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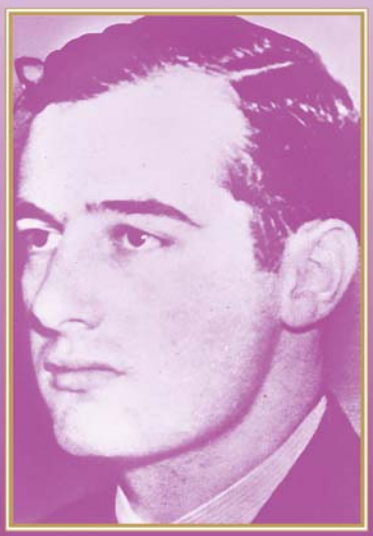
# Defining Rape: Emerging Obligations for States under International Law?



*By* Maria Eriksson

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# Part I:

## Introduction

*Legal language does more than express thoughts. It reinforces certain world views and understandings of events.*[1]

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

# 1 The Definition of Rape in an International Perspective

## 1.1 Background

The United Nations (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 by-product of war or an expression of local cultural traditions, rather than, for example, 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

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", *ibid.*

reformation of national laws to recognise such acts as crimes.[6] Improving the legislative framework on these matters has been stressed as essential by the UN Secretary-General.[7] This book 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.[10] 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

6 *Ibid*. *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 Nuremburg, 14 November 1945 – 1 October 1946 (42 Vols.), Published at Nuremberg 1947, (IMT Docs.).

10 Prosecution occurred of sexual violations as subsets of international crimes during the Tokyo trials following the Second World War. However, this was limited and unsatisfactory in scope and substance. *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.). This will be further discussed in chapter 8.4. Domestic prosecutions also took place, such as in the Netherlands (*see* 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. 62), US (Court of Military Appeals, *John Schultz case*, Judgment 5 August 1952), China (*Takashi Sakai case*, War Crimes Military Tribunal of the Ministry of National Defence, Judgement 29 August 1946). *See* list on national practice: ICRC Customary IHL: Practice Relating to Rule 93. Rape and Other Forms of Sexual Violence, <www.icrc.org/customary-ihl/eng/docs/v2_rul_rule93>, visited on 7 November 2010. However, these prosecutions were not sufficiently significant to set an international precedent.

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 occurring in populated areas and with the deliberate targeting of civilians.[11] 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 Democratic Republic of the Congo (DRC) and Darfur.[12]

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 violence, the criminalisation of sexual violence has thus been strictly deferred

11 "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, K. Askin, 'Prosecuting Wartime Rape and Other Gender-Related Crimes under International Law: Extraordinary Advances, Enduring Obstacles', 21 *Berkeley Journal of International Law* 288 (2003), p. 9, UN Doc. E/CN.4/Sub.2/1998/13, *ibid.*, 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, SC Res. 1820 on Women, Peace and Security, UN Doc. S/RES/1820, 19 June, 2008, R. Coomaraswamy, 'Sexual Violence during Wartime', in H. Durham and T. Gurd (eds.), *Listening to the Silences: Women and War* (Martinus Nijhoff Publishers, Leiden, 2005), p. 55, F. Bensouda,'Gender and Sexual Violence Under the Rome Statute', in E. Decaux *et al.* (ed.), *From Human Rights to International Criminal Law, Studies in Honour of an African Jurist, the Late Judge Laity Kama (*Brill, Leiden, 2007), p. 402.

12 *See e.g.* on *Rwanda*: 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 UN Doc. E/CN.4/S-3/1 of 25 May 1994, 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 M. Ellis, 'Breaking the Silence: Rape as an International Crime', 38 *Case Western Reserve Journal of International Law* 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.

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: "[L]aws reflect the current needs and recognise the present values of society."[13] 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 book 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".[14] 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.[15] 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.[16] 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 sexual violence as a matter of the utmost concern for the international community.[17] 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.[18] A con-

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

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

15 H. Steiner *et al.*, *International Human Rights in Context, Law, Politics, Morals*, 3rd ed. (Oxford University Press, Oxford, 2008), p. 175.

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

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

18 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.

vention 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.[19]

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.[20] 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 work 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 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 book 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 work 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.

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

20 The term "*ad hoc* tribunals" signifies the International Criminal Tribunal for Rwanda and the International Criminal Tribunal for the Former Yugoslavia.

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.[21] 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.

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 book of whether such development is appropriate considering the difference in *context* between these areas. An understanding of what constitutes coercive circumstances might 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.

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21 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* J.-M. Henckaerts and L. Doswald-Beck, *Customary International Humanitarian Law*, International Committee of the Red Cross (Cambridge University Press, Cambridge, 2005), hereafter denoted 'The ICRC Study on Customary International Humanitarian Law'. *See also* T. Meron, 'The Humanization of Humanitarian Law', 94 *American Journal of International Law* 239 (2002), p. 244: "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."

