overlapping regulations in humanitarian law and human rights law. The standards of humanity aim to resolve conflicts between the overlapping regimes. In fact, it is emphasised that most wars are preceded by human rights violations on a massive scale and that less attention should be focused on distinctions between human rights law and international humanitarian law, as in practice

²³⁷⁴ Declaration of Turku, 2 Dec. 1990. Early attempts at uniting rules on humanitarian law and human rights law were made in resolution 1970 on the “Basic Principles for the Protection of Civilian Populations in Armed Conflicts”, which listed the most basic principles to be afforded civilians, “bearing in mind the need for measures to ensure the better protection of human rights in armed conflicts of all types...”. General Assembly Resolution 2675 (XXV), Basic Principles for the Protection of Civilian Populations in Armed Conflicts, 9 December 1970.

²³⁷⁵ Introduction, Declaration of Turku.

²³⁷⁶ UN Doc. E/CN.4/2006/87, p. 2. The document has been criticised, particularly by certain human rights NGO’s, for causing an avenue for states to only abide by a minimum of norms. Still, it has been emphasised that states shall not use the rules as a substitute to their treaty obligations. Meron, Theodor, *The Humanization of International Law*, p. 60. Report of the Sub-Commission on Prevention of Discrimination and Protection of Minorities, Minimum Humanitarian Standards, Report of the Secretary-General, UN Doc. E/CN.4/1997/77/Add.1, 28 January 1997, para.32.

these two regimes are “closely related and interactive”.²³⁷⁷ The UN Secretary-General importantly notes on the issue of finding common ground between the two areas of law:

“...the need to find rules common to both branches of relevant law points to one of the most interesting aspects of the whole problem - namely, the need, where appropriate, to consider a fusion of the rules. For too long, these two branches of law have operated in distinct spheres, even though both take as their starting point concern for human dignity. Of course, in some areas there are good reasons to maintain the distinctness - particularly as regards the rules regulating international armed conflicts, or internal armed conflicts of the nature of a civil war...One must be careful not to muddle existing mandates, or to undermine existing rules, but within these constraints there is still considerable scope for building a common framework of protection.”²³⁷⁸

The formulation of the standards is therefore seen as a new venture in finding counterpoints in both regimes, focusing on the common goal of human dignity.

There has been a general unity concerning the fact that the standards should be promulgated in the form of a soft law document rather than a binding treaty, possibly in the form of a “statement of principles”.²³⁷⁹ This stems in part from the wish to avoid lowering the threshold of rights that already exists in binding treaties. Furthermore, there is a concern that the rules will cause confusion as to the distinct, albeit complementary, nature of humanitarian law and human rights law when focusing on the similarities of both regimes.²³⁸⁰ The terminology has

²³⁷⁷ Report of the Sub-Commission on Prevention of Discrimination and Protection of Minorities, Minimum Humanitarian Standards, UN Doc. E/CN.4/1997/77/Add.1, paras. 88-89. As expressed by the Secretary-General, it is often situations of internal violence that constitute the greatest threat to human dignity and freedom, particularly evident in the multitude of reports by UN human rights bodies that frequently draw a link between human rights abuses and violence between state and armed groups or amongst such groups. UN Doc. E/CN.4/1998/87, para. 8, UN Doc. E/CN.4/2004/90, para. 3. When discussing the symbiosis of the two regimes, the Secretary-General also emphasised that war itself is a negation of human rights and that the human rights abuses are among the root causes of conflicts. UN Doc. E/CN.4/1998/87, para. 14.

²³⁷⁸ UN Doc. E/CN.4/1998/87, para. 99.

²³⁷⁹ Fundamental Standards of Humanity, Report of the Secretary-General Submitted Pursuant to Commission Resolution 200/69, UN Doc. E/CN.4/2001/91, 12 January 2001, para. 4.

²³⁸⁰ See e.g. Fundamentals Standards of humanity, Impunity and International Criminal Court 54th Annual Session of the United Nations Commission on Human Rights. Report of the Sub-Commission on Prevention of Discrimination and Protection of Minorities on its forty-ninth session. Commission on Human Rights, 54th session, 1 April 1998. Statement by the International Committee of the Red Cross.

undergone change due to the fact that the Declaration solely referred to humanitarian law in its title and that it seems to imply that only a minimum of standards is sufficient, seemingly lowering the obligations of states to various conventions. Instead the project has transformed into a document called “*Fundamental Standards of Humanity*”, humanity being the unifying factor between the two regimes. The standards govern “the behaviour of all persons, groups and public authorities”.²³⁸¹

The report does note that the standards must abide by such principles as specificity, proposing that they would “need to be stated in a way that was specific enough to be meaningful in actual situations, and yet at the same time be clear and understandable”.²³⁸² Selecting which rules should be considered fundamental standards will be exacted through reviewing treaties, declarations and customary international law. Several sources are mentioned, including the Rome Statute, Article 4 of the ICCPR listing non-derogable rights and the ICRC Study on Customary Law.²³⁸³ The report by the UN Secretary-General on the standards mentions specifically that the crimes in the Rome Statute of the ICC are of particular importance in evincing the nature of the standards, specifically mentioning rape, sexual slavery and torture.²³⁸⁴

No definitions of the standards are provided as of yet. However, the UN Secretary-General holds that the rules at a minimum should include “...torture and cruel, inhuman or degrading treatment...women’s human rights...and protection of the civilian population”.²³⁸⁵ Rape is also specifically mentioned as a minimum standard in the Turku Declaration.²³⁸⁶ This means that the prohibition of rape is all-encompassing in humanitarian law, human rights law as well as in the grey zone of internal conflicts covered by the Standards, and thereby binding on states at all times. The specific definition of rape is not mentioned. Since the

²³⁸¹ Res. 1999/65. UN Doc. E/CN.4/1998/87, para. 59. Armed groups are bound by certain provisions in humanitarian law. However, there are divergent thoughts among states as to the binding nature of human rights obligations for specific non-state actors, such as armed groups. During the meeting in 2000 on the work of formulating the standards, it was urged that consensus should be sought as soon as possible on which standards that should also apply to non-state actors. Although suggestions were raised to apply human rights norms to “*de facto states*” controlling parts of a territory, it was recognised that states may not be prepared to give non-state actors recognition that would make them subjects of international law. See UN Doc. E/CN.4/2000/145, 4 April 2000, para. 28.

²³⁸² UN Doc. E/CN.4/1998/87, para. 98.

²³⁸³ UN Doc. E/CN.4/1999/92, *Fundamental Standards of Humanity*, Report of the Secretary-General, 18 December 1998, paras. 6-24.

²³⁸⁴ *Ibid.*, para. 9 (g).

²³⁸⁵ UN Doc. E/CN.4/1998/87, para. 98.

²³⁸⁶ Article 3.

prohibition of the offence pertains both to peace and all levels of conflict, the question is whether the fundamental standards will aim to define the crime in the future and how it would convene the overlapping but distinct definitions of rape, or if the standards will be satisfied with a mere prohibition.

The promulgation of international criminal law has been considered an important step in promoting fundamental standards of humanity,²³⁸⁷ indicating that the international crimes and the value of such documents as the Rome Statute is the codification of certain fundamental standards. This is not a surprising conclusion considering the level of gravity of the crimes. International criminal law therefore embodies such standards. However, the Rome Statute is but one document and only addresses a few of the substantive rules identified as fundamental. As Martin Scheinin argues, the ICTY and ICTR have further developed the normative framework, as has the domestic application of universal jurisdiction.²³⁸⁸ In more recent reports by the Secretary-General, relevant case law from the *ad hoc* tribunals is reviewed as clarifications of legal uncertainties and contributions to the fundamental standards, as well as judgments from the Special Court for Sierra Leone. The definition of rape and torture in the *Kunarac* decision is e.g. discussed.²³⁸⁹ In turn, the ICTY has referred to the Turku Declaration in its case law, e.g. in the *Tadic* case, in order to support its argumentation concerning war-fare methods in both international and internal conflicts.²³⁹⁰ Furthermore, the case law of regional human rights courts has been mentioned as a source of fundamental standards.²³⁹¹

In conclusion, though the work in specifying the fundamental standards of humanity is at an early stage, the development of such a document is of significance in providing a clarification of rules, albeit of a soft law nature, for both non-state actors and states as to a minimum level of protection for individuals. The most interesting aspect of such an endeavour is the recognition of the simultaneous application of international human rights law and humanitarian law. This creates a fusion between the two branches of law with common regulations and an affirmation of a shared goal in the protection of the human dignity. For the specific topic at hand, this development is particularly relevant in affirming the fundamental value of the prohibition of rape, and the

²³⁸⁷ Scheinin, Martin, UN Doc. E/CN.4/2000/145, 4 April 2000, appendix, para. 46.

²³⁸⁸ Ibid. para. 47. The universal jurisdiction approach would therefore be an avenue to enforce fundamental standards of humanity.

²³⁸⁹ UN Doc. E/CN.4/2004/90, 25 February 2004, paras. 23-24, UN Doc. A/HRC/8/14, 28 May 2008, para. 29.

²³⁹⁰ *Prosecutor v. Dusko Tadic*, Case No. IT-94-1-AR72, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995, para. 119.

²³⁹¹ UN Doc. A/HRC/8/14, 28 May 2008, para. 3.

harmonised application of this prohibition. The standards do not indicate whether definitions of the crimes will be provided, which would raise the question of how to fuse the distinct approaches to the offence of IHL and human rights law. Will the standards simply prohibit rape and torture but allow for varying definitions depending on the context? The *Kunarac* case is simply mentioned as an important step in the prohibition of rape, but there is no indication as to the adoption of this definition of the offence. It remains to be seen whether a more harmonised definition of the crime will develop through this project.

10.4 The Concept of "Humanisation" of Humanitarian Law and its Emergence

The *humanisation* of IHL refers to the influence of the human rights regime on humanitarian law, causing a fusion of the two regimes on occasion. As such, it is connected to the question of fragmentation in that it concerns the increased harmonisation between rules of IHL and human rights law. Fragmentation or harmonisation as concepts are, however, broader descriptions of the separate regimes of international law and means for solving inconsistencies. Humanisation instead refers specifically to the increased interpretation of IHL in light of human rights norms and concerns. The interplay between IHL and human rights law to a joint "Humanity's Law" has in fact been dubbed as the most prominent change in the international legal system.²³⁹² It is generally understood that IHL has been undergoing a transformation, from its strictly utilitarian purpose to being viewed as allied to the regime of international human rights law.²³⁹³ As will be viewed in the following, the confluence between the regimes is a result of both practicality and as a humanising evolution.

The UN Commission on Human Rights argues that the inextricable links between human rights law, IHL and international refugee law arise from the same basic concern of all areas: "ensuring respect for human dignity in all times, places and circumstances".²³⁹⁴ The same report holds that embracing this similarity will breathe new life into international humanitarian law and that hiding behind "artificial distinctions and false legalistic arguments" causes a huge protection gap.²³⁹⁵ The humanisation of IHL has in general led to an

²³⁹² Teitel, Ruti, *Humanity's Law: Rule of Law for the New Global Politics*, 35 Cornell Int'l LJ 355, p. 358.

²³⁹³ Gardam, Judith, *Women and Armed Conflict: The Response of International Humanitarian Law*, p. 120.

²³⁹⁴ Working Paper on the Relationship Between Human Rights Law and International Humanitarian Law by Francoise Hampson and Ibrahim Salama, UN Doc. E/CN.4/sub.2/2005/14, 21 June 2005, para. 3.

²³⁹⁵ Ibid, paras. 3-4.

increased focus on the autonomy of the person, which is often reiterated as one of the main aims of human rights law. This is e.g. evident in the wording of the provisions prohibiting sexual violence in the 1949 Geneva Conventions, which interpret harm in terms of a woman's dishonour. This has in practice evolved, partly due to the influence of human rights, to language discussing rape as a form of torture and a violation of sexual autonomy, e.g. by the ICRC, the ICTY and the ICTR.²³⁹⁶

The term "humanisation process" implies a stronger protection for the individual through the influence of human rights law. This is valid concerning many norms. However, Cordelia Droege cautions that one should not automatically presume that human rights law provides a wider protection than IHL. Certain rights in the 1949 Geneva Conventions exceed the protection of human rights treaties through its precision, and IHL in general does not allow for derogation or the balancing against the rights of others, unlike human rights law.²³⁹⁷ IHL has also influenced human rights law, particularly regarding the scope of derogation and the list of non-derogable rights.²³⁹⁸ Thus, as the ICRC concludes, IHL and human rights law reinforce each other.²³⁹⁹

Conducting a comparative study of the two separate systems and their aspirations in protecting similar aims through different norms and institutional frameworks is enlightening in that it clarifies the possibilities of applying and borrowing what appears to be similar concepts from one area to the other. As we have concluded, both bodies of law share, at least partly, the same goal of protecting human dignity. The sharp distinction between international humanitarian law and human rights law is in fact viewed as outdated by some, with reference to dignity. The international law notion of war and peace as two legally distinct states of affairs, equally acceptable normatively, with fundamentally different rules to govern them, has become anachronistic. Accordingly, "[t]he violations of human dignity may be just as awful during peacetime or a civil war as during an interstate war" and there are now changes

²³⁹⁶ See e.g. the ICRC Customary Law Study, which holds rape to constitute a violation of the prohibition of torture and a grave breach. See also *Prosecutor v. Kunarac* of the ICTY and *Prosecutor v. Akayesu*, ICTR.

²³⁹⁷ Droege, Cordula, *The Interplay Between International Humanitarian Law and International Human Rights Law in Situations of Armed Conflict*, p. 350.

²³⁹⁸ In General Comment 29, the UN Human Rights Committee discusses the extent of the right to a fair trial as a non-derogable right and mentions IHL as a source. Though not listed in Article 4 of the ICCPR as a non-derogable right, the Committee declares: "As certain elements of the right to a fair trial are explicitly guaranteed under international humanitarian law during armed conflict, the Committee finds no justification for derogation from these guarantees during other emergency situations." UN Human Rights Committee, General Comment No. 29, (Art. 4 of the ICCPR), 24 July 2001, para. 16.

²³⁹⁹ ICRC Customary Law Study, p. 302.

in international law eroding the law of war/peace distinction.²⁴⁰⁰ However, the specific context of the application of humanitarian law makes an automatic cross-fertilisation tentative.

Even the earliest regulations on the laws of war, e.g. the Lieber Code, contain several provisions that would later be considered human rights concerns, such as the prohibition of rape.²⁴⁰¹ This is seen in the Martens Clause of the Fourth Hague Convention of the Laws and Customs of War, which emphasised the necessity of applying notions of humanity in battle. The Martens Clause, restated in the 1949 Geneva Conventions and the Additional Protocols of the Geneva Conventions, states that all civilians “remain under the protection and authority of the principles of international law derived from established customary law, from the principles of humanity and the dictates of public conscience”.²⁴⁰² The humanisation process has continued to increase with the introduction of the 1949 Geneva Conventions, causing the two separate regimes to converge on occasion and gaps in either body of law to close.²⁴⁰³ The creation of the first universal human rights documents, the recognition of human rights as a fundamental principle of the UN as well as the inception of individual criminal responsibility, led to what can be described as an “intolerance for human suffering”, which can

²⁴⁰⁰ Ratner, Steven, *The Schizophrenias of International Criminal Law*, p. 250.

²⁴⁰¹ See discussion on the Lieber Code in chapter 8.

²⁴⁰² GCI Art. 63, GCII Art. 62, GCIII Art. 142, GCIV Art. 158, API Art. 1, para. 2, APII, preamble. This provision of IHL has been deemed to be of great significance, not the least viewed in the *Advisory Opinion on the Legality of the Use by a State of Nuclear Weapons in Armed Conflict* of 8 July 1996 of the ICJ, which stated that the Clause “has proved to be an effective means of addressing the rapid evolution of military technology”. (para. 78). The UN Commission on Human Rights also holds that the “principles of humanity and dictates of public conscience” are legally binding yardsticks, against “which we have to measure all acts, developments and policies with respect to human rights”. Furthermore, more human rights norms expand in scope, the broader the application of the Martens Clause and our interpretation of humanity. See UN Doc. E/CN.4/sub.2/2005/14, paras. 16 & 18. However, the ICTY in *Prosecutor v. Kupreskic et al.*, IT-95-16-T, Judgment of 14 January 2000, para. 525, argued that it has not been elevated to the rank of an independent source of international law, but “dictates any time a rule of international humanitarian law is not sufficiently rigorous or precise: in those instances the scope and purport of the rule must be defined with reference to those principles...”.

²⁴⁰³ Jinks, Derek, *Protective Parity and the Laws of War*, p. 1494.

also be said of humanitarian law.²⁴⁰⁴ The human rights regime has consequently caused the humanitarian restraints on military strategy to receive a more prominent role in the laws of war and IHL.²⁴⁰⁵

The human rights influence is particularly apparent in the two Additional Protocols of 1977 of the 1949 Geneva Conventions. The addition of the two Protocols has been described as a result of the diminishing gap between the two regimes, with IHL drawing inspiration from human rights law.²⁴⁰⁶ For example, Article 75 in Additional Protocol I contains such human rights principles as the non-discrimination principle, the prohibition of arbitrary detention and upholds certain due process guarantees.²⁴⁰⁷ Regulations on the prohibition of torture and the prohibition of discrimination on such grounds as race, sex or religion are also arguably a consequence of the humanisation process. The *ad hoc* tribunals of Rwanda and Former Yugoslavia have also extended the scope of the language of the Geneva Conventions, with the aid of human rights law, e.g. in situations concerning internal armed conflicts.²⁴⁰⁸ The grave breaches regime in the 1949 Geneva Conventions as well as the establishment of universal jurisdiction further speaks of a humanisation process in that it extends the protection of the

²⁴⁰⁴ Meron, Theodor, *The Humanization of International Law*, p. 6. To a degree, humanitarian law and human rights law are born out of the same context. Human rights law in its universal form was created in the aftermath of WWII and the Nuremburg trials. The London Charter not only allowed for the prosecution of crimes against peace and war crimes but also crimes against humanity, a crime not necessarily requiring the existence of an armed conflict. Lauterpacht has stated that by promoting crimes against humanity as customary law, the international community in effect created corresponding human rights for the individual. Subsequent to WWII, the Universal Declaration of Human Rights in its preamble also refers to the avoidance of “scores of war” through the proliferation of human rights, connecting the guarantee of individual rights to the prevention of war.

²⁴⁰⁵ Meron, Theodor, *The Humanization of International Law*, p. 1. I.e. the application of *ius in bello* rather than *ius ad bellum*. Meron argues that applying a more humane approach to the laws of war is apparent also in the more common use of international humanitarian law as apart from the laws of armed conflict. The increasing influence of human rights law on IHL may also be a result of the fact that human rights, concerned with all aspects of the individual’s life at all times, has had a greater impact on public opinion and international politics than IHL. Sassoli, Marco & Bouvier, Antoine, *How Does Law Protect in War?*, p. 264.

²⁴⁰⁶ Doswald-Beck, Louise & Vité, Sylvain, *International Humanitarian Law and Human Rights Law*, IRRC, No. 293, March - April 1993.

²⁴⁰⁷ See also AP II, Article 4, which prohibits violence to the life, health of persons, collective punishment, outrages upon personal dignity, slavery, pillage etc.

²⁴⁰⁸ See e.g. Wagner, Natalie, *The Development of the Grave Breaches Regime and of Individual Criminal Responsibility by the International Criminal Tribunal for the Former Yugoslavia*.

individual through increased possibilities of prosecution.²⁴⁰⁹ Also the list of rights in Common Article 3 broadly converges with the non-derogable human rights listed in several human rights treaties. The Article stipulates that the conventions apply “in addition to the provisions which shall be implemented in peacetime”, indicating the dual application of both regimes. A general humanisation of international law can also be seen through the enlargement of state responsibility, from a former relationship of bilaterism to obligations owed to the international community as a whole, such as *erga omnes* obligations.²⁴¹⁰ In this sense, the traditional state-centric interests in public international law is diminishing in place of focusing on the individual, as within the human rights field.

A result of the humanisation of IHL, and international law in general, is in part the development of the area of international criminal law.²⁴¹¹ With its foundation in individual criminal responsibility rather than the traditional state-centred focus in international law, the humanising aspect lies in the enlarged possibility for prosecution of violations within the field of IHL.²⁴¹² Accountability for grave atrocities is more encompassing, thereby leading to greater protection. In its essence, international criminal law is a fusion between IHL and international human rights law.²⁴¹³ The Rome Statute of the ICC confirms the close link between human rights law and international criminal law in Article 21, which details the applicable law of the Court. Article 21 (3) provides that the application and interpretation of law “must be consistent with internationally recognized human rights”, thereby officially encouraging the cross-fertilisation between the two bodies of law. It thus obliges the Court to

²⁴⁰⁹ In *Prosecutor v. Kupreskic et al.*, Judgment of 14 January 2000, para. 518, the ICTY noted: “the absolute nature of most obligations imposed by rules of international humanitarian law reflects the progressive trend towards the so-called ‘humanisation’ of international legal obligations, which refers to the general erosion of the role of reciprocity in the application of humanitarian law over the last century.”

²⁴¹⁰ Meron, Theodor, *The Humanization of International Law*, p. 247.

²⁴¹¹ *Ibid.*, p. 242.

²⁴¹² Ruti Teitel sees the proliferation of International Criminal Law as a result of an increased humanitarianism in global politics, changing the understanding of criminal justice by reducing state sovereignty. This is done by reconceptualising a conflict from local to viewing it as global and responsibility from collective to individual. As such, humanitarianism has raised these previously local issues to the global arena. Teitel, Ruti, *Humanity's Law: Rule of Law for the New Global Politics*, p. 373.

²⁴¹³ While the earliest example of international criminal law in the form of the Nuremburg trials preceded the establishment of substantive universal human rights, subsequent development of international criminal law has drawn inspiration from both IHL and human rights law. See e.g. the crimes in the Rome Statute to the ICC: it contains human rights norms - the prohibition of genocide, crimes against humanity and torture, as well as IHL -the prohibition of war crimes.

apply its regulations and definitions of crimes through a human rights law lens. Commentators argue that this may introduce an unfortunate hierarchy in favour of human rights, which so far has been rejected by international criminal law judges.²⁴¹⁴ Though human rights law has been applied by the *ad hoc* tribunals in order to distil e.g. general principles of law, human rights law has never been given such a prominent place in the adjudication of international criminal law as in the Rome Statute. As pointed out by Janet Halley, it is a very open-ended requirement, and could range from such documents as the Beijing Declaration to CEDAW.²⁴¹⁵ It certainly opens up for the possibilities of cross-referencing between these areas of law.

Furthermore, certain international crimes directly overlap with international human rights law. As Antonio Cassese acknowledges, many concepts underlying crimes against humanity mimic rights laid down in international human rights documents, such as the right to life and the prohibition of torture.²⁴¹⁶ The prohibition of genocide and its definition directly stems from the Genocide Convention of 1948, which is a human rights document. Several of the crimes and their definitions therefore draw inspiration from human rights law. Similarly, even though several authors equal international criminal law to IHL, both crimes against humanity and genocide lack a requirement of a link to an armed conflict and can be perpetrated in both times of peace and war. War crimes naturally, however, necessitate a link to an armed conflict. Antonio Cassese in fact notes that human rights law has “contributed to the development of criminal law by expanding, strengthening, or creating greater sensitivity to the values it protects, such as...the need to safeguard as far as possible life and limb.”²⁴¹⁷ As the case law of the *ad hoc* tribunals and the ICC develops, however, it is likely that there will be less need for international criminal tribunals to use human rights law as a source.²⁴¹⁸

The language of the jurisprudence of the *ad hoc* tribunals also reflects this humanisation process. The ICTY Appeals Chamber noted in the *Celebici* case that “both human rights and humanitarian law focus on respect for human values

²⁴¹⁴ Delmas-Marty, Mireille, *Interactions Between National and International Criminal Law in the Preliminary Phase of Trial at the ICC*, 4 J. Int'l Crim. Just. 2, March 2006, p. 3.

²⁴¹⁵ Halley, Janet, *Rape at Rome: Feminist Interventions in the Criminalization of Sex-Related Violence in Positive International Criminal Law*, p. 112.

²⁴¹⁶ Cassese, Antonio, *International Criminal Law*, pp. 721 & 738, Evans, Malcolm, *International Law*, (2003). p. 741.

²⁴¹⁷ Cassese, Antonio, *International Criminal Law*, p.18.

²⁴¹⁸ Cryer, Friman, Robinson & Wilmschurst, *An Introduction to International Criminal Law and Procedure*, p. 11.

and the dignity of the human person. Both bodies of law take as their starting point the concern for human dignity, which forms the basis of a list of fundamental minimum standards of humanity”.²⁴¹⁹ As mentioned, in the *Furundzija* case, the ICTY again stated that the respect for human dignity was the basis of both humanitarian and human rights law and that the essence of these areas lies in the protection of the dignity of each individual.²⁴²⁰ Similarly, in the *Tadic* case, the ICTY stated that “[i]f international law, while of course safeguarding the legitimate interests of States, must gradually turn to the protection of human beings, it is only natural that the aforementioned dichotomy should gradually lose weight”.²⁴²¹ The *Tadic* case also promoted an increased “human-being oriented” approach to international law.²⁴²² Accordingly, the two bodies of law share the same philosophy of human dignity.

Furthermore, human rights law has significantly influenced the development of customary norms of IHL. This is apparent in both the reasoning of the jurisprudence of the *ad hoc* tribunals as well as the ICRC study of customary rules of IHL.²⁴²³ The ICRC finds substantial support for the use of human rights law during armed conflict. In the introduction of the work, the role of human rights law in the study is explained: “human rights law has been included in order to support, strengthen and clarify analogous principles of international humanitarian law. In addition, while they remain separate branches of international law, human rights law and international humanitarian law have directly influenced each other, and continue to do so...”.²⁴²⁴ The ICRC

²⁴¹⁹ *Prosecutor v. Mucic, Delic, Zenga, Delalic*, (Celebici Camp), Case No. IT-96-21-A, Appeal Judgment, 20 February 2001, para. 149.

²⁴²⁰ See Chapter 9.2.2.1.

²⁴²¹ *Prosecutor v. Tadic*, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, Case No. IT-94-1-AR72, 2 October 1995, para. 97.

²⁴²² *Ibid*, para. 97.

²⁴²³ See Chapter 8.6 and 9.

²⁴²⁴ ICRC Customary Law Study, pp. x & xxviii-xxxi. The study identifies three areas where the two regimes are of value to each other in interpreting rights and obligations: 1) while evaluating the conformity with human rights law, at times it requires a determination of whether there has been a breach of IHL. For example measures taken during a derogation by the state may be unlawful according to human rights treaties if they violate IHL. Likewise, IHL principles referring to due process guarantees may need the interpretation of human rights regulations 2) human rights provisions exist in IHL treaties, for example Article 75 of Additional Protocol I, Articles 4 & 6 of Additional Protocol II, and likewise IHL provisions in HR-treaties, such as the CRC 3) most significantly according to the ICRC, there is “extensive practice by States and by international organisations commenting on the behaviour of States during armed conflict in the light of human rights law”.

emphasises that human rights law continues to apply during armed conflicts, which it acknowledges has been confirmed by both treaty bodies and the ICJ.²⁴²⁵ Scholars writing for the ICRC are also noting the diminishing gap between human rights and humanitarian law.²⁴²⁶

10.5 The Application of International Humanitarian Law by Human Rights Courts and Treaty Bodies

To a certain extent, the influence of human rights law on IHL not only results from an increased sense of humanity, but it is also a practical consequence. There have traditionally been few national and international judicial bodies with the role of applying and interpreting humanitarian law, whereas human rights law continues to evolve through domestic courts, regional courts as well as international treaty bodies. The enforcement of IHL, as indicated by the content and nature of its norms, has been intended through means of domestic criminal law. As Theodor Meron points out, human rights bodies fill an institutional gap as well as occasional substantive gaps.²⁴²⁷ It is therefore no surprise that academics have gravitated towards using the UN human rights systems and regional human rights courts as monitoring mechanisms also for enforcing IHL regulations.

UN treaty bodies as well as regional human rights courts have therefore frequently been forced to analyse human rights violations in the context of armed conflicts.²⁴²⁸ Such bodies have in general been established pursuant to a treaty and their mandate is in most cases limited to monitoring States Parties' obligations with regards to that treaty. Though they might have the territorial jurisdiction to evaluate the matter, the courts and treaty bodies tend to find

²⁴²⁵ ICRC Customary Law Study, introduction. As the ICRC points out, human rights violations have continued to be condemned by the UN in the context of a large number of armed conflicts, including Afghanistan, former Yugoslavia, Iraq, Rwanda and Liberia, with parallel applications of both areas of international law. ICRC Customary Law Study, section 9, p. 304.

²⁴²⁶ Doswald-Beck, Louise & Vité, Sylvain, *International Humanitarian Law and Human Rights Law*.

²⁴²⁷ Meron, Theodor, *The Humanization of International Law*, p. 8. See also Hans-Joachim Heintze who argues that IHL and human rights not only share the same philosophy but the convergence can be used to "compensate for the deficits of international humanitarian law. The underdeveloped implementation mechanisms of international humanitarian law, which have to be described as fairly ineffective, are among its great weaknesses". Heintze, Hans-Joachim, *On the Relationship Between Human Rights Law Protection and International Humanitarian Law*, ICRC, December 2004, Vol. 86, No. 856, p. 798.

²⁴²⁸ Meron, Theodor, *The Humanization of International Law*, p. 50.

themselves restricted substantively to the treaty provisions. However, certain courts refer to IHL in their case law, even if not directly applying it. Certain human rights treaties also contain humanitarian law provisions.²⁴²⁹ The various human rights bodies established within the UN system do not have the same treaty restrictions and frequently comment on both fields of law according to their mandate. As mentioned, special human rights rapporteurs are regularly mandated to investigate both human rights violations as well as those of humanitarian law, or may lack an explicit mandate for humanitarian law though the context of an armed conflict still warrants such an investigation.²⁴³⁰

As regards the application of IHL by regional human rights courts, the willingness and interpretation of their jurisdictional scope has varied. As described by Christine Byron, the situation has in a way been thrust upon human rights bodies, since they have been forced to respond to the increasing applications from individuals in armed conflicts.²⁴³¹ The ECtHR has examined violations of human rights law in the context of both international and internal armed conflicts, analysing the ECHR in the context of humanitarian law.²⁴³²

²⁴²⁹ For example, the Convention on the Rights of the Child is a clear example of this increased convergence. The human rights treaty in Art. 38 obliges States Parties to respect the rules of IHL that concern the child, e.g. restrictions on recruitment and participation in hostilities of children of a certain age and the Optional Protocol 1 to the CRC concerns the involvement of children in armed conflicts. Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa protects women in armed conflict in article 11.

²⁴³⁰ Security Council Resolution 1995/91, UN Doc. E/CN.4/1995/70 on Rwanda, Report on the Situation of Human Rights in Kuwait under Iraqi Occupation, UN Doc. E/CN.4/1992/26, International Commission of Inquiry on Darfur.

²⁴³¹ Byron, Christine, *A Blurring of the Boundaries: The Application of International Humanitarian Law by Human Rights Bodies*, p. 893.

²⁴³² In *Engel v. the Netherlands* a brief referral is made to Article 88 of the First Geneva Convention, when discussing the legitimacy of differing disciplinary measures depending on the military rank of the individual. The Court mentioned the fact that such a distinction is permitted in IHL but focused on the application of the ECHR. In other cases, the references to IHL are sparse. *Engel v. The Netherlands*, Judgment of June 8, 1976, ECtHR, para. 72. Principally, claims of violations of the right to life in Article 2 have been examined, the evaluation concerning whether the use of force by the state army has been excessive, but always from the perspective of the ECHR. For example, the situation of the Turkish occupation of Cyprus has been investigated, where violations such as rape were raised. See *Cyprus v. Turkey*, Report of the European Commission, Judgment of 10 July 1976.

More recently the Court examined the atrocities in Chechnya by Russian troops, a situation that traditionally would fall within the sphere of humanitarian law. The case concerned the attack by Russian airplanes on a convoy of vehicles, killing civilians, a situation which is continuously referred to as a "conflict". The Court, however, does not make any reference to IHL, but rather interprets the use of force solely from the perspective of the European Convention and the use of law enforcement in Article 2. *Isayeva, Yusupova and Bazayeva v. Russia*, (Application Nos. 57974/00, 57948/00 and 57949/00), Judgment of 24 February 2005, ECtHR.

Despite analysing cases against the backdrop of armed conflict, the ECtHR has been reluctant in applying international humanitarian law and to make a judgment on the existence of an armed conflict. The Inter-American Commission and the Inter-American Court of Human Rights have been more willing to apply rules of international humanitarian law in their case law, though this approach has been rather inconsistent.²⁴³³

²⁴³³ See e.g. *Arturo Ribón Avila v. Colombia*, Case 11.142, Report No. 26/97, Decision of 30 September, 1997, IACHR. See also the *Abella* case concerning the attack by an armed group on a military barrack, in which the Commission confirmed its ability to apply international humanitarian law from the 1949 Geneva Conventions, stating: “Indeed, the provisions of Common Article 3 are essentially pure human rights law. Thus, as a practical matter, application of Common Article 3 by a State party to the American Convention involved in internal hostilities imposes no additional burdens on a (a State), or disadvantages its armed forces vis-à-vis dissident groups.” *Juan Carlos Abella v. Argentina*, Case 11.137, Report No. 55/97, 18 November 1997, IACHR, para. 158, note 19. Accordingly, the argument is that because of the substantial overlap and simultaneous application in times of armed conflict of both fields of law, obliging states parties to abide by IHL would not place an additional burden on the states. Arguably, the Commission went too far when, instead of merely using provisions of IHL as an authoritative source of interpretation to evaluate the existence of a human rights violation, the Commission applied the IHL norms directly to assess the state’s responsibility for violations of both IHL and human rights law. See discussion in Byron, Christine, *A Blurring of the Boundaries: The Application of International Humanitarian Law by Human Rights Bodies*, p.857, Moir, Lindsay, *Law and the Inter-American Human Rights System*, 25 Hum. Rts. Q, 182, (2003), p. 194.

Two cases from 2000 demonstrate a rather more inconsistent approach to the standing of IHL in the judgments by the Inter-American Court. In the *Las Palmeras* Case the Court stated that while it is “competent to determine whether any norm of domestic or international law applied by a State, in times of peace or armed conflict, is compatible or not with the American Convention,” the result of this evaluation “will always be an opinion in which the Court will say whether or not that norm or that fact is compatible with the American Convention.” *Las Palmeras Case*, Judgment on Preliminary Objections, (series C) No. 67, IACtHR, Judgment of Feb. 4, 2000, paras. 32-33. It thereby emphasised that any analysis of facts in an armed conflict will always solely be restricted to the American Convention on Human Rights.

However, in the *Bámaca Velásquez* case in the same year, the Court directly referred to humanitarian law, stating with regard to the internal armed conflict in Guatemala that “international humanitarian law prohibits attempts against the life and personal integrity” of persons not participating in the hostilities. It expounded generally on IHL and held that the judgment in the *Las Palmeras* Case demonstrated that “the relevant provisions of the Geneva Conventions may be taken into consideration as elements for the interpretation of the American Convention” and that while the Court lacks competence to hold a State Party responsible for violations of treaties outside the scope of the Inter-American system, it did not prevent the Court from holding that “certain acts or omissions that violate human rights, pursuant to the treaties that they do have competence to apply, also violate other international instruments for the protection of the individual, such as the 1949 Geneva Conventions...”. See *Bámaca Velásquez Case*, (series C) No. 70, IACtHR, Judgment of Nov. 25, 2000, paras. 207-209. See, also, *Detainees in Guantanamo Bay, Cuba; Request for Precautionary Measures*, IACHR, 13 March, 2002.

This trend of human rights bodies applying humanitarian law means that there is broad support for the notion of interplay between the two spheres of law. The notion of human dignity and the protection of the individual warrants a holistic approach. However, the application of humanitarian law by human rights bodies begs the question of how to reconcile diverse definitions in the two bodies of law. As Noam Lubell poses the current dilemma, “the focus of the arguments is now shifting from the question of *if* human rights law applies during armed conflict to that of *how* it applies, and to the practical problems encountered in its application”.²⁴³⁴ It also necessitates a discussion of whether human rights bodies are equipped to apply and interpret rules of international humanitarian law. Theodor Meron, while arguing that the application of IHL by human rights bodies gives IHL an “even more pro-human-rights orientation”, cautions that such bodies “often lack expertise in the law of war and tend to reach conclusions that humanitarian law experts find problematic”.²⁴³⁵ Liesbeth Zegveld agrees that “the fact that the substantive norms of human rights law and international humanitarian law are complementary in character does not mean that supervisory bodies set up under human rights law are *ipso facto* competent to apply humanitarian law.”²⁴³⁶ On the other hand, a benefit of the application of IHL by human rights bodies is that it may add to the pressure on states to comply with their obligations under IHL.²⁴³⁷ As such, a reference to IHL by human rights bodies emphasises the gravity of the offence since the general understanding is that more is permitted in armed conflicts than through the regulations of human rights. Arguably then: “the affirmation that humanitarian law has been violated - that what has happened is prohibited even during an armed conflict - carries a connotation of greater moral reprobation”.²⁴³⁸

In conclusion, a trend towards an increased harmonisation between the examined areas of law in the thesis can be noted, as well as a general trend towards a humanisation of international law, with an increased focus on the concept of human dignity and protection of the individual’s autonomy. This is

²⁴³⁴ Lubell, Noam, *Challengers in Applying Human Rights Law to Armed Conflict*, Vol. 87 Nr. 860 Dec. 2005, IRRC, p. 738. Emphasis added.

²⁴³⁵ Meron, Theodor, *The Humanization of Humanitarian Law*, p. 247. It should be noted that in general, states have not opposed to the interpretation of the application of human rights law in armed conflicts with the exception of a few.

²⁴³⁶ Zegveld, Liesbeth, *The Inter-American Commission on Human Rights and Humanitarian Law: A Comment on the Tablada Case*, 324 Int’l Rev. Red Cross 505, (1998), p. 508.

²⁴³⁷ Byron, Christine, *A Blurring of the Boundaries: The Application of International Humanitarian Law by Human Rights Bodies*, p. 887.

²⁴³⁸ O’Donnell, Daniel, *Trends in the Application of International Humanitarian Law by United Nations Human Rights Mechanisms*, 324 Int’l Rev. Red Cross 481 (1998), p. 485.

evident in several regards, e.g. in the acceptance of a complementary approach, the simultaneous application by UN treaty bodies and of IHL by human rights courts, as well as the Fundamental Standards of Humanity. The question is thus if this has had, or will have, an impact on the approach to both the prohibition and definition of rape in international law.

10.6 Is Harmonisation Desirable?

Several norms are similar to the areas of international human rights law, IHL and international criminal law, e.g. the prohibition of torture, genocide and rape. The question whether the norms should be harmonised is therefore of practical importance. The prohibition of rape and, specifically, the definition of the crime has long been equally non-specific in all these areas of law. However, the topic is increasingly regulated in international law and whereas a certain harmonisation can be noted between human rights bodies and *ad hoc* tribunals, we are far from a coherent approach to the subject.

The idea that the separate regimes are mutually supportive finds substantial support among scholars, arguing that there is "considerable scope for reference to human rights law as a supplement to the provisions of the laws of war"²⁴³⁹ and that they are "*ratione materiae* interrelated fields, both raising the level of behaviour towards individuals and both concerned with the rights and protection of individuals".²⁴⁴⁰ The convergence between IHL and human rights law is by certain leading experts viewed as a necessity. Specific norms, either in humanitarian law or human rights law, are increasingly analysed referring to the corresponding regulation in the other area.²⁴⁴¹ Hans-Joachim Heintze, writing for the ICRC, argues that a cumulative application of both fields of law must necessarily lead to interpretations of rights which refer to both areas of law.²⁴⁴²

²⁴³⁹ Greenwood, Christopher, *Rights at the Frontier: Protecting the Individual in Time of War*, in Law at the Centre, the 50th Anniversary Lectures of the Institute for Advanced Legal Studies, ed. Barry Rider, (1999), pp. 277-293.

²⁴⁴⁰ Detter, Ingrid, *The Law of War*, Cambridge University Press, (2000) p. 161. See also Meron, Theodor, *The Humanization of International Law*, Viseur Sellers, Patricia, *The Prosecution of Sexual Violence in Conflict: The Importance of Human Rights as a Means of Interpretation*. See also Working Paper on the Relationship Between Human Rights Law and International Humanitarian Law by Francoise Hampson and Ibrahim Salama, UN Doc. E/CN.4/sub.2/2005/14, 21 June 2005, paras. 3-4 and the reports on the Fundamental Standards of Humanity.

²⁴⁴¹ See e.g. the argumentation below of the European and Inter-American Courts of Human Rights, as well as the *ad hoc* tribunals.

²⁴⁴² Heintze, Hans-Joachim, *On the Relationship Between Human Rights Protection and International Humanitarian Law*, p. 795.

This raises the issue of whether there is value in the harmonisation of two separate legal disciplines. What are the benefits? The ILC states that fragmentation creates the “danger of conflicting and incompatible rules, principles, rule-systems and institutional practices...it may occasionally create conflicts between rules and regimes in a way that might undermine their effective implementation”.²⁴⁴³ Harmonisation is therefore a proposed objective regarding similar norms in separate legal disciplines. The ILC notes specifically that “[i]t is a generally accepted principle that when several norms bear on a single issue they should, to the extent possible, be interpreted so as to give rise to a single set of compatible obligations”.²⁴⁴⁴ Harmonisation of the interpretation of norms brings consistency to the application of international law. Legal certainty and equality of legal subjects is then achieved. A victim of sexual violence might be subject, not only to different legal regimes and bodies, but also to different legal guarantees regarding e.g. the definition of rape. The ICC and the European Court of Human Rights might provide different answers to the same question. However, the ILC does also point out that deviations that do exist have not emerged as “legal-technical mistakes”, but reflect differing pursuits and preferences of actors in a pluralistic society.²⁴⁴⁵

The progression of humanisation is not solely heralded by all in the international community, since the specificity of IHL and its military functionality to a certain degree may be lost.²⁴⁴⁶ Most of the arguments focus on the historical differences of the two regimes, their different aims and the process of development. Arguably, human rights bodies and experts may at times apply an idealism to their interpretation of the laws of war that experts on humanitarian law find unrealistic and impractical.²⁴⁴⁷ Some human rights scholars do have a tendency to consider humanitarian law as a subset of human rights law, diminishing the importance of IHL.²⁴⁴⁸ The fact that the rules are more specific does not necessarily mean that they are compatible.²⁴⁴⁹ It is important to remember that because of the distinct ambition of IHL, limitations on the individual’s rights and freedoms must necessarily be greater than in human rights law. International humanitarian law allows for collateral damage and the killings of civilians, limitations on such derogable rights as the freedom of assembly as

²⁴⁴³ ILC Fragmentation Study, UN Doc. A/CN.4/L.702, para. 8.

²⁴⁴⁴ Ibid, para. 14 (4).

²⁴⁴⁵ Ibid, para. 11.

²⁴⁴⁶ Jinks, Derek, *Protective Parity and the Laws of War*, p. 1494.

²⁴⁴⁷ Meron, Theodor, *The Humanization of International Law*, p. 8.