## 1.2 Purpose and Research Questions

This work 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 book 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 Convention on the Elimination of All Forms of Discrimination against Women (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.[22] 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".[23] 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.[24] However, even though criminal law is undoubtedly

22 *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.

23 C. Chinkin, 'Feminist Interventions into International Law', 19 *Adelaide Law Review* 1 (1997), p. 18.

24 D. Adams, 'The Prohibition of Widespread Rape as Jus Cogens', 6 *San Diego International Law Journal* 357 (2005), p. 394.

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 society[25] 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".[26] 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 "power of the law" was recognised and held as forming one of the essential principles for achieving an end to violence directed at women.[27]

The author 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.[28]

Furthermore, in order to limit the reach of this analysis, 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.

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

26 M. Chamallas, 'Consent, Equality and the Legal Control of Sexual Conduct', 61 *Southern California Law Review* 777 (1988), p. 777.

27 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.

28 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* A. Aust, *Handbook of International Law* (Cambridge University Press, Cambridge, 2005), p. 429. *See also* A. Nollkaemper, 'Concurrence between Individual Responsibility and State Responsibility in International Law', 52 *International & Comparative Law Quarterly* 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*, 10 December 1998, ICTY, Case No. IT-95-17/1-T, <www.icty.org/x/cases/furundzija/tjug/en/fur-tj981210e.pdf>, visited on 10 November 2010, para. 142.

## 1.4 Terminology

*Sexual Violence*

In the course of this book 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 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".[29] This was also discussed by the International Criminal Tribunal for the former Yugoslavia (ICTY) in its *Kvocka* 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.[30] 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:

> International 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.[31]

Certain obligations under international law, however, extend solely to rape or are more far-reaching than those for sexual violence. For example, some authors argue that the

29 UN Doc. E/CN.4/Sub.2/1998/13, *supra* note 10, paras. 21-22.

30 *Prosecutor* v. *Miroslav Kvocka*, 2 November 2001, ICTY, Case No. IT-98-30/1-T, <www.icty.org/x/cases/kvocka/tjug/en/kvo-tj011002e.pdf>, visited on 10 November 2010, 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*, 2 September 1998, ICTR, Case No. ICTR-96-4-T, <www.unictr.org/Portals/0/Case/English/Akayesu/judgement/akay001.pdf>, visited on 10 November 2010, para. 598.

31 *Prosecutor* v. *Furundzija*, *supra* note 28, para. 186.

prohibition of rape is considered to be an *ius cogens* norm, may incur universal jurisdiction and of a customary international law nature, at least against the background of international criminal law, which does not extend to 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.[32] 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.[33] 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.[34] It presumes that certain forms of violence are gender-specific, with the most pervasive forms of violence perpetrated by a husband or partner.[35] Violence such as rape, forced pregnancy, dowry deaths, sati and female genital mutilation (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 in armed conflicts.[36] Sexual violence is thus seen as a social construction based upon the gender-related attributes of each sex. This is relevant, for example, when discussing the necessity or possibilities for constructing a gender-neutral definition of rape, not pertaining solely to *e.g.* the

32 C. Benninger-Budel, *Due Diligence and its Application to Protect Women from Violence* (Martinus Nijhoff, Leiden, 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.

33 H. Charlesworth and C. Chinkin, *The Boundaries of International Law: A Feminist Analysis* (Manchester University Press, Manchester, 2000), p. 3, M. K. Eriksson, *Reproductive Freedom in the Context of International Human Rights and Humanitarian Law* (Martinus Nijhoff, The Hague, 2000), p. 11.

34 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.

35 Charlesworth and Chinkin, *supra* note 33, p. 12.

36 *Ibid*., 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).

physical attributes of the *actus reus* of rape, but also 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.[37] 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 "inherent dignity […] and inalienable rights of all members of the human family".[38] 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.[39] 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* is generally defined as the branch of international law that limits the use of violence in armed conflicts through a) sparing those who

37 *See* chapter 4.

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

39 Steiner *et al.*, *supra* note 15, p. 59.

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.[40] 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 […]".[41] 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. Such distinction, however, is gradually eroding.[42] 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 their armed forces or state agents. State parties to the Conventions are obliged to "respect and ensure" the provisions.[43] The "grave breaches" provisions of the conventions and additional protocols are of particular importance as they entail strong enforcement obligations on states to enact and enforce legislations concerning the breaches, as well as *aut dedere aut judicare* responsibilities.[44] 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

40 M. Sassòli and A. Bouvier, 'How Does Law Protect in War? Cases, Documents and Teaching Materials on Contemporary Practice in International Humanitarian Law', *ICRC* (1999), p. 67.