²⁴⁴⁸ Provost, René, *International Human Rights and Humanitarian Law*, p. 9

²⁴⁴⁹ Koller, David, *The Moral Imperative: Toward a Human Rights-Based Law of War*, 46 Harv. Int’l L.J. 231, p. 260.

well as regulations on arrest and fair trial. Human rights law, on the other hand, aims to achieve a respectful co-existence between the individual and the state.²⁴⁵⁰

Scholars such as Draper have emphasised that “the two regimes are not only distinct but are diametrically opposed...at the end of the day, the law of human rights seeks to reflect the cohesion and harmony in human society and must, from the nature of things be a different and opposed law to that which seeks to regulate the conduct of hostile relationships between states or other organized armed groups, and in internal rebellions”.²⁴⁵¹ Where current international law views peace as the norm and war as the exception, the convergence of IHL and human rights law in a sense represents a fusion of the norm and the exception. The question then arises whether the exception will become the standard.²⁴⁵² Judith Gardam further argues that “[t]he provisions of human rights are not crafted to cover situations of conflict where societal structures have broken down. The issues with which these norms deal take on new forms in the midst of the disruption caused by armed conflict, a factor that is not reflected in their content”.²⁴⁵³ Theodor Meron agrees that “excessive humanization [of the rules of humanitarian law] might exceed the limits acceptable to armed forces, provoke their resistance, and thus erode the credibility of the rules”. In other words, a too strong humanisation of IHL may dilute the appropriateness of the rules to the particular situation of armed conflicts.²⁴⁵⁴ René Provost, however, points out that certain experts in humanitarian law are overly rigid in differentiating the two areas of law out of fear that humanitarian law will be “watered down” and laced

²⁴⁵⁰ See e.g. Greenwood, Christopher, *Scope of Application of Humanitarian Law*, p. 102, who argues: “Human rights law is designed to operate primarily in normal peacetime conditions, and within the framework of the legal relationship between a state and its citizens. International humanitarian law, by contrast, is chiefly concerned with the abnormal condition of armed conflict and the relationship between a state and the citizens of its adversary.”

²⁴⁵¹ Draper, Gerald, *Humanitarian Law and Human Rights*, Acta Juridica 193, (1979), p. 205.

²⁴⁵² Gross, Aeyal, *Human Proportions: Are Human Rights the Emperor's New Clothes of the International Law of Occupation?* p. 3.

²⁴⁵³ Gardam, Judith, *Women and Armed Conflict: The Response of International Humanitarian Law*, p. 121. A lack of practical value is noted concerning the complementarity approach. Best, Geoffrey, *War & Law Since 1945*, p. 248, who argues: “...the amount of IHL which is, strictly speaking, applicable therein is so much smaller and more disputable; for another, it coexists there with human rights law, plentiful in quantity and presumed applicability but, compared with IHL, an inexperienced newcomer on the humanitarian stage of as yet unproved practical worth”.

²⁴⁵⁴ Ibid, p. 241.

with human rights concerns.²⁴⁵⁵ The nature of each area of law may often be simplified, disregarding human rights law as “idealistic and inappropriate” for conflict situations.²⁴⁵⁶

Maintaining the legal independence of the two regimes may in fact be more beneficial to the individual and provide greater protection, according to certain scholars. Raúl Vinuesa argues that “the maintenance of their own identity will assure the possibility of duplication of rules, furthering the protection of human beings by different means...”, thereby generating different avenues to accomplish similar objectives.²⁴⁵⁷ A positive aspect of fragmentation may be that it induces states to comply with international law to a higher degree and that a specialisation of rules leads to a progressive development of international law.²⁴⁵⁸ By a too extensive convergence, one loses the advantages of legal regimes specifically constructed for particular purposes and situations. A human rights analysis could diminish the protection for particular groups that are offered specific safeguards in the 1949 Geneva Conventions, e.g. people living under occupation, by placing all individuals on the same level.²⁴⁵⁹ The argument is accordingly that by not singling out the most vulnerable groups for protection, and by providing the same standard of rights to all persons, the precarious nature of their situation is ignored.²⁴⁶⁰ Concern has also been raised that the merger may cause a threat to the existence of an independent human rights discourse.²⁴⁶¹ An increased convergence between the two areas could be to the detriment of human

²⁴⁵⁵ Provost, René, *International Human Rights and Humanitarian Law*, p. 9. See also Cryer, Friman, Robinson & Wilmschurst, *An Introduction to International Criminal Law and Procedure*, p. 10, who argue that while almost every international crime would be a violation of human rights law, the converse does not apply and that international criminal courts do not exist to prosecute the full gamut of human rights.

²⁴⁵⁶ Droege, Cordula, *The Interplay Between International Humanitarian Law and International Human Rights Law in Situations of Armed Conflict*, p. 324.

²⁴⁵⁷ Vinuesa, Raúl Emilio, *Interface, Correspondence and Convergence of Human Rights and International Humanitarian Law*, *Yearbook of International Humanitarian Law*, vol. 1, (1998), p. 108.

²⁴⁵⁸ Hafner, Gerhard, *Pros and Cons Ensuing From Fragmentation of International Law*, 25 Mich. J. Int'l L. 849, (2004), pp. 850 & 863.

²⁴⁵⁹ Gross, Aeyal, *Human Proportions: Are Human Rights the Emperor's New Clothes of the International Law of Occupation?*, p. 35.

²⁴⁶⁰ The Inter-American Commission in the *Abella* case stated that the rules of IHL “generally afford victims of armed conflicts greater or more specific protections than do the more generally phrased guarantees in...human rights instruments”. *Abella v. Argentina*, IACHR, para. 159.

²⁴⁶¹ Teitel, Ruti, *Humanity's Law: Rule of Law for the New Global Politics*, p. 375, Bennouné, Karima, *Do We Need New International Law to Protect Women in Armed Conflict?*, p. 181.

rights law, since IHL seems to be the preferred regime in normative conflicts due to its apparent specificity, and that human rights law will be more easily discarded.²⁴⁶² It could thereby lower the standards of human rights law. A careful analysis must therefore be made concerning the particular right and the specific context before borrowing concepts between the two regimes. It must, however, be borne in mind that no proponents suggest a complete merger, but rather complementarity where suitable.

In sum, concern has been raised from both the perspective of IHL and human rights law regarding the harmonisation of the two regimes; either that the specificity and functionality of IHL will be lost or that the level of protection offered by the human rights regime will lose its strength. Proponents on the other hand hold that harmonisation, e.g. through the process of humanisation, will only strengthen the protection for the individual and bring further coherence to the field of public international law. A static approach to law may cause an impediment to the progression of the field of public international law and a cross-fertilisation recognises that each area of law cannot be regarded in a legal vacuum.

10.7 Harmonising the Definitions of Rape and Torture

The idea of a harmonisation between the discussed regimes in international law has been particularly alluring in the field of women's rights. Because the experiences of women and the particular forms of violence to which they are subjected occur both in times of peace and armed conflicts, the level of protection e.g. concerning the prohibition of sexual violence may be strengthened through an increased harmonisation in providing a more holistic approach. Authors such as Hilary Charlesworth argue that these forms of violations know no borders, and that "the collapsing of the conceptual boundaries between the two categories of law [IHL and human rights law] also takes account of experiences that do not differentiate between international

²⁴⁶² Mendez, Juan, *International Human Rights Law, International Humanitarian Law, and International Criminal Law and Procedure: New Relationships*, in *International Crimes, Peace, and Human Rights: The Role of the International Criminal Court*, ed. Shelton, Dinah, Transnational Publishers, (2000), p. 69.

armed conflict, internal conflict and ‘normal’ conditions”.²⁴⁶³ This is to a certain extent confirmed through the promulgation of the Fundamental Standards of Humanity, which offers certain minimum standards, such as the prohibition of rape, regardless of context. Charlesworth similarly argues that “violence against women in armed conflict and in peacetime conditions are not distinct phenomena but form part of the same spectrum of behaviour. They are both the product of systematic relations of male power and domination”.²⁴⁶⁴ From a feminist perspective, the barriers that the different regimes have created are an impediment to the full realisation of women’s rights and an unnatural construction. According to such arguments, distinguishing the prohibition of sexual violence depending on the context is haphazard.²⁴⁶⁵ For example, the exclusion of rape committed opportunistically in conflict/post-conflict situations from the jurisdictional scope of the international crimes, if they do not occur as part of an armed conflict or widespread attack, has been criticised. Though it is acknowledged that e.g. the jurisdiction of the ICC should not be over-inclusive, it creates a hierarchy among incidents of rape that is “difficult to reconcile morally”.²⁴⁶⁶ However, while the underlying gendered social structure and the act of rape itself may be similar in both situations, the difference in the approach to sexual violence has not developed by chance. Rather, the particular circumstances of armed conflict and peacetime have informed the definition in question. Though the specific discussions on sexual violence and its characterisation, as e.g. torture, is dealt with further in other chapters, the general issue of harmonisation in connection to these violations will be briefly touched upon in the following.

International human rights law, IHL and international criminal law all prohibit various sexual offences, naturally leading to questions of cross-fertilisation. The

²⁴⁶³ Charlesworth, Hilary & Chinkin, Christine, *The Boundaries of International Law: A Feminist Analysis*, p. 332. Also “the notions of conflict and attacks are themselves contingent and controversial. When do they begin and end? For many women, violence is not reduced with the cessation of military hostilities, and ostensible times of peace may be full of conflict for women and produce serious human rights violations”. See Charlesworth, Hilary, *Feminist Methods in International Law*, AJIL, vol. 93, (1999), p. 389.

²⁴⁶⁴ Charlesworth, Hilary & Chinkin, Christine, *The Boundaries of International Law: A Feminist Analysis*, p. 334. See also Copelon, Rhonda, *Surfacing Gender: Reconceptualizing Crimes Against Women in Time of War*, pp. 212-213, who asserts that all instances of rape are expressions of male domination and a vehicle for terrorising, i.e. that the distinction between war and peace is not relevant to the experiences of women.

²⁴⁶⁵ See e.g. Copelon, Rhonda, *Surfacing Gender: Reconceptualizing Crimes Against Women in Time of War*, p. 214.

²⁴⁶⁶ Condon, Elizabeth-Merry, *The Incoherent International Jurisprudence of Rape*, p. 24.

significant overlap between the three areas means that the different bodies of law may prohibit the same conduct. However, the redress depends on which system is applicable. Whereas human rights law requires state action or acquiescence, international criminal law regulates the actions of individuals and humanitarian law that of states and specific groups of individuals. IHL additionally requires a connection to an armed conflict as does international criminal law with regard to war crimes. The premise of the various areas therefore differs substantially, though interplay is significant. What is evident, however, is that the protection of the autonomy of the individual, including sexual autonomy, has been increasingly discussed in all areas, as seen in the case law of regional human rights courts and *ad hoc* tribunals. In all cases concerning the prohibition of rape, a large focus has been placed on the principle of human dignity, which is seen as the unifying standard of these regimes. This in turn has led to a redefinition of the harm of rape, e.g. from being seen as a violation of a woman's honour in the 1949 Geneva Conventions, to harm being viewed as a violation of the person's sexual autonomy. As noted by the ICTY, this indicates a development towards a "human-being oriented" approach. Patricia Viseur Sellers notes that the condemnation of sexual violence in e.g. humanitarian law always has been parallel to contemporary social values and that political and social mores has permeated the increased illegality of sexual violence in armed conflicts. An increased focus of the individual's integrity has led to a shift of balance from military necessity to an extensive protection of individuals.²⁴⁶⁷ This is also due to the influence of human rights law. Similarly, the increased obligations on states in human rights law have advanced parallel to social developments in the area of sexual integrity and the autonomy of the individual.

In general, it can be noted that several human rights that pertain to sexual violence also fully operate during armed conflicts. As mentioned, all human rights are equally applicable in armed conflicts, apart from derogable rights in certain circumstances. For example, the UN Convention against Torture prohibits torture at all times and specifies that "no exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture".²⁴⁶⁸ One of the most fundamental principles of human rights, non-discrimination, including on the basis of sex, is stipulated in numerous human rights conventions and applies during armed conflicts as a non-derogable right.²⁴⁶⁹ Human rights instruments particularly pertaining to the rights of women are applicable during times of armed conflicts. CEDAW prohibits discrimination against women on

²⁴⁶⁷ Viseur Sellers, Patricia, *The Cultural Value of Sexual Violence*, p. 314.

²⁴⁶⁸ UN Convention Against Torture, Art. 2.

²⁴⁶⁹ See Chapter 7.4.

the basis of sex, which incorporates violence against women.²⁴⁷⁰ The Declaration on the Elimination of Violence against Women as well as the Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women also proscribes sexual violence against women, whether committed in armed conflicts or in peacetime and regardless of whether it is committed by a state official or private actor.²⁴⁷¹ Article 38 of the 1993 Vienna Declaration and Programme of Action states: “Violations of human rights of women in situations of armed conflict are violations of the fundamental principles of international human rights and humanitarian law. All violations of this kind, including in particular murder, systematic rape, sexual slavery, and forced pregnancy, require a particularly effective response”.²⁴⁷² Furthermore, several crimes applicable to sexual violence have reached the status of *ius cogens*, including the prohibition of genocide, war crimes, torture, slavery and crimes against humanity, and are therefore prohibited at all times and can arguably be prosecuted by any state on the basis of universal jurisdiction.²⁴⁷³ Most of these acts are simultaneously prohibited also in international criminal law. Cross-fertilisation is thus a natural consequence.

As viewed, the protection of the individual has certainly been strengthened by the humanising effect on, and development of, public international law. The duties of states and individuals have expanded to encompass the prevention of rape, by e.g. qualifying rape as torture. Both international criminal law and international human rights law have sought to achieve an internationally applicable definition of rape. The definition of rape does, however, differ between the *ad hoc* tribunals, the Elements of Crimes of the ICC and the case law from regional and UN human rights bodies as regards to e.g. the use of non-consent as an element, but also the *actus reus* of rape. The definition of torture has also been given two separate definitions in the application of the element of a ‘state nexus’ and ‘purpose’ the two regimes. Can these norms be fully harmonised or shall we accept that each area of law regulates various aspects of the same norm and that a certain distinction must exist, i.e. recognise parallel prohibitions of torture and rape, but with differences as to their content?

²⁴⁷⁰ As interpreted by the Committee on the Elimination of Discrimination against Women.

²⁴⁷¹ UN Declaration on the Elimination of Violence against Women, Inter-American Convention on the Prevention, Punishment and Eradication of Violence Against Women, Convention of Belem do Para.

²⁴⁷² Vienna Declaration and Programme of Action, UN Doc. A/CONF.157/23, 12 July 1993.

²⁴⁷³ See Chapter 7.6.

10.7.1 The Definition of Torture

Though the definition of torture in the UN Convention against Torture was adopted by the ICTR in *Akayesu* and the ICTY in *Celebici* on the basis that it constituted customary international law, this was rejected in later cases concerning certain elements. In the *Kunarac* case, the Trial Chamber of the ICTY, when discussing the definition of torture, commented on the need to consult the international human rights regime and stated:

“Because of the paucity of precedent in the field of international humanitarian law, the Tribunal has, on many occasions, had recourse to instruments and practices developed in the field of human rights law. Because of their resemblance, in terms of goals, values and terminology, such recourse is generally a welcome and needed assistance to determine the content of customary international law in the field of humanitarian law. With regard to certain of its aspects, international humanitarian law can be said to have fused with human rights law.”²⁴⁷⁴

However, the Trial Chamber did warn against directly and uncritically applying human rights concepts in the field of humanitarian law, noting:

“The Trial Chamber is therefore wary not to embrace too quickly and too easily concepts and notions developed in a different legal context. The Trial Chamber is of the view that notions developed in the field of human rights can be transposed in international humanitarian law only if they take into consideration the specificities of the latter body of law.”²⁴⁷⁵

The ICTY has expounded on the differentiation that must be made between international criminal law and human rights law with regard to the definition of torture:

“The Trial Chamber draws a distinction between those provisions which are addressed to States and their agents and those provisions that are addressed to individuals. Violations of the former provisions result in the responsibility of the State to take the necessary steps to redress or make reparation for the negative consequences of the criminal actions of its agents. On the other hand, violations of the second set of provisions may provide for individual criminal responsibility, regardless of an individual’s official

²⁴⁷⁴ *Prosecutor v. Kunarac, Kovac and Vukovic*, Judgment of 22 February 2001, para. 467.

²⁴⁷⁵ *Ibid.*, para. 471.

status. While human rights norms are almost exclusively of the first sort, humanitarian provisions can be both or sometimes of mixed nature.”²⁴⁷⁶

The ICTY argued that applying the definition of torture in the UN Convention against Torture in international criminal law must necessarily entail certain adjustments, since the role of the state is marginal in this discipline, which holds individuals accountable. Under IHL, torture can also be committed by non-state actors such as armed opposition groups. The importance is then the act and purposive element, rather than the identity of the individual. As such, torture has been defined in a non-state centric manner in international criminal law/IHL, due to the “general spirit of humanitarian law”, as opposed to in human rights law. Considering the different subjects of the various areas of law, the exclusion of the state nexus is logical. The ICC has, however, gone even further in their modification of the torture definition in the Rome Statute. Neither torture as a war crime or crime against humanity requires a state nexus, albeit an element of being “in the custody or under control” has been added to the latter. Additionally, the Statute has removed the ‘purpose’ element for torture as a crime against humanity. The rape, as torture, must thus be carried out with intent but not for a particular purpose.

Is the exclusion of the purpose requirement as obvious in international criminal law as the removal of the state nexus? The purpose requirement in the torture definition in human rights law exists to emphasise the gravity of certain categories of acts and to separate “ordinary” forms of violence from that which is deemed by the international community to lead to a particular stigma. The aim is to condemn particularly systematic forms of violence, and not those motivated solely by cruelty. It is thus, to a certain extent, connected to the state nexus requirement. It also serves to demarcate torture from inhuman or degrading treatment. Though the reasons for the removal of the purpose requirement in the Rome Statute have not been thoroughly explained, it appears to be connected, in part, to the removal of the state nexus. The severity of the act, in the context of a widespread or systematic attack, is thus sufficient to classify it as an international offence. The purpose element would overly restrict prosecutions of acts committed in such circumstances. Thus, again the “general spirit” of IHL/international criminal law would call for such a distinction.

10.7.2 The Definition of Rape

The prohibition of rape *per se* is harmonised in international law in that it can be found in all the examined areas. Initially a prohibition existed in customary

²⁴⁷⁶ *Prosecutor v. Kunarac, Kovac and Vukovic*, Judgment of 22 February 2001, paras. 489-90.

international humanitarian law and was further developed in the case law of regional human rights in the 1980s and forward. It has now been firmly recognised as existing in both treaty law and customary norms of all three areas. The definition of rape has not, however, been dealt with in such a coherent manner.

A definition of rape did not exist on the international arena until the *Akayesu* judgment by the ICTR in 1998. Though the qualification of rape as a human rights violation was tentatively seen in the case law already in the 1980s in regional human rights courts, an attempt to internationally define rape was first conducted by an *ad hoc* tribunal applying international criminal law. Since then, the *ad hoc* tribunals and human rights courts have generously borrowed concepts and legal arguments from each other, sometimes with different results. The European Court of Human Rights has shown an increased propensity to consider other areas of international law in the interpretation of the European Convention, in fact viewing it as a necessity. The Court has concluded regarding the European Convention that “the Convention...cannot be interpreted in a vacuum...The Convention should so far as possible be interpreted in harmony with other rules of international law of which it forms a part...”.²⁴⁷⁷ As seen, the ECtHR in the *M.C. v. Bulgaria* case discussed the criminal elements of rape as concluded by the ICTY, alongside the criminal laws of various states. The Inter-American Court in the *Case of the Miguel Castro-Castro Prison v. Peru* referred to the jurisprudence of the tribunals on defining rape. Similarly, the ICTY in *Kunarac* discussed principles promulgated by regional human rights courts. In order to evince general principles of international law, both human rights courts and international criminal tribunals have thus analysed case law from other regimes.

The discussion on the definition of rape in international law and the distinction between rape in IHL/international criminal law and human rights law, has primarily concerned the elements of force, coercion and non-consent. In the human rights context, as developed or discussed by the ECtHR, the Inter-American Human Rights system as well as UN treaty bodies, it appears that applying a legal definition focusing on the non-consent of the victim constitutes a human rights obligation on states, since only a non-consent-based standard fully protects the individual’s sexual autonomy.²⁴⁷⁸ In early case law from the *ad*

²⁴⁷⁷ *McElhinney v. Ireland*, Judgment of 21 November 2001, ECtHR, para. 36, *Al-Adsani v. The United Kingdom*, Judgment of 21 November 2001, ECtHR, para. 55. As mentioned above, the ECtHR has, however, been rather conservative in applying IHL directly in the case law.

²⁴⁷⁸ *M.C. v. Bulgaria*, ECtHR, *Case of the Miguel Castro-Castro Prison*, IACtHR. See also Chapters 6.4.6 and 7 on the UN treaty bodies and sexual violence.

hoc tribunals, it was argued that the issue of non-consent was not applicable in situations of armed conflict, since the situation was inherently coercive. Rather, the use of force or threat of force was the focus. However, the *Kunarac* decision of the ICTY qualifies *all* instances of rape as violations of sexual autonomy, regardless of the context, and holds that a definition of rape requiring force would not reflect this. This has been affirmed in subsequent case law both by the ICTY and the ICTR. Even so, the Tribunal indicates that non-consent is more readily ascribed to the victim in armed conflicts, due to the oppressive circumstances. The context in which the international crimes occur therefore provides *evidence* as to the elements of the crime of rape. In a departure from this development, the Elements of Crimes of the ICC requires the demonstration of force or coercion, with the argument that requiring proof of non-consent in these contexts is inappropriate and irrelevant. The approaches have thus been varied.

As for the particular acts of the *actus reus*, this has not been more closely discussed by regional human rights courts, apart from the *Miguel Castro-Castro Prison* case, which found penetration of the vagina by fingers to constitute rape. The *actus reus* has, however, been thoroughly examined by the *ad hoc* tribunals and incorporated in the Elements of Crimes, indicating a similar approach, albeit with certain technical differences. Here it is clear that the nature of the rapes in the Rwanda and Yugoslavia conflicts clearly influenced the construction of the elements, opting for a wide approach to what constitutes acts of a sexual nature.

Whereas it may be logical to find a difference between the regimes as regards the role of the state in the definition of torture, does the nature of these areas of law necessarily inform e.g. the elements of rape? This is not as apparent. To determine when a cross-fertilisation can be made, it helps to look at the different premises of the regimes. Naturally, IHL and international human rights law will most fundamentally diverge where the premises conflict, e.g. regarding the deprivation of life where IHL allows the killing of combatants and human rights law places substantial restrictions.²⁴⁷⁹ Do the premises of the two regimes then differ regarding the protection of individuals against sexual violence? Does the context of a breakdown of control and a heightened level of violence in armed conflict warrant a different conceptualisation of rape? As viewed above, in the discussions by scholars and as evident in the case law of the *ad hoc* tribunals, certain sources point to the common nature of rape in all circumstances, e.g. as a form of oppression of women, thereby necessitating a harmonised approach. Others emphasise the distinct role of rape as a military tactic in armed conflicts.

²⁴⁷⁹ Koller, David, *The Moral Imperative: Toward a Human Rights-Based Law of War*, 46 Harv. Int'l L.J. 231, p. 260.

This distinctive role may, accordingly, indicate ‘force’ as more appropriate element of the offence rather than examining the consent of the victim.

It should, however, be noted that the *ad hoc* tribunals have primarily based their reasoning on the source of general principles of law, arising from domestic penal codes of rape that do not particularly concern rape in the context of armed conflict. This is an indication that there is a common basis for a definition of the offence regardless of the context. Furthermore, the definition of a crime should emanate from the perceived *harm* of an act. As continuously emphasised in relation to rape, the harm primarily constitutes a violation of an individual’s sexual autonomy. This is similar whether in international criminal law or human rights law. The element that best reflects this is non-consent. The logic of differentiating the definitions of rape between these areas is thus not as apparent as e.g. torture. It can also be questioned whether the coercive circumstances of e.g. an armed conflict or a widespread attack simply constitute *evidence* as to non-voluntary sexual acts, rather than informing the choice of elements in the definition? This was indicated in the *Kunarac* decision but is not reflected in the Elements of Crimes of the ICC.

Would a harmonisation of the definition of rape between the various bodies of law increase the protection for the victim? Would perhaps a distinction be more beneficial to the individual by recognising the specific circumstances in which sexual violence occurs? As mentioned, harmonisation in general leads to coherence and advances legal certainty for the individual. This is a particularly valid point in cases where the concept is still under development. The aim towards coherence can be noted in the work by the ICJ, regional human rights courts, UN human rights treaty bodies and special rapporteurs, increasingly examining situations from the viewpoint of both IHL and human rights law. If we presume that the protective interest of penal provisions on rape is the sexual autonomy of the individual, a harmonisation would be beneficial to provide full protection, regardless of whether the rape happens to occur in peacetime, during an armed conflict, is perpetrated by a state official or a private actor. This would avoid a situation where the protection of women is haphazard, depending on which area of law is applicable, and would allow for a greater consistency. As argued, the particular contexts may provide evidence as to the existence of rape, in the same manner as in domestic settings where rape occurs in a wide variety of contexts, e.g. in detention, at home or when walking home. This does not necessarily need to be reflected in the definition.

Perhaps the overall conclusion on harmonisation and humanisation is “that there is no rational or organized convergence between the two systems of law, that similitude and correspondence are sometimes overwhelmed by diversity, and that gaps and overlaps between their rules are a common feature of their

interactions”.²⁴⁸⁰ Though the first mention of a convergence between the regimes occurred as early as the 1970s, the approach has been hesitant and greeted with scepticism from many sides. The interpretation of the relationship between the various areas and the application of a possible convergence has been on an *ad hoc* basis, leading to a lack of foreseeability in a particular case. As a conclusion, one must not be overly eager in discovering convergences between IHL and human rights law, considering that IHL combines humanitarian concerns with military necessity, and human rights law solely focuses on the protection of the human person. One must not treat humanitarian law as the human rights law of armed conflicts, as this does not reflect the true nature of either legal regime. However, interaction has, and must continue to occur, in order to fertilise both fields of law and increase the coherence of international law. At the present time, the discussion on convergence is particularly prominent in the context of internal disturbances and conflicts, e.g. through the work of promulgating Fundamental Standards of Humanity. However, as noted, interaction is also possible and fruitful outside this scope. This has been evident in the case law and literature on the prohibition of torture and rape. In conclusion, the extent and substance of the interplay between IHL and human rights law is therefore still developing on a case by case basis and it is likely that this will grow in the area of sexual violence, since regional and universal systems are increasingly called on to examine this subject.

²⁴⁸⁰ Vinuesa, Raúl Emilio, *Interface, Correspondence and Convergence of Human Rights and International Humanitarian Law*, p. 70.

Part VI: A Cultural Perspective

11. Cultural Relativism and Obstacles to a Uniform International Definition of Rape

Previous chapters in the thesis have examined the possibilities of adopting a definition of rape within the international human rights regime, IHL and international criminal law respectively, or a coherent, harmonised definition applicable to all areas. Fundamental differences in the separate regimes may, however, place obstacles on achieving such conformity. An additional concern, albeit a dilemma of a general nature concerning particularly international human rights law, is the issue of cultural relativism and certain cultural objections to acknowledging rights and freedoms concerning sexual autonomy as universal values and corresponding international obligations. The rejection of the universality of such rights is not only a concern as to the theoretical validity of the existence of universal human rights, but can lead to practical obstacles in the implementation process of human rights related to the prohibition of rape. The difficulty in the construction of abstract obligations for states, such as in CEDAW, is that the regulations need to be translated into a wide variety of cultures and realities, ranging from societies that deny a full range of women's most fundamental rights, to more subtle means of discrimination. In the following chapter I will therefore introduce the subject of cultural relativism and discuss its potential impediment to the implementation of potential state obligations on the prohibition of rape.

11.1 Cultural Relativism and Women's Human Rights

"All people share a desire to live free from the horrors of violence, famine, disease, torture, and discrimination. Human rights are foreign to no culture and intrinsic to all nations. They belong not to a chosen few, but to all people. It is this universality that endows human rights with the power to cross any border and defy any force. Human rights are also indivisible; one cannot pick and choose among them, ignoring some, while insisting on others."²⁴⁸¹

²⁴⁸¹ Annan, Kofi, Foreword, in *The Universal Declaration of Human Rights: Fifty Years and Beyond*, eds. Yael Danieli, Elsa Stamatopoulou and Clarence J. Dias, 1999, p. v.

Culture can be defined as collective identities, from its social organisation to beliefs.²⁴⁸² It has been described as the totality of values, institutions and forms of behaviour within a society.²⁴⁸³ UN Special Rapporteur on Violence against Women, Yakin Ertürk, defines culture as “the set of shared spiritual, material, intellectual and emotional features of human experience that is created and constructed within social praxis...culture is intimately connected with the diverse ways in which social groups produce their daily existence economically, socially and politically”.²⁴⁸⁴ Culture can therefore be defining for the individual member of a group and inform a person’s moral values as well as gender patterns. Culture should not be viewed as a static fact that applies to all, but rather as an evolving process which changes over time. The meaning of a particular right can have varying implications to different people depending on their political, religious, social and cultural identities.²⁴⁸⁵ Certain circumstances may in fact reinforce cultural ideologies, such as an armed conflict, occupation or in failed states where group cohesion may rest on the role of women, e.g. their honour.²⁴⁸⁶

Law is naturally imbued with cultural influences. It is evident in legal formulations, in the severity of punishments but also in “legal silences”, i.e. which acts society consider as crimes and which it condones.²⁴⁸⁷ The varying

²⁴⁸² Raday, Frances, *Culture, Religion, and Gender, International Journal of Constitutional Law*, Vol. 1 (2003), p. 666. Binder argues that frequently a country does not ascribe to one single culture or cultural influence but that it may consist of many different cultural structures, including “...local village custom, broad religious traditions, the global state system, and multinational capital”. See Binder, Guyora, *Meaning and Motive in the Law of Homicide: Samuel H. Pillsbury's Judging Evil: Rethinking The Law of Murder and Manslaughter*, p. 220.

²⁴⁸³ The Draft Convention on Cultural Diversity, preamble. An Na'im holds that culture is “the source of the individual and communal world view: it provides both the individual and the community with the values and interests to be pursued in life, as well as the legitimate means for pursuing them”. See An Na'im, Abdullahi Ahmed, *Human Rights in Cross-Cultural Perspectives: A Quest for Consensus*, ed. An Na'im, University of Pennsylvania Press, (1992), p. 23.

²⁴⁸⁴ Implementation of General Assembly Resolution 60/251 of 15 March 2006 Entitled “Human Rights Council”, Report of the Special Rapporteur on Violence Against Women, its Causes and Consequences, Yakin Ertürk, UN Doc. A/HRC/4/34, 17 January 2007, p. 8.

²⁴⁸⁵ Donoho, Douglas Lee, *Autonomy, Self-Governance, and the Margin of Appreciation: Developing a Jurisprudence of Diversity Within Universal Human Rights*, 15 Emory Int'l L. Rev. 391, Fall 2001, p. 392.

²⁴⁸⁶ UN Doc. A/HRC/4/34, p. 24, paras. 63-64.

²⁴⁸⁷ See e.g. Shaheed, Farida, *Violence against Women Legitimised by Arguments of 'Culture' - Thoughts from a Pakistani Perspective*, p. 242.

beliefs and values related to different cultures directly affect the substantive definition of crimes and legal system at large. In fact, regarding many criminalised acts that people view as harmful, it is difficult to prove that the act is objectively harmful, independent of cultural norms. A particular society's understanding of the criminal elements of rape is therefore strictly related to the nature of that society, particularly its view on gender and sexuality and which boundaries it creates regarding women's behaviour.

The fundamental philosophy of creating universal human rights law is that such norms transcend culture and are inherent claims by every human being. They are necessarily and, by definition, universal.²⁴⁸⁸ The Universal Declaration of Human Rights proclaims that it constitutes "a common standard of achievement for all peoples and all nations". Similar wording is found in all major human rights treaties. Universality is a normative concept rather than a descriptive one, i.e. it refers to the intention of norm-makers.²⁴⁸⁹ Universalists argue that human rights law concerns itself with individuals and should not be circumvented by states or ideologies.²⁴⁹⁰ While recognising that cultures may have unique traits, universalists maintain that individual similarity should prevail over such differences.²⁴⁹¹ However, the idea that norms can be unattached to culture is not uncontroversial. The notion of a relativist approach to international human rights law largely developed as a reaction to colonialism, where such external pressure as the human rights movement was seen as a new form of "moral imperialism".²⁴⁹² The historical context of the creation of human rights law arguably reflects Western ideals and morals, mimicking the political cultures of these societies, which contradict the universal applicability of the rights to all cultures.²⁴⁹³

²⁴⁸⁸ Brems, Eva, *Human Rights: Universality and Diversity*, p. 5.

²⁴⁸⁹ Ibid, p. 4.

²⁴⁹⁰ In fact, one cannot automatically presume that government objectives represent the cultural beliefs of its citizens. Further, representatives of different cultures and legal systems have been involved in the drafting process of several international human rights instruments, which build on and reflect the principles of the UDHR.

²⁴⁹¹ Bell, Lynda, Nathan. Andrew, Peleg, Ilan, *Negotiating Culture and Human Rights*, Columbia University Press, (2001), p. 5.

²⁴⁹² Ibid, p. 5. See also Donnelly, Jack, *Universal Human Rights in Theory and Practice*, Cornell (2003), p. 99. Rights are accordingly a historical construct, with a distinctive European point of view.

²⁴⁹³ An-Na'Im, Abdullahi, *Culture and Human Rights*, in the East Asian Challenge For Human Rights, Cambridge University Press, (1999), p. 153, Donnelly, Jack, *Universal Human Rights in Theory and Practice*, Cornell (2003), p. 99.

The rejection of the universality of rules varies in degree. Cultural relativism with regard to human rights law can be described as a continuum.²⁴⁹⁴ At one end of the spectrum one finds the radical form of relativism which entails the belief that there are no universal legal or moral standards against which human practices can be judged, claiming culture to be the true source of legal rules. Law is seen as a form of cultural expression which is not readily transplantable from one culture to another.²⁴⁹⁵ At the other end of the spectrum we find the radical universalists arguing that culture is entirely irrelevant to the application of rights. Solely the radical approach to relativism aims at the exclusion of non-Western cultures from the international human rights system. The more moderate approaches are rather claims of inclusion, conditional on that the system accommodates cultural differences.²⁴⁹⁶ The majority of states ratify international human rights instruments and voluntarily agree to be bound by the same universal legal standards that some reject in principle. The reason behind this is principally that states generally do not disagree with the relevance of human rights in the administration of their state. As Dinah Shelton correctly argues, in most situations in international law, the problem is one of ensuring compliance by states that have freely consented to the obligations in question and not one of imposing obligations on dissenting states.²⁴⁹⁷ A *qualitative* aspect of relativism also exists concerning the substance of the list of human rights, the interpretation of particular rights and the manner in which such rights are implemented.²⁴⁹⁸ In fact, the radical relativist argument is not as frequently raised as are objections to *specific* rights or the content or interpretation of such.

As the scope and substance of human rights evolves and becomes more ‘intrusive’ in the traditionally wide sphere of states’ internal affairs, the references to cultural relativism have grown in force. Yakin Ertürk warns that the threat of cultural relativism to the universality of human rights is not outdated, but human rights are in fact increasingly challenged by the “cultural

²⁴⁹⁴ Donnelly, Jack, *Universal Human Rights in Theory & Practice*, pp. 90-91. See, also, An Na'im, Abdullahi Ahmed, *Human Rights in Cross-Cultural Perspectives: A Quest for Consensus*, p. 4.

²⁴⁹⁵ UN Doc. E/CN.4/2003/75, para. 62. It is held that the home has become the “repository of a society’s cultural traditions and values in the face of the colonial onslaught. As a result any attempt to change the norms and practices of the family is seen as an assault on the culture as a whole.” Ibid, para.63.

²⁴⁹⁶ Brems, Eva, *Enemies or Allies? Feminism and Cultural Relativism as Dissident Voices in Human Rights Discourse*, p. 144.

²⁴⁹⁷ Shelton, Dinah, *International Law and 'Relative Normativity'*, p. 152. It should also be born in mind that customary norms are established through reference to existing state practices and policies.

²⁴⁹⁸ Donnelly, Jack, *Universal Human Rights in Theory and Practice*, p. 90.

discourse”.²⁴⁹⁹ This was evident in the discussions at the Fourth World Conference on Women in Beijing in 1995, where several countries held that the Platform of Action was contrary to Islam.²⁵⁰⁰ The Sudanese official e.g. emphasised the principle of non-interference in the internal affairs of the state and criticised the “trend not to recognise cultural diversities on the global level and the tendency to impose one set of cultural values as an indispensable and solitary model”, among other issues denouncing absolute sexual freedom.²⁵⁰¹

The UN World Conference on Human Rights in Vienna in 1993 is another example of the dispute regarding the universal foundation of human rights law. At the regional preparatory meeting in Asia, several Asian governments adopted the Bangkok Declaration as a statement demonstrating their approach to human rights. It stated that “while human rights are universal in nature they must be considered in the context of a dynamic and evolving process of international norm-setting, bearing in mind the significance of national and regional particularities and various historical, cultural and religious backgrounds”.²⁵⁰² As a response to this perceived challenge to undermine the entire system of international law, the final document of the Vienna Conference clearly emphasised the universality of the rules: “While the significance of national and regional particularities must be borne in mind, it is the duty of States, regardless of their political, economic and cultural systems, to promote and protect all human rights and fundamental freedoms”.²⁵⁰³ The Vienna Declaration appears to suggest a balance between universality and local diversity even though the former constitutes the basic premise.

If we accept that certain rights are of a universal nature, can we also at the same time accommodate regional or national diversity? The challenge is to find a balance to ensure that human rights are sufficiently universal to make them appropriate subjects for meaningful international regulation, yet consistent with the diversity that exists globally.²⁵⁰⁴ Proponents of a wide flexibility in domestic implementation of international standards argue that while human rights are

²⁴⁹⁹ UN Doc. A/HRC/4/34, 17 January 2007, p. 8.

²⁵⁰⁰ See e.g. Bahrain, Iran, Sudan and the United Arab Emirates.

²⁵⁰¹ Statement of the Delegation of the Republic of the Sudan at The Fourth World Conference on Women, Beijing, China, 4-15 Sept. 1995, Presented By H.E. Mrs. Mariam Osman Sir El Khatim, State Minister for Social Planning, Head of Delegation.

²⁵⁰² Final Declaration of the Regional Meeting for Asia of the World Conference on Human Rights, adopted 7 April 1993, UN. Doc. A/Conf.157/ASRM/8-A/Conf.157/PC/59 (1993).

²⁵⁰³ Vienna Declaration, para. 5.

²⁵⁰⁴ Donoho, Douglas Lee, *Autonomy, Self-Governance, and the Margin of Appreciation: Developing a Jurisprudence of Diversity Within Universal Human Rights*, p. 394.

universal in nature, they must be considered in light of a dynamic process of establishing international norms and that one must bear in mind the significance of historical, cultural and religious differences on the national level.²⁵⁰⁵ As such, it is held that rights only gain value when applied contextually. This notion is largely based on the empirical understanding that moral values depend on the particulars of each society.²⁵⁰⁶ Abdullahi An Na'im recognises that it is not possible, nor desirable, for an international system of human rights to be culturally neutral.²⁵⁰⁷ Many states seem to share the idea that local variations are not in opposition to universalism, as viewed in the agreement on the Vienna Declaration. In fact, many academics insist that the issue of cultural relativism raises an important issue in that the implementation and interpretation of rights may vary culturally without undermining their basic universal nature.²⁵⁰⁸ A certain level of margin of appreciation is e.g. given to states when implementing human rights norms. This, in fact, allows a subsidiarity aspect to universality, i.e. that culture and context can affect the substance of standards.²⁵⁰⁹

Feminist scholars have now begun to speak of a "culturally sensitive universalism", acknowledging the criticism of third world feminists.²⁵¹⁰ Others speak of an "inclusive universality", implying the need to accommodate contextual particularities.²⁵¹¹ There are, however, risks with inclusive universality, as with relativism in general, in that it can be invoked to justify exclusion of certain groups, e.g. women.²⁵¹² The increasing need to acknowledge contextual elements in human rights can similarly be seen in for example the feminist discourse and the contextual approach to sexual violence, e.g. armed conflicts. Feminist and cultural relativist critique of international law are in fact

²⁵⁰⁵ Banda, Fareda, *Global Standards: Local Values*, Oxford University Press, 17 Intl.J.L. & Pol'y & Fam. 1, April 2003, p. 1.

²⁵⁰⁶ Donoho, Douglas Lee, *Autonomy, Self-Governance, and the Margin of Appreciation: Developing a Jurisprudence of Diversity Within Universal Human Rights*, p. 401.

²⁵⁰⁷ An-Na'im, Abdullahi Ahmed, *State Responsibility Under International Human Rights Law to Change Religious and Customary Laws*, in *International Human Rights Law, in Human Rights of Women*, ed. Rebecca Cook, University of Pennsylvania Press, (1994), p. 173. An Na'im sees the relationship between local culture and international law as "a genuinely reciprocal global collaborative effort".

²⁵⁰⁸ Donoho, Douglas Lee, *Autonomy, Self-Governance, and the Margin of Appreciation: Developing a Jurisprudence of Diversity Within Universal Human Rights*, p. 405.

²⁵⁰⁹ Brems, Eva, *Human Rights: Universality and Diversity*, p. 15.

²⁵¹⁰ Engle, Karen, *International Human Rights and Feminisms: When Discourses Keep Meeting*, in *International Law: Modern Feminist Approaches*, ed. Doris Buss, Ambreena Manji, Hart Publishers, (2005), p. 50.

²⁵¹¹ Brems, Eva, *Human Rights: Universality and Diversity*, p. 308.

²⁵¹² *Ibid.*, p. 322.

similar in certain respects.²⁵¹³ Eva Brems argues that the “human” in human rights often is presented as “an abstract, decontextualised individual”. Both perspectives find that the abstract human being and dominant discourse is based on Western male culture, thereby excluding the perspective of other discourses.²⁵¹⁴ However, whereas feminists tend to argue for the enlargement of international legal regulation, cultural relativists are concerned with narrowing international law, and excluding certain areas from regulation.²⁵¹⁵ According to Eva Brems, feminism, largely arising from Western countries, is not viewed as threatening as cultural relativism, the latter which arguably is raised as a justification for human rights violations.²⁵¹⁶

11.1.1.1 Relativity of Women’s Rights

The UN Special Rapporteur on Violence against Women notes that cultural relativism often is used as an excuse to permit discriminatory practices against women.²⁵¹⁷ It is widely understood in international law that gender inequality is deeply embedded in tradition, history and culture and as a result largely goes unpunished.²⁵¹⁸ Controlling women’s sexuality is often the underlying motivation for cultural and political justifications to perpetuate traditional gender roles and violations of women’s rights. In a report by the UN Special Rapporteur, it is noted that oppressive practices are perpetuated principally owing to the underlying ideology in various cultures that the sexual identity of a

²⁵¹³ An-Naïm, Abdullahi Ahmed, *State Responsibility Under International Human Rights Law to Change Religious and Customary Laws*, p. 171. Peach, Lucinda Joy, *Are Women Human?*, in *Negotiating Culture and Human Rights*, eds. Bell, Lynda, Nathan. Andrew, Peleg, Ilan, Columbia University Press, (2001), p. 157.

²⁵¹⁴ Brems, Eva, *Human Rights: Universality and Diversity*, p. 316.

²⁵¹⁵ Charlesworth, Hilary & Chinkin, Christine, *The Boundaries of International Law: A Feminist Analysis*, p. 225.

²⁵¹⁶ Brems, Eva, *Enemies or Allies? Feminism and Cultural Relativism as Dissident Voices in Human Rights Discourse*, p. 149.

²⁵¹⁷ UN Doc. E/CN.4/2002/83, para. 1. See also Fried, Susana, *Controlling Women’s Sexuality: The Case for Due Diligence*, p. 251, who notes that violence against women are justified in the name of culture, while culture is defined in terms articulated by those in power.

²⁵¹⁸ CCPR General Comment 28, Equality of Rights Between Men and Women (article 3). See also Bunch, Charlotte, *The Progress of Nations Report*, UNDP, (1997), *The Intolerable Status Quo: Violence Against Women and Girls*, p.41. As Raday asserts: “...religion is derived from culture, and gender is, in turn, derived from both culture and religion”. Raday, Frances, *Culture, Religion, and Gender*, p. 665. As Lucinda Joy Peach notes, women are often excluded from participating in the establishment of most cultural values which dictate how they live their lives. See Peach, Lucinda Joy, *Are Women Human?*, p. 173.

woman must be curtailed. The protection of female sexuality is responsible for restrictive laws in many countries and women who transgress the boundaries of appropriate sexual behaviour are often subject to violence.²⁵¹⁹ It is no surprise that these clashes occur, since the normative system of the human rights doctrine is secular in nature. Religious or traditional cultures, however, were formulated in a patriarchal context at a time when individual human rights, particularly women's rights, had not yet reached a global urgency.²⁵²⁰ A problem in eradicating such cultural norms and practices is that violence against women frequently occurs in the private sphere, into which international and domestic legal systems have been reluctant to delve.

Rhadika Coomaraswamy acknowledges that all cultures to a certain extent have practices that deny women their rights and that there is a risk that cultural practices that discriminate women are ascribed to solely developing countries or immigrant communities.²⁵²¹ The clash between culture and women's rights is most frequently raised regarding traditional harmful practices that form part of a historical custom, such as FGM or sati. Discriminatory laws based on gender stereotypes and prejudices are also included.²⁵²² Yakin Ertürk advises that there be no distinction between so-called harmful traditional practices and "non-traditional practices, such as rape and domestic violence", a distinction previously upheld by the UN.²⁵²³ Such a division fails to acknowledge the impact of culture on the existence of sexual violence and the predominantly female victim. It also fails to acknowledge that no society is void of culture and that the most dominant form of culture is influenced by patriarchal attributes which lead to high levels of violence against women.²⁵²⁴ Intimate violence is therefore a

²⁵¹⁹ UN Doc. E/CN.4/2002/83, para. 99.

²⁵²⁰ Frances Raday also observes that it was not until the 20th century that women's rights to equality started to gain momentum, whereas the philosophy of traditionalist cultures and the monotheistic religions were developed millennia earlier. Raday, Frances, *Culture, Religion, and Gender*, p. 3.

²⁵²¹ UN Doc. A/HRC/4/34, p. 2. Gender-based violence can still be culture-specific. See Fried, Susana, *Controlling Women's Sexuality: The Case for Due Diligence*, p. 259.

²⁵²² Report of the Special Rapporteur on Violence against Women, its Causes and Consequences, Ms. Rhadika Coomaraswamy, Submitted in Accordance with Commission on Human Rights Resolution 2001/49, Cultural Practices in the Family that are Violent Towards Women, UN Doc. E/CN.4/2002/83, 31 January 2002, para. 65-69.

²⁵²³ UN Doc. A/HRC/4/34, 17 January 2007, para. 33. See Harmful Traditional Practices Affecting the Health of Women and Children, Human Rights Fact Sheet No. 23, 1995.

²⁵²⁴ Shaheed, Farida, *Violence against Women Legitimised by Arguments of 'Culture'-Thoughts from a Pakistani Perspective*, p. 241, Copelon, Rhonda, *International Human Rights Dimensions of Intimate Violence: Another Strand in the Dialectic of Feminist Lawmaking*, 11 Am. U.J. Gender Soc. Pol'y & L. 865, (2003), p. 871.

“cultural practice” in most societies. As such, culture in most states creates the basis for violence against women and is not solely restricted to certain regions of the world.

Noting the high levels of rape in the Western world, despite sufficient legal and institutional measures in place in such countries to handle sexual assaults, Ertürk concludes that “it is hard not to perceive these violations as harmful social traditions rather than merely as the crimes of individual, deviant perpetrators”.²⁵²⁵ Since the root causes of “traditional” practices and sexual violence stem from the same ideologies, it is unhelpful to divide gender-based violence in such a manner, which solely serves to ascribe the problems to cultures in certain regions of the world. The occurrence of rape may not be viewed by all as a cultural phenomenon because of its universal existence. However, the widespread nature of a particular form of violence does not mean that it is not rooted in culture. In fact, the UN Secretary-General has discussed “date-rape” as tied to cultural norms. Accordingly, dating is a “culturally specific form of social relations between women and men, with culturally constructed expectations”.²⁵²⁶ Annan hereby notes that, though violence against women is universal, the manner in which it is expressed depends on the culture in question. Charlesworth and Chinkin also argue that all social values and hierarchies can be described as forms of culture.²⁵²⁷ Accomodating culture in the international system then becomes a difficult exercise since by giving culture a ‘special’ status, we are precluded from assessing any culture in relation to gender-discriminatory practices.

Furthermore, according to the UN Secretary-General’s Special Representative on Sexual Violence in Conflict, the prevalence of sexual violence during armed conflicts has long been viewed as a cultural tradition rather than a tactic of choice. Accordingly: “[c]ultural relativism legitimizes the violence and discredits the victims, because when you accept rape as cultural, you make rape inevitable. This shields the perpetrators and allows world leaders to shrug off sexual violence as an immutable...truth.”²⁵²⁸

Sexuality and culture are highly entwined. As asserted by Jeffrie Murphy: “[t]he importance of sex is essentially cultural...” and the particular wrong of penetration of the sexual organs stems from our culture surrounding “sexuality

²⁵²⁵ UN Doc. A/HRC/4/34, para. 33.

²⁵²⁶ In-depth study on all forms of violence against women. Report of the Secretary-General, UN Doc. A/61/122/Add.1, 6 July 2006, para. 83.

²⁵²⁷ Charlesworth, Hilary & Chinkin, Christine, *The Boundaries of International Law: A Feminist Analysis*, p. 224.

²⁵²⁸ “Rape must never be minimized as part of cultural traditions, UN envoy [Margot Wallström] says”, UN News, 25 March 2010.

with complex symbolic and moral baggage”.²⁵²⁹ Research has shown that cultural differences, in terms of public misconceptions of rape and acceptance of rape myths, are significantly related to restrictive beliefs of the social roles and rights of women.²⁵³⁰ Independence by the individual in decisions regarding his/her sexual life challenges the social power structure in a society. A general survey conducted by the UN Commission on Human Rights of municipal legal systems revealed widespread gender-discrimination codified in criminal laws regarding sexual violence around the world. This included societies where rape was defined as a crime against the community and not against the individual victim, rape defined as acts committed by a man against a woman who is not his wife, evidentiary laws which accord less weight to evidence if presented by a woman, evidentiary laws which require women to provide corroborating testimony by men and substantive laws which provide that a married woman who does not prove that she has been raped can be charged with adultery.²⁵³¹ The legality of marital rape is an expression of the cultural impact on the understanding of the nature of rape since it affirms cultural notions of conjugal obligations. This may be expressed through legislation either expressly obliging a wife to engage in sexual intercourse or generally obey her husband, or a criminal code where rape is explicitly excluded in cases of forceful sexual relations between spouses. The Mexican Supreme Court in a case in 1997 e.g. held that a husband’s rape of his wife did not legally constitute rape since marriage is legally premised on a permanent right of access to conjugal relations.²⁵³² The Yemen Personal Status Act No. 20 of 1992 states that a wife must obey her husband and must permit him licit intercourse.²⁵³³

²⁵²⁹ Murphy, Jeffrie, *Some Ruminations on Women, Violence and the Criminal Law*, p. 214.

²⁵³⁰ Shalhoub-Kevorkian, Nadera, *Towards a Cultural Definition of Rape- Rape and Public Attitudes*, Women’s Studies International Forum, Vol. 22, No.2, 157, (March 1999), p. 158.

²⁵³¹ UN Doc. E/CN.4/Sub.2/1998/13, para. 96.

²⁵³² UN Doc. E/CN.4/2002/83, para. 101.

²⁵³³ Article 40. Rape has been one of the forms of violence in the home that has received the least attention, the extent of the problem unknown coupled with the reluctance of the state to interfere in the highly intimate relations of the married couple. A committee on the reform of the rape legislation in England e.g., held that it did not see marital rape as a serious social problem. Policy Advisory Committee, Criminal Law Revision Committee, Working paper on Sexual Offences, HMSO, (1980), para. 32. Even among academics, marital rape has been viewed as a fictional problem, evident in the statement of a Professor Shorter arguing: “In our own time, a married woman who dislike’s her husband’s advances can leave the marriage”. Shorter, Edward, *Women’s Bodies: A Social History of Women’s Encounter with Health, Ill-Health and Medicine*, Transaction Publishers, (1997), p. 3.

A cultural influence on the definition of rape also includes gender stereotypes in the interpretation of the elements of force or non-consent. Definitions in many countries clearly aim to curtail women's sexuality or display preconceived notions of the appropriate behaviour of either gender. This might include conclusions as to consent based on the victim's clothes or behaviour or a lack of resistance. Though the discussion on cultural restraints on rights related to the individual's sexuality primarily focuses on the topic from the standpoint of the female victim, and cultural relativism as an opposition to women's rights, the male victim must not be overlooked. As mentioned previously, many domestic jurisdictions have restricted rape to the female victim because of cultural presumptions on gender relations. Male rape is therefore often not acknowledged as a possibility, culturally and legally, and the shame is considered particularly grave as a reflection of society's view on male sexuality. Thus, because many domestic definitions of rape reflect a cultural restriction of female sexuality, leading to unequal obstacles for the female victim, the male victim is often simply ignored. Culture may consequently, depending on the country, dictate that men, married women, women who marry the perpetrator, women with a promiscuous past such as prostitutes, or who transgress appropriate female behaviour, are not considered potential victims of rape since they do not experience the *harm* of rape.

11.1.1.2 Conflicts of Rights

What happens when cultural norms conflict with the protection of women's rights? Cultural diversity is viewed as a fundamental value to be protected by the international human rights system.²⁵³⁴ This includes the right for everyone to take part in cultural life.²⁵³⁵ However, it cannot restrict the rights of others. Article 4 of the Universal Declaration on Cultural Diversity by UNESCO states:

“The defense of cultural diversity is an ethical imperative, inseparable from respect for human dignity. It implies a commitment to human rights and fundamental freedoms, in particular the rights of persons belonging to minorities and those of indigenous peoples.

²⁵³⁴ UDHR: Articles 22 and 27, ICESCR: Articles 1 and 15, ICCPR: Article 27. See also The Convention on the Rights of the Child; the International Convention on the Elimination of All Forms of Racial Discrimination; the Declaration on Race and Racial Prejudice; the Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief; the Declaration on the Principles of International Cultural Cooperation; the Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities; the Declaration on the Right to Development; the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families; and the ILO Convention No. 169 on the Rights of Indigenous and Tribal Peoples.

²⁵³⁵ See e.g. Article 15 of the ICESCR.

No one may invoke cultural diversity to infringe upon human rights guaranteed by international law, nor to limit their scope.”

Several human rights instruments explicitly state that cultural attitudes cannot be justified in maintaining discriminatory practices. In General Comment No. 28, the UN Human Rights Committee asserts that “[s]tates parties should ensure that traditional, historical, religious or cultural attitudes are not used to justify violations of women’s rights to equality before the law and to equal enjoyment of all Covenant rights”.²⁵³⁶ Article 5 of CEDAW calls on all state parties “[t]o modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary and all other practices which are based on the idea of inferiority or the superiority of either of the sexes or on the stereotyped roles for men and women”.²⁵³⁷ The Convention was the first international instrument to list tradition and culture as fundamental causes in creating gender roles. Yakin Ertürk has also asserted that “[s]tates cannot invoke any cultural discourses, including notions of custom, tradition or religion, to justify or condone violence against women”.²⁵³⁸ The 1995 Beijing Platform for Action, the document adopted at the UN Beijing Conference on Women’s Human rights, also obliges governments to refrain from invoking customs, traditions or religious considerations to avoid their responsibilities with respect to the elimination of discrimination against women.²⁵³⁹ In the Vienna Declaration, the issue of women’s rights and culture is addressed in broad terms, calling for “the eradication of any conflicts which may arise between the rights of women and the harmful effects of certain traditional or customary practices, cultural prejudices and religious extremism”.²⁵⁴⁰

It is thereby generally accepted within the international human rights regime that while a right to culture and religion exists, such claims cannot be used to restrict women’s human rights. While cultural values and morals should be taken into account, such values must not discriminate women and ought to be consistent with human rights standards.²⁵⁴¹ As such, the theoretical foundation

²⁵³⁶ CCPR General Comment No. 28, Equality of Rights Between Men and Women, with regard to Article 3 and 27, guaranteeing minority culture rights.

²⁵³⁷ UN Doc. A/RES/S-23/3, 16 November 2000, para. 3.

²⁵³⁸ UN Doc. A/HRC/4/34, 17 January 2007, para. 30.

²⁵³⁹ The 1995 Beijing Platform for Action, para. 125 a.

²⁵⁴⁰ The Vienna Declaration, para. 38.

²⁵⁴¹ Banda, Fareda, *Global Standards: Local Values*, p. 4. See, however, the ambivalent attitude of the UN Human Rights Committee in *Sandra Lovelace v. Canada*, Comm. No. R.6/24, UN. Doc. Supp. No. 40 (A/36/40) at 166 (1981), where the Committee failed to expressly condemn gender discriminatory traditional rules of the Maliseet Indians.

for cultural relativism at its core is clearly rejected. However, issues of culture still arise beyond the general discussion of the universal application of human rights, through the national implementation of states' human rights obligations and e.g. through the use of a cultural defence in criminal proceedings on the national level. One may therefore say that the debate has moved from the general acceptance of universal human rights to the national interpretation of these rights. In relation to the prohibition of sexual violence, this concerns the domestic application of the prohibition of torture, the non-discrimination principle and the right to privacy. These rights are not controversial in theory but in application demonstrate major cultural differences.

11.2 Cultural Relativism and International Criminal Law

The issue of cultural relativism is most frequently raised as a consideration regarding international human rights law and its universal application. It has been argued that the cultural relativist critique has been largely absent from the debate on international criminal law.²⁵⁴² However, the same concerns are prevalent in the development of international criminal law and the determination of its scope, since it in part draws inspiration from human rights norms.²⁵⁴³ The argument is raised that since culture informs which acts are criminalised in a society, ethical and societal norms which are not universally accepted should not be a part of the international criminalisation process. It must therefore avoid becoming a culturally biased value system.²⁵⁴⁴

Is there a risk that the body of international criminal law has its roots in subjective notions of justice, or that the ICC will be informed by such considerations? The list of crimes in the Rome Statute primarily stems from the Nuremberg trials and their closer definitions from the 1949 Geneva Conventions, the UN Genocide Convention and the jurisprudence of the *ad hoc* tribunals. The crimes are generally considered to represent customary international law and therefore a reflection of an international consensus. They are seen as setting back

²⁵⁴² McGoldrick, Dominick, Rowe, Peter, Donnelly, Eric, *The Permanent International Criminal Court: Legal and Policy Issues*, p. 462.

²⁵⁴³ Cultural relativism is rarely raised as a challenge to IHL, which is often explained by the nature of IHL which has a broad participation of states, a unified conventional basis and the special role of the ICRC. The substance of IHL also seems to be less provocative to participating member states and is less frequently applied due to its exceptional nature. It also does not regulate the relationship between the state and its citizens, which may be particularly sensitive. See Provost, René, *The International Committee of the Red Wicket? The Diversity Debate and International Humanitarian Law*, 40 *Isr. L. Rev.* (2007), p. 628.

²⁵⁴⁴ Bagaric, Mirko & Morss, John, *In Search of Coherent Jurisprudence for International Criminal Law: Correlating Universal Human Responsibilities with Universal Human Rights*, p. 160.

the vital interests of the victim and there is a high degree of consensus as to which crimes requires condemnation and prosecution on the international level. A large number of states had input in the creation of the Rome Statute during the PrepCom meetings, representing both common law and civil law systems. It is, however, argued that non-western legal traditions are not represented in the Rome Statute to any significant degree.²⁵⁴⁵ Whether the definitions of the crimes have reached the same status of customary law depends on the crime in question, but it is less certain that the definition of rape has reached such a consensus or customary level. The issue of cultural relativism is therefore also pertinent to various aspects of international criminal law, despite its strong customary heritage.

The framework of the ICC and the Rome Statute to a certain extent allows for cultural diversity through its complementarity regime, and its possibility to consider other forms of justice than retributive justice, e.g. negotiation and reconciliation, taking into consideration local customs and norms. However, though it leaves room for diversity, its approach to the crimes and their definitions is decidedly non-relativist in that it appears that countries must implement the list of international crimes and cannot adopt overly restrictive definitions. It should also be noted that no reservations to the Rome Statute are allowed, in order to ensure a uniform system of obligations.²⁵⁴⁶

The notion that an international definition of rape is developing may, on its face, seem impossible. As Boon concludes: “One of the central problems in creating effective measures to criminalize, prosecute, and deter sexual atrocities in international law arises from the range of cultural and political assumptions that inform municipal criminal law”.²⁵⁴⁷ The difficulty in reaching an internationally accepted definition of rape was evident in the negotiations concerning sexual crimes within the ICC Statute and Elements of Crimes.²⁵⁴⁸ Several Arab states, as well as a few Catholic countries, attempted to restrict the scope of the elements of gender crimes.²⁵⁴⁹ The opposition included the

²⁵⁴⁵ McGoldrick, Dominick, Rowe, Peter, Donnelly, Eric, *The Permanent International Criminal Court: Legal and Policy Issues*, p. 464.

²⁵⁴⁶ Article 120 of the Rome Statute.

²⁵⁴⁷ Boon, Kristen, *Rape and Forced Pregnancy Under the ICC Statute: Human Dignity, Autonomy, and Consent*, p. 637.

²⁵⁴⁸ McGoldrick, Dominick, Rowe, Peter, Donnelly, Eric, *The Permanent International Criminal Court: Legal and Policy Issues*, p. 462.

²⁵⁴⁹ Roach, Steven, *Arab States and the Role of Islam in the International Criminal Court*, p. 143, Hebel, Herman von & Kelt, Maria, *Some Comments on the Elements of Crimes for the Crimes of the ICC Statute*, Yearbook of International Humanitarian Law, Vol. 3, (2000), p. 275.

criminalisation of enforced pregnancy, since it arguably could result in an international challenge of anti-abortion laws in certain countries.²⁵⁵⁰ The issue of non-consent in connection to sexual violence caused the most serious controversies owing to various cultural and legal assumptions on women's sexuality. For example, a number of delegates from the Middle East insisted that all sex during marriage by definition is consensual and further required that the provisions of the Statute contain a higher standard of proof of non-consent, such as evidence of physical resistance.²⁵⁵¹ Compromises were therefore made during the drafting of the Statute because of the varying legal and religious traditions of the participating countries.

Will the implementation process cause particular problems for certain states? Certain scholars propose that the Court's complementary approach will do the opposite of encouraging repressive states to change its policies.²⁵⁵² The question whether Islamic values can be reconciled with the international criminal justice system has been raised by several authors.²⁵⁵³ It is unlikely that the Islamic approach to rape, concerning both its definition and procedural rules will be found to abide by the ICC's approach. This would thus require the revoking of e.g. legislation that requires male witnesses to rape, incorporating a gender-neutral definition of the offence and repealing legislation that exempts marital rape.

The precarious situation when discussing such broad and uncertain terminology as e.g. non-consent or force in international jurisdiction is that it arguably requires an understanding of human relations within a particular culture.²⁵⁵⁴ According to such an argument, the elements of a definition of rape

²⁵⁵⁰ PCNICC/1999/WGEC/DP.39, Proposal submitted by Bahrain, Iraq, Kuwait, Lebanon, the Libyan Arab Jamahiriya, Oman, Qatar, Saudi Arabia, the Sudan, the Syrian Arab Republic and the United Arab Emirates concerning the elements of crimes against humanity, Third Session of the Preparatory Commission of the International Criminal Court (29 November - 17 December 1999). See also discussion by Nill, David, *National Sovereignty*, p. 139, Arsanjani, Mahnoush H, *The Rome Statute of the International Criminal Court*, p. 40.

²⁵⁵¹ Boon, Kristen, *Rape and Forced Pregnancy Under the ICC Statute: Human Dignity, Autonomy, and Consent*, p. 639.

²⁵⁵² Roach, Steven, *Arab States and the Role of Islam in the International Criminal Court*, p. 144.

²⁵⁵³ Ibid, p. 154. Steven Roach refers to the problem that exists in many Arab states where there is an apparent absence of specific elements of crimes in the penal codes, and the codes rather refer to the use of *Shariah*. According to Roach, *Shariah* is an unfinished form of constitutional rule since it lacks comprehensive codification.

²⁵⁵⁴ Fitzgerald, Kate, *Problems of Prosecution and Adjudication of Rape and other Sexual Assaults Under International Law*, p. 644.

must always be interpreted in light of the culture in which the situation occurs. This would become more difficult in an international court, such as the ICC, which has jurisdiction over crimes occurring in over 100 member states and additionally has the ability to prosecute individuals in non-member states, as opposed to the *ad hoc* tribunals which have dealt with assault occurring in a particular setting and culture. This raises the question not only if the definition of rape can be applied in a universal context but also how familiar concepts such as non-consent will be applied.²⁵⁵⁵ Since concept such as ‘force’ or ‘non-consent’ may be interpreted in a liberal or conservative manner, and may in fact even be given similar interpretations, this must also be clarified.

An interesting point is that in several cases of the *ad hoc* tribunals, general principles of law have been applied through a review of domestic law and jurisprudence in aiming to define rape. The application of this source of law must not solely look to civil and common law systems but also the Islamic world as well as the Asian and African contexts, which are frequently overlooked in practice.²⁵⁵⁶ In *Furundzija*, the ICTY was careful to include a variety of systems and emphasised its importance:

“Whenever international criminal rules do not define a notion of criminal law, reliance upon national legislation is justified, subject to the following conditions: (i) unless indicated by an international rule, reference should not be made to one national legal system only, say that of common law or that of civil law States. Rather, international courts must draw upon the general concepts and legal institutions common to all the major legal systems of the world”.²⁵⁵⁷

A similar process was undertaken in the *Akayesu* and *Kunarac* cases, albeit in the first mentioned case not as transparently as by the ICTY. The ICTR and ICTY have thus found a common ground among the world’s legal systems in defining rape. Similar concepts can thus perhaps be evinced, though certain elements will be more prone to cultural variations and critique.

²⁵⁵⁵ According to Fitzgerald, defining non-consent in the international context also requires awareness of the prejudicial approach to the female victim in traditional interpretations of which behaviour constitutes consent. Fitzgerald, Kate, *Problems of Prosecution and Adjudication of Rape and other Sexual Assaults Under International Law*, p. 644, Asp, Petter, *M.C. v. Bulgaria - A Swedish Perspective*, p. 210.

²⁵⁵⁶ Cassese, Antonio, *International Criminal Law*, (2008), p. 23.

²⁵⁵⁷ *Prosecutor v. Furundzija*, Judgment of 10 December 1998, para. 178.

11.3 Culture and *Mens Rea* – A Criminal Defence

An additional hurdle to the effective prosecution of sexual violence and implementation of international rules is the possibility of a cultural defence in domestic criminal law in various states. Culture may affect several steps of the justice system - from the definition of rape to decisions on arrest and prosecution, cultural evidence at trial and the evaluation of defense, e.g. insanity or provocation.²⁵⁵⁸ A review of recent case law from national courts shows that cultural concerns are used as a consideration in criminal law cases, particularly regarding the evaluation of *mens rea* and in the sentencing phase.²⁵⁵⁹ This primarily concerns cases of violence against women, e.g. honour killings and rape, and has been applied in jurisdictions in various countries as a “cultural defence”, though not usually a formalised tool of defence. This line of argumentation allows judges and attorneys to consider the cultural and religious background when determining the responsibility of the defendant in assessing his mental state, *mens rea*. The fact that the defendant did not know that his/her actions were wrong or could not control his behaviour due to his background can affect the finding of *culpa* or affect sentencing.²⁵⁶⁰ As such, the criminal behaviour is interpreted according to the cultural parameters of the perpetrator and is partially mitigated because the individual is, morally, less culpable. This pertains to situations where the individual belongs to a minority or lives in a foreign culture, yet still conducts himself in accordance with the norms of his own culture.²⁵⁶¹ The offence has to be connected to the cultural background and entail that the moral status of the offence is different in that culture.

The discussion on the application of cultural defence surfaced in law journals in the United States in the 1980s subsequent to several cases in national courts where the defendants invoked tradition as mitigating circumstances of the crime.²⁵⁶² The principle objection to a cultural defense is the assimilation argument - that everyone should be held to the same standard, otherwise violating the principle of equality.²⁵⁶³ Furthermore, it may promote stereotypes of certain cultures. Feminist authors have heavily criticised the notion as legitimising violence against women because of tradition and that the defence

²⁵⁵⁸ Dundes Renteln, Alison, *The Cultural Defense*, Oxford University Press, (2004), p. 7.

²⁵⁵⁹ Phillips, Anne, *When Culture Means Gender: Issues of Cultural Defence in the English Courts*, *Modern Law Review* 66 (4), 510-531, (17 July 2003), p. 526.

²⁵⁶⁰ Kim, Nancy, *Blameworthiness, Intent, and Cultural Dissonance: The Unequal Treatment of Cultural Defense Defendants*, 17 U. Fla. J.L. & Pub. Pol'y 199, August, (2006), p. 203.

²⁵⁶¹ Phillips, Anne, *When Culture Means Gender: Issues of Cultural Defence in the English Courts*, p. 512.

²⁵⁶² *Ibid*, p. 510.

²⁵⁶³ Dundes Renteln, Alison, *The Cultural Defense*, p. 193.

serves to enforce patriarchal practices and ideals. Because women are considered a subordinate gender in most societies, many cases applying the cultural defence have concerned harmful practices to women and children.²⁵⁶⁴ However, certain authors argue that by ignoring the effect of culture, we fail to provide equal protection under the law since the aim of criminal law is to ensure just punishment for the defendant by determining *mens rea*.²⁵⁶⁵

Various countries have allowed such considerations in criminal proceedings, demonstrating that cultural relativism is not solely a theoretical criticism of the fundamental nature of the international human rights regime, but also influences domestic criminal law proceedings in several countries. This of course causes a great obstacle to the notion of universally applied standards of women's human rights since different cultural approaches to women's social standing are transposed into the justice system. As such, the rights of women in the same country could vary according to the culture that she or the defendant represents. This could lead to separate standards for citizens in the same country, depending on whether the individual belongs to a cultural minority.

The use of a cultural defence also raises the larger question of the purpose of criminal law - whether it primarily strives to punish morally unacceptable behaviour or to deter harmful conduct. If a person is morally unaware of the wrongs of his actions due to a different cultural framework, are we achieving our goal in punishing the individual? A general theorem in criminal law is to punish morally wrongful acts, evident through an intent to injure. The element of *mens rea* attached to crimes such as rape is an indication of societies' wish to punish perpetrators aware of the consequences of their actions. However, as viewed in the chapter on *mens rea*, an unawareness of the law is not an excuse and the standard tends to be accompanied by a general evaluation, such as the behaviour of "the reasonable man". Should culture then be a standard with which to evaluate a person's guilt? Piers Beirne argues that "criminal behaviour cannot ultimately be understood apart from the cultural context in which it occurs.

²⁵⁶⁴ Kim, Nancy, *Blameworthiness, Intent, and Cultural Dissonance: The Unequal Treatment of Cultural Defense Defendants*, p. 211.

²⁵⁶⁵ Dundes Renteln, Alison, *The Cultural Defense*, p. 196.

Second, generalizations about criminal behaviour must refer to the cultural and subjective values of those who engage in it”.²⁵⁶⁶

Examples exist from a handful of countries, mostly related to violence against women. *People v. Chen*, heard by the New York Supreme Court, concerned a woman who had been murdered by her husband subsequent to his learning of her extramarital affair. The charge was reduced by the judge from second degree murder to second degree manslaughter due to the cultural background of the defendant, bearing in mind the particular gravity and condemnation of adultery in Chinese culture.²⁵⁶⁷ An expert witness testified that a wife’s adultery in China caused a tremendous dishonour for a husband and that violence against adulterous women was commonplace in China. The defence was not based on the premise that it was acceptable behaviour to take a persons life in China, but rather that his cultural background caused a severe emotional strain and affected the defendant’s state of mind. The judge affirmed this reasoning by accepting that Chen was “driven to violence by traditional Chinese values about adultery and loss of manhood”.

A few cases specifically concern charges of rape. In August 2005, a judge in the Supreme Court of the Northern Territory in Australia sentenced a 55 year old aboriginal man to merely one month in prison after beating and raping a 14-year old girl, who had been promised as his bride. The judge argued that the man, subscribing to traditional aboriginal beliefs, was not aware that his behaviour was illegal.²⁵⁶⁸ A case from a county court in the United States concerned the rape of a Korean woman by two Korean youths. The Court, in looking at the surrounding circumstances to determine the existence of non-consent, found that since the woman had gone to bars and dressed provocatively, which was

²⁵⁶⁶ Beirne, Piers, *Cultural Relativism and Comparative Criminology*, Contemporary Crises 7, (1983), p. 372. Nancy Kim argues that all actions do not carry the same cultural significance. Kim, Nancy, *Blameworthiness, Intent, and Cultural Dissonance: The Unequal Treatment of Cultural Defense Defendants*, p. 202. Guyora Binder also poses the question: “Should we really punish on the basis of the social meaning of offenses, rather than the offender’s blameworthiness? After all, there can be a disjunction between the social meaning of an act and the actor’s intent in committing it.” See Binder, Guyora, *Meaning and Motive in the Law of Homicide: Samuel H. Pillsbury’s Judging Evil: Rethinking The Law of Murder and Manslaughter*, p. 764.

²⁵⁶⁷ *People v. Chen No 87-7774* (Supreme Court, NY County, 2 December 1988). See discussion e.g. in Beirne, Piers, *Cultural Relativism and Comparative Criminology* & Song, Sarah, *Majority Norms, Multiculturalism, and Gender Equality*, American Political Science Review (2005), 99 : 473-489.

²⁵⁶⁸ *The Queen and GJ, SCCC 20418849*, The Supreme Court of the Northern Territory, Australia, Transcripts of proceedings at Yarralin on Thursday 11 August 2005.

arguably unacceptable in her culture, the men were reasonable in their beliefs that she had consented.²⁵⁶⁹

Similarly, in *People v. Moua* the defendant forced a woman of Laotian heritage to engage in sexual intercourse while claiming that he had simply engaged in the Laotian ritual of “marriage-by-capture”, *zij poj niam*.²⁵⁷⁰ This tradition entailed that in order for a woman to be wed, the man must display signs of virility and strength and the woman protest the sexual advances and in so doing establish her virtue. The sole data presented by the defence was a 22-page pamphlet on the subject-matter. In the case it was also taken into account that the defendant was unaware of the law because of cultural influences, and the judge subsequently dropped the charges on kidnapping and rape, restricting the indictment to false imprisonment, for which Moua was sentenced to 90 days in jail. The state law provided the possibility of defence to rape charges based on a “mistake of fact” to consent and it was considered that the prosecution would not be able to disprove his lack of intention

In the Canadian case of *R v. Lucien*, two men originally from Haiti were convicted of sexual assault yet were only sentenced to community service despite the standard for gang rape being 4-14 years.²⁵⁷¹ The judge noted the evident lack of remorse on the part of the defendants as stemming “more from a particular cultural context with regard to relations with women than to a real

²⁵⁶⁹ See discussion in Oliver, *Immigrant Crimes: Cultural Defense - A Legal Tactic*, L.A. Times, 15 July 1988, at A13, col. 4.

²⁵⁷⁰ *People v. Moua*, No. 315972-0, Cal. Super. Ct. Fresno County 7 Feb., 1985. See also *State v. Her*, 510 N.W.2d 218 (Minn. Ct. App. 1994). In *State v. Her*, the defendant, charged with forcible rape, also belonged to the Hmong tribe. In cross-examination the defendant testified that rape as understood in the United States did not exist in Hmong culture. However, the argument was not accepted by the court, nor was the claim raised as a mistake of fact defence as in *Moua* case. In *State v. Lee*, evidence as to Hmong practice was also admitted as evidence yet ultimately rejected. The Hmong defendant who was found guilty of forcible rape of two Hmong women, presented evidence through the testimony of a leader of the Hmong culture as to the common behaviour of men and women when there has been an accusation of rape, in order prove that the victims had not behaved as if they had been raped. Though the evidence in the latter cases was non-determinative and did not lead to a finding of lacking *mens rea*, the cases are important to illustrate that the evidence was in fact admitted by the court in the various cases, leading to the conclusion that cultural aspects as to how we view rape and the proper behaviour by rape victims, can influence the adjudication of rape cases even in countries with, what can be considered, a progressive definition and understanding of rape. *State v. Lee*, 494 N.W.2d 475 (Minn. 1993).

²⁵⁷¹ *R. v. Lucien*, 63. (1998), AQ no 8. (Cour du Quebec).

problem of a sexual nature”.²⁵⁷² Also: “they behaved like two young roosters craving for sexual pleasures...”, further enforcing stereotypes based on the cultural background of the men.²⁵⁷³ This demonstrates an example of domestic legal systems ascribing certain types of behaviour or attitudes towards women in general or sexual relations in particular to specific cultures. In this sense, the universalist approach to a global condemnation of sexual violence is threatened on the national level, since culture is seen as a determinative factor in judging rape cases.

The issues of a cultural defence reflects the larger debate on how to balance the preservation of tradition and cultural differences and the protection of women’s rights, i.e. the debate on cultural relativism in relation to international human rights law. The principle elevates cultural membership above other considerations and becomes an important factor in the determination of whether an offence or violation has occurred.²⁵⁷⁴ Similarly to the issue of cultural relativism on the international level, the question of a defence based on culture in national courts primarily concern the sexuality of women, and whether a woman has behaved in a morally unacceptable manner. The use of a cultural defence equally assumes that culture is homogenous and static. In a sense, taking into account cultural aspects, frequently relegated to traditional gender roles, affirms the validity of such attitudes. Whether through cultural relativist claims or by means of cultural defence, culture is used as a justification for human rights violations, either by states or by individuals. The clashes concerning women’s rights may even be couched in terms of human rights, invoking the right to manifest one’s religion and right to one’s culture.

As seen in this chapter, culture, religion and tradition are particularly linked to issues of the individual’s sexuality and regulations pertaining to such autonomy. Domestic legislation in many states aim to curb women’s sexuality while not acknowledging the possibility of male victims of sexual violence. These premises inform national definitions of rape, influence criminal laws in countries in the form of cultural defences and, most importantly, create major obstacles to national implementation of states’ international obligations, be it in international criminal law or international human rights law. To a certain extent, local differences are accommodated through the structure of the respective regime of international law, e.g. through a margin of appreciation, but culture can never

²⁵⁷² *R. v Lucien*, 63. (1998), para. 15. See translation in Fournier, Pascale, *The Ghettoisation of Difference in Canada: “Rape by Culture” and the Danger of a “Cultural Defence”* in *Criminal Law Trials*, 2 Manitoba Law Journal Vol. 29 No. 1, (2002).

²⁵⁷³ *Ibid*, para. 7.

²⁵⁷⁴ Phillips, Anne, *When Culture Means Gender: Issues of Cultural Defence in the English Courts*, p. 513.

constitute a sufficient excuse not to fulfil state obligations. Though the international law system aims to provide a legal remedy to a problem that arise from culture and gender aspects, that is the role of law.

11.4 Relativism Inherent in the International Law System

A way to accommodate variation in domestic implementation of human rights norms has been developed by e.g. the ECtHR, which allows for a certain margin of appreciation in implementing the rights of the European Convention. This permits the state in question to adapt its obligations in a manner suitable to the national justice system. The extent of margin of appreciation for a state depends on the right in question and the level of coherence among the members of the Council of Europe.²⁵⁷⁵ In relation to criminalising rape, the Court in *M.C. v. Bulgaria* stated that “[i]n respect of the means to ensure adequate protection against rape States undoubtedly enjoy a wide margin of appreciation. In particular, perceptions of a cultural nature, local circumstances and traditional approaches are to be taken into account. The limits of the national authorities’ margin of appreciation are nonetheless circumscribed by the Convention provisions”.²⁵⁷⁶ The margin of appreciation doctrine affirms the subsidiarity of the Court to national systems. The European system thus embodies a form of relativity found in human rights in general, i.e. “absolute uniformity of national rules is not the goal”.²⁵⁷⁷ The ICC through its complementarity regime to a certain degree also allows for domestic differences.

A natural margin of appreciation exists in relation to all treaties, since the domestic implementation of the states’ treaty obligations may take different forms depending on the country. States may also attach reservations and declaratory interpretations of specific rights when ratifying treaties. In general, rights are formulated in a wide and abstract manner in order to attract ratifications. The international system is therefore structured to provide diversity in implementation, a flexibility which was intended in the negotiations of the earliest treaties to allow for the preservation of sovereignty.²⁵⁷⁸ Though certain national differences may be accommodated through this structure, the substance of certain rights is still challenged with reference to culture. The scope with which national authorities interpret the right in question depends on the right. For example, there is little flexibility concerning the prohibition of torture owing to a

²⁵⁷⁵ See Chapter 6.5.

²⁵⁷⁶ *M.C. v. Bulgaria*, ECtHR, para. 154.

²⁵⁷⁷ Brems, Eva, *Human Rights: Universality and Diversity*, p. 360.

²⁵⁷⁸ Donoho, Douglas Lee, *Autonomy, Self-Governance, and the Margin of Appreciation: Developing a Jurisprudence of Diversity Within Universal Human Rights*, p. 427.

nearly universal acceptance of its general scope. Freedom of speech is provided as an example for which a larger margin of appreciation exists due to its sensitivity to domestic values.²⁵⁷⁹ The variations pertaining to each right are therefore conducted on a case by case basis.

Regional human rights mechanisms in certain aspects reflect specific regional characteristics and cultural interpretations. It is recognised that if laws are not in harmony with local values and morals, it will from a technical standpoint be difficult to enforce such norms.²⁵⁸⁰ The European Court of Human Rights has even categorically stated that Sharia is incompatible with the fundamental principles of democracy:

“The Court considers that sharia, which faithfully reflects the dogmas and divine rules laid down by religion, is stable and invariable. Principles such as pluralism in the political sphere or the constant evolution of public freedoms have no place in it...It is difficult to declare one’s respect for democracy and human rights while at the same time supporting a regime based on sharia, which clearly diverges from Convention values, particularly with regard to its criminal law and criminal procedure, its rules on the legal status of women and the way it intervenes in all spheres of private and public life in accordance with religious precepts.”²⁵⁸¹

²⁵⁷⁹ Donoho, Douglas Lee, *Autonomy, Self-Governance, and the Margin of Appreciation: Developing a Jurisprudence of Diversity Within Universal Human Rights*, p. 427.

²⁵⁸⁰ The Arab Charter, which came into force on 30 January 2008, does not refer to cultural relativism but rather such international documents as the UN Charter, the UDHR and the two Covenants. However, it also makes references to the Cairo Declaration on Human Rights in Islam from 1990, which refers to Islam as the “religion of true unspoiled nature” and refers to the notion of equality in Islamic Sharia. The Charter contains the majority of rights and freedoms of major universal treaties and therefore is an example of the acceptance of the universality of such rights. Sex discrimination is e.g. explicitly prohibited. However, the Charter has been criticised for not reflecting and conforming to universal standards, e.g. when it comes to women’s rights. See Statement by the UN High Commissioner for Human Rights on the Entry Into Force of the Arab Charter on Human Rights, Geneva, 30 January 2008. More hurdles are deemed to exist in creating an Asian-Pacific human rights system due to the vast diversity in terms of religion, culture and legal systems of the region. Additionally, as viewed during the Vienna Convention, many governments have been unwilling to ratify human rights treaties. However, an Asian Human Rights Charter (17 May 1998) exists, but in the form of a non-governmental declaration.

²⁵⁸¹ *Refah Partisi v. Turkey*, (Application Nos. 41340/98, 41342/98, 41343/98 and 41344/98), ECtHR, Judgment of 13 February, 2003, para. 123, concerning the prohibition of a political party aiming to introduce Sharia in the secular Turkey.

The diversity of the human rights mechanisms can be viewed as detrimental to the universality of rights, e.g. by Melissa Robbins who argues that "...by decentralizing human rights enforcement away from the United Nations system, human rights, once heralded as universal values that cannot vary from nation to nation or from region to region, are now becoming increasingly region-specific".²⁵⁸² Thus, while the international community is approaching a finding of certain common universal elements of the crime of rape, the mechanisms of international law are such that a certain level of flexibility is allowed in the implementation of the obligations. This is, however, increasingly restricted regarding obligations to prevent rape, particularly through the enactment of domestic penal codes. The impact of culture on definitions of rape is therefore expected to diminish as the elements of the crime are progressively regulated in international law.

²⁵⁸² Robbins, Melissa, *Comment: Powerful States, Customary Law and the Erosion of Human Rights through Regional Enforcement*, 35 Cal. W. Int'l L.J 275, (2005), p. 275.

Part VII: Conclusions - Emerging Obligations in Defining the Crime of Rape?

12. Concluding Summary and Remarks

12.1 Introduction

Rape occurs in a multitude of circumstances. They range in scope from a lone attack by a stranger or an acquaintance, to being used methodically as a means of torture or to being employed as a tactic of war. Rape is committed within the family, in the community or as a state sponsored tool. It is by its nature widespread and systematic in the sense that women are the chief victims and it is continuously applied to oppress specific categories, whether women in general or e.g. an ethnic group in particular. International reaction to the pervasiveness of sexual violence has exhibited itself in various ways. This thesis considers three different regimes of public international law, each containing diverse constructions as to subject and subject-matter, yet with the similar overarching goal of upholding human dignity in various contexts. International criminal law proscribes crimes committed by individuals, but is restricted solely to the most serious crimes of international concern, the prosecution of such crimes being seen as owed to all of humanity. International humanitarian law establishes regulations for the conduct of parties participating in armed conflicts, with a view to maintaining humanitarian concerns, especially for certain protected categories of people. International human rights law also consists of moral standards for the advancement of personal dignity, but limits its scope to acts and omissions of states, intending to raise the minimum standards provided by the state to individuals within their jurisdiction. An increased interplay between the bodies of law can be noted, be it through the processes of humanisation, harmonisation or a globalisation, which is also evident in the approach to sexual violence. Common ground has thus been found in both the prohibition and definition of rape, leading to growing obligations on states to adopt domestic criminal laws on the offence. This chapter will first summarise the conclusions in the thesis as to obligations for states to enact domestic criminal laws prohibiting rape, and the question of whether such laws require the adoption of certain elements of the crime. A general discussion and remarks on the subject will follow.

12.2 Conclusion: The Prohibition and Definition of Rape in International Law

While aiming to evince responsibilities on the part of states to adopt specific elements of the crime of rape in domestic criminal laws, the initial question inevitably concerns the scope of obligations to prevent the offence. Thus it is noticeable in this work that the *prohibition* on and the *definition* of rape have been treated as separate issues in international law. Standards in international human rights law, international humanitarian law and international criminal law exist obliging states and individuals to prohibit and refrain from rape, whereas efforts to define it have entered at a secondary stage. This is in part due to the structure of international law, which permits a wide flexibility for states when implementing treaty obligations, allowing an adaptation of legal provisions in the domestic setting. However, a prohibition of conduct without a clearly defined substance raises concern from the standpoint of the principle of legality, especially in the area of international criminal law, which directly affects individuals. Obligations as to the definition of rape are also important in order to effectively fulfil duties to prevent the offence.

The *prohibition* of rape is found in both treaty law and customary international law. In human rights treaty law, rape has been extensively interpreted as a violation of the prohibition of torture, an aspect of gender discrimination and as an invasion of the right to privacy. As a form of torture and discrimination, it can additionally be argued that the prohibition has reached a customary level and also constitutes an *ius cogens* norm. In international criminal law and IHL, rape is prohibited in the 1949 Geneva Conventions and the Rome Statute. As affirmed by the *ad hoc* tribunals, the prohibition has also reached a level of customary law, on the basis of such instruments as the Lieber Code and Martens Clause as well as several UN Security Council Resolutions. This is affirmed by the ICRC Study on Customary Humanitarian Law. Obligations have thus existed for states to adopt legislation prohibiting the crime of rape, but with no indication on its appropriate definition.

The necessity to *define* the content of this prohibition did not arise until the 1990s in the case law of the *ad hoc* tribunals. The definition of rape in international law can thus be found mainly in judicial decisions. Because of the lacunas in international law, the tribunals have to a great extent relied in turn on general principles of law to specify the content. Though judicial decisions are considered a subsidiary source of law and solely have a law-determining function in international law, with regard to the development of regulations pertaining to sexual violence, decisions by the *ad hoc* tribunals and regional human rights courts have been the primary source of law. These have found implicit obligations in treaties. Naturally, treaties only bind states which are parties to the document. Obligations on states to adopt a particular definition of

rape developed by e.g. the regional human rights systems or the ICC therefore do not reach beyond the member states. However, this study has also directed itself to examining whether the adoption of certain elements of the crime of rape has developed into obligations on the customary international law level. Customary international law is developed through state practice and *opinio iuris*, but owing to the difficulties in e.g. evincing state practice, an greater focus has been placed on the element of *opinio iuris*. The Kirgis argument of an increased importance of *opinio iuris* in relation to norms that protect the vital interests of the international community can also be raised. For example, declarations and resolutions by international organisations are then considered to contribute to the development of this source as are decisions by *ad hoc* tribunals and regional courts.

Considering the inconsistent promulgation of the definition of rape, it is doubtful that one coherent definition can be seen as constituting customary international law at the present time. Albeit the *chapeaus* of e.g. genocide and crimes against humanity constitute customary norms, the definitions of the crimes are not necessarily customary. Certain trends, however, can be noted indicating the development of specific elements as a burgeoning *opinio iuris*. Both within international criminal law and human rights law it has been recognised that the decision to engage in sexual relations is ultimately an expression of the individual's autonomy rather than a matter of e.g. the honour of the victim, with its source in the protection of human dignity. The courts and tribunals have therefore analysed the division between legal sexual activities and sexual violence on the basis of such autonomy. This has in turn influenced the construction of the definition of rape. The focus on non-consent rather than force or the threat of force when defining the crime of rape has been held by the Inter-American Court on Human Rights, the Inter-American Commission on Human Rights, the European Court of Human Rights, the Council of Europe, the UN Special Rapporteur on the Elimination of Violence against Women, the CEDAW Committee, the ICTY and ICTR as the standard which most fully captures the sexual autonomy of the person. This similar conclusion has therefore been reached in separate regimes and contexts of international law.

The *Miguel Castro-Castro Prison Case, M.C. v. Bulgaria*, CEDAW recommendations, reports by the Inter-American Commission and the UN Special Rapporteur on the Elimination of Violence against Women all promote a non-consent-based standard, as does the 2009 Draft Convention on Preventing and Combating Violence against Women and Domestic Violence by the Council of Europe of 2009. The *Kunarac* decision of the ICTY has been accepted as the most appropriate definition of rape both by the ICTY, in its jurisprudence subsequent to *Kunarac*, and the ICTR. The argument maintained by the Tribunal in the case was that non-consent as a standard best corresponded to the

protection of the sexual autonomy of individuals, rather than requiring force, which could constitute *evidence* of non-consent.

This unified acceptance, however, is disrupted by the definition of rape in the Elements of Crimes of the ICC, which establishes a definition combining the elements of force, coercion and, to a limited extent, non-consent. This definition has also been adopted by the Special Court for Sierra Leone. The construction of this definition is in part a consequence of the fact that the Elements of Crimes unfortunately preceded the ICTY's *Kunarac* decision, but also reflects a compromise between representatives of both common law and civil law systems at the Rome Conference. Though the Elements of Crimes is not binding on the ICC, it would be difficult, in principle, to disregard a document created and agreed upon by the state parties to the Rome Statute during the Rome Conference. The definition of the permanent court, with its large number of member states, is therefore at odds with the international criminal law that has developed by the *ad hoc* tribunals. The future will show whether the ICC takes into consideration later developments in international criminal law when interpreting the definition of rape or whether it will restrict its analysis to the Elements of Crimes. It will also be interesting to see if the Court interprets the elements of 'force' and 'coercion' in a literal or expansive manner. Apart from the ICC's non-binding definition, a strong indication therefore exists from both human rights bodies and international criminal law tribunals for converging on the non-consent of the victim.

As for the elements of the *actus reus* of the offence, international human rights law has largely been silent, with only the Council of Europe and the Inter-American Court indicating appropriate elements of the crime. In the Draft Convention on Preventing and Combating Violence against Women and Domestic Violence of 2009 of the Council of Europe, rape is defined as "[e]ngaging in non-consensual vaginal, anal or oral penetration of the body of another person with any bodily part or object".²⁵⁸³ In the *Case of the Miguel Castro-Castro Prison*, the offence was defined as "[v]aginal or anal penetration, without the victim's consent, through the use of other parts of the aggressor's body or objects, as well as oral penetration with the virile member".²⁵⁸⁴

Whereas the ICTR has favoured a conceptual approach to the *actus reus*, the ICTY and the ICC have opted for a clearly defined construction, bearing in mind the principle of specificity. A detailed definition has also been deemed necessary in order to distinguish rape from other forms of sexual violence, in order to maintain the gravity of the crime. The ICTR in the *Akayesu* case defined rape as

²⁵⁸³ Draft Convention on Preventing and Combating Violence against Women and Domestic Violence, 15 October 2009, Article 27.

²⁵⁸⁴ *Case of the Miguel Castro-Castro Prison v. Peru*, para. 310.

a physical invasion of a sexual nature. However, later case law has adopted the approach of the ICTY – that is, the insistence on clearly defined acts. The *Kunarac* and *Furundzija* cases have defined rape as penetration of the vagina or anus by genitals or objects or oral penetration by a penis. The Elements of Crimes of the ICC similarly requires penetration of the vagina or anus by either a body part or an object, or by oral penetration of the penis. This was also adopted by the Special Court for Sierra Leone. Though this definition, similar to that of *Akayesu*, refers to invasion, this is restricted through the further requirement of penetration.

A discernible trend can thus also be observed concerning the *actus reus* of the crime of rape. In both international human rights law and international criminal law, there has been an expansion of recognisable acts beyond vaginal penetration to include oral and anal sex, plus the use of body parts such as fingers and objects. The traditional focus on vaginal penetration as a more harmful act has thus been supplanted at the international level. This has most likely been inspired by the events of the conflicts in Rwanda and former Yugoslavia, where sexual violence often was inflicted with the use of objects such as weapons or bottles. What is also apparent is that the definition must be gender-neutral, not restricting the roles of perpetrator and victim to either gender. Women are principally at risk of being sexually violated, but the existence of male rape victims has increasingly been recognised internationally and domestically. Certain aspects such as gender-neutrality and a wider *actus reus* of the definition of rape, at least containing vaginal, oral and anal penetration by sexual organs, and vaginal or anal penetration by other body parts and objects, could thus constitute elements of a growing *opinio iuris*.

Mens rea in relation to rape has not been widely discussed. The question has not been raised before regional human rights courts or UN treaty bodies and the case law of the *ad hoc* tribunals indicates that it has rarely been controversial against the background of international criminal law, i.e. in inherently coercive circumstances. Here it appears that the tribunals and the Rome Statute have adopted a similar approach, i.e. that the sexual act occurs with intent and knowing that it occurs without consent, or alternatively, with force.

In conclusion, general trends in the treatment of the crime of rape in international law can be noted. Increased emphasis is placed on the harm to personal autonomy rather than e.g. the dishonour of the victim. This understanding of the harm of rape also entails that the definition must reflect the principle of equality, requiring gender-neutrality. The stigma of rape is deemed to pertain to a wider category of offences, leading to an expanded *actus reus*. The *public* element of rape is also recognised. Rather than viewing it as a private concern or cultural manifestation, the systematic nature of sexual violence and its grave implications has elevated its prohibition to the international level.

In registering these trends, the question arises whether it is possible to create an international minimum standard on the definition of rape. Though certain elements of the crime may develop into customary obligations, owing to the indeterminate nature of such concepts as non-consent, force, coercion or *mens rea*, the question is only partly resolved. Not only might the elements *per se* be controversial but also their application or interpretation. Petter Asp argues that it is impossible to unify laws of different states solely by referring to the obligation to adopt a non-consent based standard.²⁵⁸⁵ This would require all states to agree on the notion of consent – whether, for instance, consent is negated by economic pressure or intoxication etc. This is a valid point. ‘Non-consent’, ‘force’ or ‘coercion’ may be applied in broad or restrictive ways and could in fact overlap, depending on the interpretation. Care must therefore be taken not to prescribe vacuous concepts. It was conspicuous e.g. in the *M.C. v. Bulgaria* case, that while the ECtHR concluded that member states must base their definitions of rape upon the element of non-consent, it did not preclude formulations focusing on force, if interpreted in a manner consistent with ‘non-consent’. Not only does this impair the traditional understanding of the concepts, but it creates difficulties from the perspective of foreseeability and consequently the principle of legality. The application and interpretation of the elements become indeterminate and difficult for the individual to adjust to. Thus, when creating obligations for states on the elements of rape, a certain indication must also be given as to the scope of application of the terms.

12.3 The Harmonisation of Regimes and the Importance of Context

The importance of context has consistently been raised in this thesis. As indicated, context serves a *jurisdictional* function in elevating certain incidents of rape to international crimes. It may influence the *definition* of rape in international law and can also constitute *evidence* of the elements of the crime.

The study has applied a contextual approach in several regards. Primarily, a comparative approach between several areas of international law has been employed, thereby examining the prohibition and definition of rape from the viewpoint of contexts such as armed conflict or peacetime. Throughout this work, the interplay between international human rights law, IHL and international criminal law has thus been a continuing element, despite differences in context. The natures of the various regimes of international law are historically different in their aims and objectives, so considerable care must be taken when comparing similar concepts. Though the humanitarian concern is prevalent in all the areas of law examined, IHL provisions e.g. are imbued with

²⁵⁸⁵ Asp, Petter, *M.C v. Bulgaria- A Swedish Perspective*, p. 210.

the notion of military necessity and the context of armed conflicts. The premises of the three regimes have thus informed the discussion on the elements of rape. However, owing to the rather novel endeavour of defining the crime at the international level, similar arguments and theories have been raised in all these areas.

The principle of the protection of human dignity is seen as the unifying factor and common denominator of the regimes. The ICTY in fact held in the *Furundzija* case that the general principle of respect for human dignity was the basic underpinning of both international human rights and humanitarian law, stating: “The essence of the whole corpus of international humanitarian law as well as human rights law lies in the protection of the human dignity of every person, whatever his or her gender... This principle is intended to shield human beings from outrages upon their personal dignity, whether such outrages are carried out by unlawfully attacking the body or by humiliating and debasing the honour, the self-respect or the mental well-being of a person”.²⁵⁸⁶ This is of particular consequence regarding sexual violence. The pronounced objective of safeguarding human dignity has in fact been instrumental to understanding sexual violence as primarily a violation of a person’s sexual autonomy - autonomy and dignity being corresponding concepts. An increased humanisation of international humanitarian law can be detected and this quality has also led to an growing *harmonisation* creating new endeavours, e.g. the ‘Fundamental Standards of Humanity’. The standards, which apply at all times, acknowledge that the prohibition of rape constitutes a minimum standard to guarantee the human dignity of an individual and therefore exists regardless of the context of peace or armed conflict. The promulgation, though still at an early stage, has been important in emphasising the commonalities between the various areas of international law and serves to stress that the eradication of sexual violence is a concurrent goal in these areas.

However, the jurisprudence of the *ad hoc* tribunals, the PrepCom documents serving as the basis for the creation of the Rome Statute, as well as the majority of legal scholars, also emphasise the disparity between rape occurring in times of armed conflict or widespread attacks as opposed to peacetime. Regarding the first mentioned situations, it is continually stressed that rape is frequently employed as a large-scale, well-planned tactic of war, that the intent of rape is non-personal, and that the general circumstances of unrest give rise to a naturally coercive environment, unlike that found in peacetime. Rape, in qualifying as an international crime, must shock the conscience of humanity and be regarded as an offence of the utmost gravity to the international community. In order to differentiate it from the “common” offence of rape at the domestic level, the

²⁵⁸⁶ *Prosecutor v. Furundzija*, Judgment of 10 December 1998, para. 183.

particulars of wartime rape are emphasised to distinguish those situations where rape rises to the level of an international crime. Thus, the context of rape is clearly of importance from a *jurisdictional* aspect. It should also be noted that regional human rights courts and UN treaty bodies had until recently found rape within the context of detention settings alone as representing violations international human rights, indicating that surrounding circumstances have been essential in placing rape within the jurisdiction of also this area.

Many legal experts have stressed the necessity of bearing in mind context also when *defining* the crime of rape, particularly regarding the elements of ‘non-consent’, ‘force’, and ‘coercion’. Accordingly, examining whether a person has consented to a sexual activity in armed conflicts is inappropriate when considering such inherently coercive environments. It would be similar to assuming that a victim could consent to e.g. genocide. This was similarly argued by the ICTY in the *Furundzija* case as well as a contention for centring the definition on force and coercion in the Elements of Crimes of the ICC. However, this has not been accepted by the subsequent case law of the *ad hoc* tribunals and in the human rights context, suggesting that the harm to a person’s autonomy can only be reflected in a definition focusing on non-consent. A similar trend can thus be discerned despite the major differences between the regimes in recognising non-consent and certain aspects of the *actus reus* of the offence as appropriate elements. The context has therefore ultimately not resulted in a wide discrepancy in the definition of rape. Rather, the context appears to be reflected from an evidentiary standpoint.

Much of this thesis has dealt with the question of what constitutes coercive circumstances or inappropriate antecedents to sexual interactions. This inquiry places an emphasis on context as *evidence* of the elements of rape, e.g. non-consent. The case law on international criminal law indicates that the nature of the international crimes of genocide, crimes against humanity and war crimes *in general* automatically negates an individual’s consent to sexual activity. The *ad hoc* tribunals have to a great extent presumed a lack of consent based upon prevailing conditions, be it detention in a camp, the armed conflict in general or even such issues as the ethnicity of the perpetrator and victim. The context of coercive circumstances thus provides evidence as to e.g. non-consent.

The issue of coercive circumstances raises the question of whether it is legitimate to define rape or to interpret concepts such as ‘non-consent’ in a different manner in international criminal law from that of “everyday” forms of rape. International case law and most legal scholars agree that the application of the elements of rape in international criminal law must take into account the exceptional circumstances of the offence against the setting of e.g. genocide or armed conflict. However, certain feminist experts find all rapes to be similar on the spectrum of violence against women. According to such theories, the power

imbalance between the sexes in society constitutes a coercive context. The subordination of women economically, politically and socially means that women as a group are not free to form an informed decision of consent. The sexes are thus not equal partners in sexual activity, regardless of whether that activity takes place during a conflict or in peacetime. This is supported by the recognition of violence against women as a form of sex discrimination in the international human rights regime. In this view, sexual violence is a structural form of discriminatory practice aimed at a particular group, i.e. women. It also has to a limited extent been accepted by the ICTY when analysing rape as a form of torture. Thus, proving coercion may be less problematic within the context of the jurisdictions of the *ad hoc* tribunals and the ICC, but international law should not fail to recognise coercive circumstances resulting from gender hierarchies also outside of this framework.

It should be noted that the gravity of coercive circumstances is not only emphasised in international criminal law, but also in the case law of regional human rights courts, e.g. in *Aydin v. Turkey* and the *Miguel Castro-Castro Prison* case. The detention or prison setting not only more easily constituted evidence of state involvement but the severity of the offence in such contexts was also stressed. Similarly, as concerns the definition of torture, a criteria of *powerlessness* of the victim has been introduced as an element by the Special Rapporteur on Torture in order to distinguish the violation from inhuman or degrading treatment. The Elements of Crimes has also introduced the requirement of a person being in custody or under control to qualify as torture as a crime against humanity. Thus the context may serve as evidence of e.g. non-consent but also increases the perceived gravity of the crime. Notions of powerlessness and control focus on power hierarchies. This is language similar to that used by those feminist legal scholars who argue that the power imbalance between the genders should inform the definition of rape as well as the application of the elements.

The question of coercive circumstances and sexual violence is at a tangent to the issue of what is political/private. From the early assumption in international law that violence against women concerned personal matters to be regulated by domestic law, that rape in armed conflict was motivated by sexual urges, as argued by the defence in the *Kunarac* case, to the failure to see the structural aspect of sexual violence as discrimination on the basis of sex, rape has been viewed as private acts of violence rather than as political forms of aggression or power. Acknowledging sexual violence as a tactic of war or a form of sex discrimination and the coercive element of such factors, is to accept rape as a “political” and systemic act.

12.4 General Remarks

International human rights law, IHL and international criminal law are important complements for reaching similar objectives. In general, individual criminal responsibility is regarded as providing a more effective deterrent to human rights abuses than norms providing for state obligations, since impunity is a substantial risk in situations of large-scale or grave forms of abuse where the state may frequently be involved.²⁵⁸⁷ International criminal law thus performs an important retributive function alongside its deterring effect, albeit deterrence might be limited in cases of systematic violence. However, the obligations raised by the international human rights regime are also of the utmost importance in that this system analyses the *structural* problems of a state in a more extensive manner. To a certain degree, the construction of the relationship between member states and the ICC will also lead to a certain evaluation of domestic legal systems, but not in the same extensive manner as that within international human rights law. From a feminist legal point of view, the development of international criminal law and its inclusion of various forms of violations particularly pertaining to women is an important contribution, but it must not distract from the examination of the *causes* of problems.²⁵⁸⁸ Concentration on a limited number of acts of violence fails to acknowledge the structural and systemic nature of violence against women, which may be corrected through other and more effective, means. Furthermore, pervasive failures may create the conditions that lead to the commission of international crimes. For example, as mentioned earlier, the prevention of human rights abuses is judged to be as important from the viewpoint of peace and security, and as repression of armed conflicts. International criminal law, IHL and international human rights law are therefore important complements as means of eradicating sexual violence through international law.

The fact that the three regimes place obligations on states in relation to sexual violence demonstrates the severity of the crime, which in turn will hopefully result in an international minimum standard in domestic laws on the prohibition and definition of rape. Qualifying rape as a matter of international law is an end in itself and forms a catalyst for further movement, acting as a moral affirmation of the importance of the subject and as an incentive for further political and social change at the domestic level. Qualifying sexual freedom in terms of rights is a relatively new undertaking and one that is expected to lead to practical results in equipping national legal systems with the appropriate means for preventing sexual violence and punishing perpetrators.

²⁵⁸⁷ Ratner, Steven, *The Schizophrenias of International Criminal Law*, p. 240.

²⁵⁸⁸ Charlesworth, Hilary, *Feminist Methods in International Law*, p. 390.

This thesis has focused on law as the sole instrument for eradicating sexual violence. There is indeed a strong tendency to promote moral claims in a rights-based language, in order to increase legitimacy. Documents such as the UN Women's Convention and the Declaration on Violence against Women stress the important parts that legislation and legal institutions play in achieving gender equality and in eliminating violence. The due diligence regime of human rights, as developed in the case law of the regional human rights courts and UN treaty bodies, requires the implementing of legislation as a measure of prevention. In the case of rape, criminal sanctions, not civil remedies, have been deemed a necessity. The preamble to the Rome Statute also emphasises the duty of every state to exercise its criminal jurisdiction with regard to the international crimes. Additionally, various relevant treaties such as the UN Convention against Torture and the UN Genocide Convention express the duty to implement relevant legislation.

Undoubtedly, education and other basic strategies are also necessary components for achieving the effective application of the regulations. It has been argued that ultimately the eradication of impunity is not a problem of legal definitions, but of states failing to investigate and punish perpetrators.²⁵⁸⁹ Accordingly, the "differential treatment of rape makes clear that the problem, for the most part, lies not in the absence of adequate legal prohibitions, but in the international community's willingness to tolerate sexual abuse against women".²⁵⁹⁰ However, the lack of a definition of rape in international law has directly contributed to the impunity for sexual violence. The key to ending impunity for the crime of rape is prevention and punishment, two concepts persistently given prominence in the fields of international criminal law and human rights law. The core of prevention is the criminalisation of rape, which is the prerequisite for other measures of prevention as well as prosecution. By characterising the crime as merely a violation of honour in the 1949 Geneva Conventions, as opposed to a violation of the personal security and autonomy of the person, prosecutions have naturally not been afforded priority. Failure to define the offence in international law prior to the precedent of the two *ad hoc* tribunals in the 1990s also indicated that it was not a crime of the utmost concern to the international community, which was evident in the dearth of prosecutions for rape during the Nuremberg trials. As such, recent developments affirming the prohibition of rape, and efforts to define the crime at the international level have *per se* been monumental in acknowledging its severity. Though the jurisprudence of the *ad hoc* tribunals, together with the Rome Statute, has created a rather

²⁵⁸⁹ UN Doc. E/CN.4/2001/73, para. 66.

²⁵⁹⁰ Human Rights Watch: Shattered Lives: Sexual Violence During the Rwandan Genocide and its Aftermath, 1996, p. 28

inconclusive precedent, the discussions arising on issues such as the role of non-consent to sexual relations in armed conflict, gender-neutrality and the *actus reus* of rape have contributed to the advancement of the international legal discourse on the matter.

In the review of criminal laws on rape, from the times of the Roman Empire in various domestic contexts to its elevation as an issue of international concern, an evolution is observable in the perception of the harm of rape. Such harm has traditionally been viewed as a violation of the property rights of relevant male family members. Certain categories of women, or men in general, have been excluded as victims since they have not been considered harmed by sexual violence, for example as evident in marital rape exemptions. Harm has and continues to be seen as the dishonour of a woman in certain cultures, reflected in laws extinguishing prosecutions for rape in cases where the victim marries her assailant. International law now clearly affirms rape as a crime against the bodily integrity and sexual autonomy of all individuals. Sexuality, as a highly intimate matter, has thus been recast as an international human right in specific contexts in the sense that it touches upon one's autonomy - the freedom to choose when and with whom to engage in consensual sexual relations.

The initial aim of strengthening protection against sexual violence was to make the crime visible within the context of international law, which serves an important symbolic purpose. This simply entailed the acknowledgement and condemnation of the occurrence of rape in various settings, in which limited positive obligations for states were implied. This developed into the recognition of rape as a grave violation of human rights law, IHL, international criminal law with a full range of obligations attached. The journey from visibility to accountability has been the result of innumerable efforts. These include adjudications by tribunals, regional human rights courts, the work carried out within the UN through e.g. the Special Rapporteurs on Torture and Violence against Women as well as scholars who have critically analysed the structure and substance of international law in its treatment of women's rights.

The analysis of the scope of state responsibility to prevent and punish acts of sexual violence highlights new developments in international law. Governments are increasingly being held responsible for acts of violence between private individuals, including violence against women, mainly due to insufficient or defective legislation or a lack of enforcement of regulations. It attests to a new international regime characterised by a decline in national sovereignty coupled with a rise in new strong actors in the form of inter-state organisations and NGOs, together with a more prominent place for the private individual. It necessarily involves a partial erosion of the strict distinction drawn between the public and private spheres, as well as increased integration of the national and international legal systems, evidenced by the extensive reliance on national

legislation in establishing ‘general principles’ of international law. International human rights law is increasingly regulating state behaviour, placing additional and extensive duties on the state to eradicate sexual assault between private individuals. To a certain extent, the criticism of the lack of acknowledgment of human rights violations pertaining particularly to women, due to the construction of international law in a public *versus* private divide, has subsided. The enlarged scope of positive obligations placed on the state and the furtherance of the due diligence regime constitute new ways of obliging states to eradicate gender discrimination.

The scope of rape in human rights law jurisprudence has advanced from being strictly context-based, e.g. restricted to detention settings, to focusing on the *harm* administered to the sexual autonomy of the person. From the review of jurisprudence of regional human rights courts and international criminal law tribunals, it is evident that the understanding concerning the harm and consequences of rape has greatly developed and departed from the sparse language of early case law. Examples include the ECtHR, which initially was only willing to find violations of inhuman treatment in cases of mass rapes committed by state officials, cases with an obvious link to the state. This has advanced to the in-depth analysis of cases such as *M.C. v. Bulgaria*, which detailed the experiences of the rape victim and discussed the violation in light of the sexual autonomy of the individual, recognising rape as a serious transgression of several human rights of the person.

Similarly, the Nuremberg and Tokyo trials did not acknowledge sexual violence as a serious concern of international law, whereas the jurisprudence of the *ad hoc* tribunals has jointly held rape to be an element of all international crimes, raising awareness of the role rape may play in armed conflicts or widespread violence. The Special Court for Sierra Leone has gone even further, qualifying rape as a form of terrorism. Responsibilities for states to criminalise rape have also increased in this field, particularly for member states of the Rome Statute as well as all members of the UN pursuant to resolutions of the UN Security Council. The restricted mandate of the *ad hoc* tribunals, with their narrow jurisdictions, entails that their jurisprudence is mostly of importance concerning its effect on the Rome Statute as well as the possible development of customary international law. However, the jurisprudence has also had an effect on regional human rights courts and domestic justice systems, which have referred to the legal analysis of the tribunals. As for the ICC, owing to limited capabilities and resources, the court concerns itself solely with those bearing the greatest responsibilities for international crimes. Only a limited number of individuals will be brought to justice at the ICC and the main responsibility still lies on states to prevent and punish abuses. The effect of the Rome Statute will hopefully consequently resonate at the national level, leading to legislative

reforms and incentives to prevent and punish such crimes for member states. Obligations exist for member states to prohibit rape as an international crime at the domestic level, albeit no such duty bears upon the definition of the offence. The Rome Statute might, however, contribute to the development of customary international law. Possibilities and obligations for states to prosecute rape also exist through the universal jurisdiction regime.

As illustrated in this thesis, the prohibition of rape within the arena of international criminal law has garnered more attention and development than that of international human rights over the past few decades. The evolving codification and jurisprudence in this area is thus on its way to offering a stronger protection regarding rape than found in international human rights law. The emphasis of international law has changed, given the previously sporadic nature of international criminal law and the limited protection found in IHL. Rape in the context of armed conflict has been unanimously and consistently condemned, e.g. by the UN Security Council and in the prosecutions of the crime initiated and undertaken by tribunals and the ICC. Rape as an international crime is deemed to have reached the level of customary prohibition and a definition has been extensively discussed by the *ad hoc* tribunals. It is included in a document promulgated by a large number of states representing different legal cultures and regions of the world, the Elements of Crimes.

This has not been parallel in international human rights law. The definition of rape in human rights law still remains within the regional spheres of the European and Inter-American systems and has not developed at the same pace, indicating that the margin of appreciation concerning the prohibition of rape may be wider in the context of rape in peacetime. The UN Special Rapporteur on Violence against Women has noted the trend of increased attention to violence in emergency situations, due to the augmentation of militarisation and armed conflicts and has warned that this could result in the “normalization” of routine, everyday violence against women.²⁵⁹¹ However, Rhonda Copelon asserts that greater attention to rape in wartime and its gender dimension has increased the focus on rape also in peacetime. In fact, “the recognition of rape as a war crime is...a critical step toward understanding rape as violence”.²⁵⁹² This is a legitimate point. The acknowledgment of rape during conflict as a serious infringement of international law helps to recognise the violent and systematic nature of rape in general, as opposed to being seen as a private problem of sexually deviant offenders. Sexual violence has thus in part been advanced as a concern for the international community because of the focus on the role of rape in armed

²⁵⁹¹ UN Doc. E/CN.4/2004/66, para. 71.

²⁵⁹² Copelon, Rhonda, *Surfacing Gender: Reconceptualizing Crimes Against Women in Time of War*, p. 213.

conflict. The acknowledgment of the gender dimension of rape as e.g. genocide or in armed conflicts has also informed the discriminatory aspect of rape in peacetime. However, greater effort must also be expended at the international level to combat sexual violence outside of this context.

It is apparent that international law does not generally concern itself with sole instances of rape, such acts being relegated to national criminalisation and domestic legal systems. As such, sexual violence becomes a concern of the international human rights regime when the state has failed in its general obligations to prevent and punish the crime, be it through insufficient or defective legislation or widespread impunity. A focus is here on the infrastructure and functions of the legal system of the state. While attention has been paid mainly to *systematic* state failures to prevent and punish violations in human rights case law, cases such as *X and Y v. the Netherlands* and *M.C. v. Bulgaria* demonstrate that inadequate legislation also can embody a breach. As previously noted, a general trend is evident in international law towards obliging states to implement specific legislation. Consequently, states are progressively being restricted in their legislative capacities in defining crimes.

In international criminal law, single instances of rape may be prosecuted but high thresholds of gravity are in place, limited to acts of rape in the contexts explicitly required by the elements of the three international crimes, be it a matter of a widespread attack, an armed conflict or acts committed with genocidal intent. The nature of international law has therefore never been that of extending justice to individual victim of rape. Rather, it dwells on providing the structure to deal with cases of rape, or in the case of international criminal law, to eradicate impunity in relation to the most serious of infractions. In general, the purpose of the international law system is not to investigate every occurrence of rape but to gauge whether *states* are sufficiently equipped to do so.²⁵⁹³ Expectations on international law should therefore not be excessive. It must be realistically acknowledged that its scope can at best be extended to ease the struggle against cultures of impunity and lead to progress in the domestic adjudication of sexual violence.

12.5 Critique of International Law Affecting the Prohibition of Rape

Critique of international law has been raised from several standpoints in this thesis, perspectives that have been essential in the development of the theories on the prohibition of rape at the international level. Both feminist scholars and

²⁵⁹³ To a certain extent this differs regarding the *ad hoc* tribunals ICTY and ICTR, which have primary jurisdiction over the international crimes. However, this in itself can be viewed as a conclusion that the domestic justice systems were insufficient.

cultural relativists have questioned the abstract and neutral construction of international law. Feminist legal scholars claim that international human rights law has been created by men and still primarily represents a male viewpoint. This is evident in the construction of the public/private dichotomy of international law. Law is a product of exercising political power and a reflection of the values of those in authority. Rules reflect the values a society seeks to protect. Until recently, rights, particularly norms relating to women, were not represented nor was the idea of protecting sexual autonomy.

Cultural relativists maintain that international human rights law is a product of Western ideals and Christian morals, and therefore is not universal in nature. Human rights are thus representative of solely a limited social group, which naturally informs its content. Whereas feminists criticise human rights law from the standpoint that sexual and reproductive rights were not until recently considered part of the international discourse, cultural relativists question the validity of the universal application of matters concerning sexual independence and dignity. The critiques of feminist and cultural relativists on human rights law frequently clash, since they commonly lead to opposing views. The feminist approach, however, has gained an acceptance that the cultural relativists have not achieved, being an inclusive theory that seeks to expand the scope of international human rights law rather than restricting its application.

The aim of the feminist perspective on international law is to investigate the possible existence of a “hidden gender” in its construction or regulations.²⁵⁹⁴ This has been useful in exposing gaps in international law in relation to violence against women. For example, rape in armed conflict has been prohibited, but solely as a violation of the woman’s honour. Despite evidence of widespread sexual violence in e.g. the Second World War, such acts were largely ignored from a legal standpoint. Violence inflicted on women has been recognised by human rights law but only when emanating from a state actor, owing to the nature of the regime. The acknowledgment of rape as a violation of human rights norms has been restricted to cases of apparent state control, such as detention settings. Sexual violence is not explicitly included in CEDAW as a form of discrimination. These problems have to a certain extent been transformed.

Though the public/private critique has somewhat abated, the feminist method has been essential for international law to reach its current position on women’s rights in general and the prohibition of sexual violence in particular. The prominent position that the prohibition of sexual violence was accorded in the Rome Statute was largely through the influence of women’s rights NGOs, and the jurisprudence on rape by the ICTR was greatly influenced by a female

²⁵⁹⁴ Charlesworth, Hilary, *Feminist Methods in International Law*, p. 380.

judge.²⁵⁹⁵ The feminist influence has therefore played an important part in placing the prohibition of sexual violence on the map in international law. In general, the construction of public international law, e.g. the role of the state and its responsibilities as well as the harmonisation of various areas within the field of international law, is thus challenged and debated through the prism of how to define the crime of rape.

Are there still gaps from a feminist point of view? The fact that the prohibition of rape in the human rights context has in general been implied in the scope of other human rights has been raised as a problem in so far as it does not acknowledge the gravity of sexual violence in its own right. Similarly, the fact that rape is solely mentioned under the *chapeau* of other international crimes in international criminal law has further been criticised. That rape is signified to be as a crime against the community rather than against individuals in international criminal law has also raised concern. Prominent feminist legal scholars, such as Hilary Charlesworth, argue that the linking of rape to genocide is yet another example of the public/private divide of international law, fuelling the notion that rape is not wrong *per se* except when conducted against a racial or ethnic group, thereby “operating in the public realm of the collectivity”.²⁵⁹⁶ Accordingly, sexual violence only becomes a crime when it is an aspect of the destruction of the community. The violation of a woman is thus secondary to that of the group and the notion of harm is understood from the viewpoint of patriarchal societies. This is, however, due to the link to the question of jurisdiction in international criminal law, which in general prescribes violations against specific groups or widespread violence. However, feminists, to a certain extent, support harm being understood in relation to a collective. Whereas international criminal law presumes the harm of rape as being against the community, feminists insist on the collective harm of rape to women as a group. This is particularly evident in the interpretation of rape as a form of discrimination on the basis of sex.

Furthermore, the definition of rape in the Rome Statute has been criticised for focusing on the level of force employed, instead of constructing a definition involving the individual’s sexual autonomy as the basis. In international criminal law, certain feminists find parallels between wartime rape and sexual violence occurring in peacetime, noting the continuation of discriminatory gender roles as a constant factor. As has been argued, rape committed during the course of war is but a continuum of sexual violence that occurs in everyday situations. Others

²⁵⁹⁵ Judge Pillay.

²⁵⁹⁶ Charlesworth, Hilary, *Feminist Methods in International Law*, p. 387, Dixon, Rosalind, *Rape as a Crime in International Humanitarian Law: Where to from Here?*, p. 703 ff.

emphasise the particularities of wartime rape in order to prove the redundancy of a non-consent based standard in such coercive circumstances.

As for the issue of culture and rights pertaining to sexual autonomy international human rights law, IHL and international criminal law intend to construct universal regulations, unperturbed by cultural mores. However, in practice the universal rules are not completely protected from domestic cultural interpretations and claims of non-applicability in certain cultures. A prohibition of rape clearly exists in international law and this is rather uncontroversial considering its universal domestic criminalisation, regardless of culture. However, the definition of rape and accompanying procedural rules are highly dependent on the cultural context. This may concern not only procedural rules e.g. requiring male witnesses, but also the exclusion of certain categories of victims of rape as well as restrictive interpretations of elements such as ‘force’. Such issues were evident e.g. during the PrepCom meetings on the Rome Statute. Thus, while universality is presumed, cultural aspects may create obstacles to the implementation of rights/obligations relating to sexual violence, considering the precarious relationship existing between women’s rights and the preservation of cultural and religious norms.

12.6 The Legal Basis for Defining Rape

The subject of this thesis brings to light interesting trends in the application of sources in international law. The mutual effect and impact between international and municipal law is noticeable throughout the study. The international human rights regime, through various regional and universal mechanisms, obliges states to criminalise rape. Similarly, at the eve of the vast evolution of international criminal law and the future influence of the Rome Statute of the ICC, criminal laws will most certainly lead to extensive amendments of national criminal law. Correspondingly, international law has been greatly inspired by national criminal laws on rape. It is generally understood that the growing support for a prohibition of rape at the international level arises from a widespread criminalisation at the domestic level, together with an enlarged legal conscience among states. Patricia Viseur-Sellers argues: “unmistakably, there is a general norm of international law derived from municipal law regarding the illegality of rape”.²⁵⁹⁷ Since the prohibition of rape until recently was unregulated in the international arena, the European Court of Human Rights, the *ad hoc* tribunals and the Rome Statute have all used a comparative method of national laws and jurisprudence to evince an appropriate definition of rape, through the mechanism of “general principles of law recognized by civilized nations” as a source in

²⁵⁹⁷ Viseur Sellers, Patricia, *Sexual Violence and Peremptory Norms: The Legal Value of Rape*, p. 302.

international law.²⁵⁹⁸ Though “general principles” is an illusive concept in determining the rules of international law, it has been essential owing to the lack of other sources such as treaty regulations or customary law. Reliance on judicial decisions and soft law documents is also natural concerning sexual violence, since those are the sources that allow the greatest development and interpretation of international law, bearing in mind the often static nature of treaties and customary law. This is true in general concerning women’s human rights.

In *M.C. v. Bulgaria*, the European Court conducted a wide review of domestic penal codes. In order for regional courts to determine the inadequacy of the law, a comparison with similar legislation in other state parties is useful.²⁵⁹⁹ It is arguable that general surveys of state legislation to establish a standard only work within the regional context, because of the moral and cultural congruencies of such areas. However, the ICTY adopted the same technique in its *Furundzija* and *Kunarac* cases, as did the ICTR in *Akayesu*, in order to determine a definition of rape, albeit in the area of international criminal law. In this case, the tribunal conducted a review of a wide variety of common law and civil law provisions from different regions to evince a general principle of international law.²⁶⁰⁰ Thus, while the prohibition of rape largely has developed through customary law, within international criminal law, and through interpretations of treaty obligations in international human rights law, its definition is largely transposed from domestic penal provisions. This may in turn further develop into obligations of a customary nature.

As indicated, the principle of legality as a basic tenet of criminal law requires that international and domestic provisions are specific and clear in order to assure foreseeability for the individual. This has been problematic in international law, considering the lack of explicit provisions on sexual violence in treaty law, as well as the sporadic and inconsistent case law on rape. This has naturally had a detrimental effect on implementing legislation by concerned states. Though human rights law provisions by their very nature are wide and provide an extensive flexibility for states in specifying the content of implementing legislation, international criminal law directly binds individuals and a higher degree of clarity in such provisions must necessarily be required. Not only has the case law been inconsistent between various adjudicatory bodies, but the same tribunal may issue diverging definitions of crimes, since such bodies are not bound by *stare decisis* to the same extent as domestic courts. A

²⁵⁹⁸ Art. 38 Statute of the International Court of Justice.

²⁵⁹⁹ Ewing, Anthony P., *Establishing State Responsibility for Private Acts of Violence Against Women Under the American Convention on Human Rights*, p. 787.

²⁶⁰⁰ *Prosecutor v. Kunarac, Kovac and Vukovic*, Judgment of 22 February 2001, para. 440 ff.

certain level of interpretation of the international crimes is also allowed. However, at times a fine line has existed between the creation of new crimes and interpretation. The introduction of a document such as the Elements of Crimes of the ICC is consequently a welcome contribution in the wake of increased calls for legitimacy and legality, albeit its content does not reflect the development at the international level on certain elements of the offence. Thus, for reasons of avoiding both a fragmentation of international law and to better adhere to the principle of legality, a common core of elements of the definition will hopefully develop.

12.7 Suggestions for the Future

With the acceptance of the prohibition of rape as an essential component of the protection of the individual in international law, increasing demands are placed on states to put in place criminal laws to this effect. While international law through its structure intentionally provides for a wide discretion in the implementation of international obligations, duties as to the *substance* of a prohibition of rape is a necessity in order to make the norm operational and effective. Restrictive definitions could e.g. exclude certain individuals from protection or support prejudicial gender roles in society. Though efforts to this effect have been made in several areas of international law, they are lacking in clarity and cohesion. The approaches of the *ad hoc* tribunals and the ICC are inconsistent, though a common core can be found upon which to further develop customary international law. International human rights law has only sporadically articulated duties as to the elements of rape. More effort is required in this area. Harmonisation between international human rights law, IHL and international criminal law would strengthen the duty to enact criminal laws prohibiting rape. The fact that the prohibition of rape is a norm on the customary international law level but is defined differently depending on the system of law, or even depending on the judges of the different bodies, leaves a fragmented impression. A state could, for example, plausibly have parallel but dissimilar duties in defining the offence, if it is a member state to both the Rome Statute and the ECHR.

Though the context and jurisdictions of the various areas can be borne in mind in individual cases as a matter of evidence e.g. as to coercion, the nature of the different regimes does not require such divergent definitions of rape. A non-consent based standard is highly appropriate since it most closely corresponds to the sexual autonomy of the individual and focuses on inappropriate antecedents other than force alone. Other coercive or inappropriate incidents may lead to sexual activities where a participant is not willing, thereby causing the victim harm. A definition which finds its basis in the harm of the autonomy of the individual also corresponds to demands of equality, e.g. between genders. A

wide category of offences included in the definition of rape also reflect the emphasis on the harm to the autonomy of the victim, rather than with the traditional preoccupation with vaginal penetration, which seeks to protect against such harms as a loss of virginity or pregnancy. The understanding of harm affirmed in international law has therefore been an essential precursor to the development of defining the offence. This should similarly be transposed into domestic penal codes. In conclusion, important steps have been taken to define the crime of rape in international law but much work remains in clarifying and further developing obligations for states on this matter. The overall condemnation of sexual violence by e.g. the UN and the acknowledgement of rape as a serious concern of international law is not sufficient. Concrete steps must be taken to strengthen the protection of the individual against such offences, of which the enactment of effective and appropriate penal provisions of the crime is one important measure.

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