41 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).

42 M. Shaw, *International Law*, 5th ed. (Cambridge University Press, 2003), p. 1069. *See also* e.g. L. Moir, 'Grave Breaches and Internal Armed Conflicts', 7:4 *Journal of International Criminal Justice* (2009), N. Wagner, 'The Development of the Grave Breaches Regime and of Individual Criminal Responsibility by the International Criminal Tribunal for the Former Yugoslavia', Vol. 85, No. 850 *International Review of the Red Cross*, (June 2003), Henckaerts and Doswald-Beck, *supra* note 21, J.-M. Henckaerts, 'Study on Customary International Humanitarian Law: A Contribution to the Understanding and Respect for the Rule of Law in Armed Conflict', 87 *International Review of the Red Cross*, No. 857 (March 2005).

43 Article 1 of the Geneva Conventions.

44 Article 50 (GC I), Article 51 (GC II), Article 130 (GCIII), Article 147 (GC IV), Article 11 (Additional Protocol I), Article 85 (Additional Protocol II).

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.[45] 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 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.[46] 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[47] – in addition to human rights treaties such as the UN Genocide Convention[48] and the UN Convention against Torture.[49] 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.[50] War crimes naturally require a nexus to an armed conflict and are primarily

45 C. De Than and E. Shorts, *International Criminal Law and Human Rights* (Sweet & Maxwell, London, 2003), p. 13.

46 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* M. Sassòli, 'The Implementation of International Humanitarian Law: Current and Inherent Challenges', 10 *Yearbook of International Humanitarian Law* (December 2007), p. 57.

47 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 and the Rome Statute of the International Criminal Court.

48 Convention on the Prevention and Punishment of the Crime of Genocide, 9 December 1948, 78 U.N.T.S. 277.

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

50 G. Werle and F. Jessberger, *Principles of International Criminal Law* (Asser Press, The Hague, 2005), p. 40. The authors argue that international criminal law, among other

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 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 (ICJ) has generally been accepted as establishing the sources of international law.[51] Though the Article serves specifically to guide the ICJ, its influence extends to other international courts and contexts beyond its adjudication.[52] 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.[53] The following sections will generally explain the traditional sources of international law and how they have been applied throughout this work. 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 European Court of Human Rights (ECtHR), which have relied upon this source in order to determine the elements of the crime of rape.

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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 international criminal law.

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

52 Steiner *et al.*, *supra* note 15, p. 60, Shelton, *supra* note 13, p. 6.

53 C. Bassiouni, 'A Functional Approach to "General Principles of International Law"', 11 *Michigan Journal of International Law* 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.[54] 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 the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR),[55] the American Convention on Human Rights,[56] the International Covenant on Civil and Political Rights (ICCPR),[57] Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)[58] 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 Treaties.[59] This is, however, not uncontroversial because the committees themselves have not indicated such a wide scope.[60]

54 J. Dunoff *et al.*, *International Law, Norms, Actors, Process, A Problem-Oriented Approach* (Aspen Law & Business, New York, 2002), p. 70.

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

56 American Convention on Human Rights, 22 November 1969, O.A.S.T.S. 36, OEA7Ser.1./V/11.23 doc.rev.2.

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

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

59 Vienna Convention on the Law of Treaties, 23 May 1969, 1155 U.N.T.S 331. M. Scheinin, '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".

60 *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, H. Steiner, 'Individual Claims in a World of Massive Violations: What Role for the Human Rights Committee?', in P. Alston and J. Crawford (eds.), *The Future of UN Human Rights Treaty Monitoring* (Cambridge University Press, Cambridge, 2000), pp. 17 *et seq.*, T. Buergenthal, '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.

### *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*).[61] 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.[62] Different states must not have engaged in substantially divergent conduct.[63] However, state conduct that contradicts a rule may confirm it, if accompanied by attempts to justify the act.[64] The practice does not have to be universal, but it is sufficient that it is "general".[65]

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.[66] 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*.[67] However, the significance and implications of a particular document varies greatly. As concerns the resolutions of *e.g.* the

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

62 *Ibid.*, para. 74.

63 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 Case Concerning Military and Paramilitary Activities in and Against Nicaragua* (*Nicaragua* v. *the United States*), 27 June 1986, ICJ, ICJ Reports 1986, para. 186.

64 Henckaerts and Doswald-Beck (ICRC), *supra* note 21, Introduction, p. xxxvii. *See also* Werle and Jessberger, *supra* note 50, p. 47.

65 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, *supra* note 42 and *North Sea Continental Shelf Cases*, *supra* note 61, para. 74.

66 Dunoff *et al.*, *supra* note 54, p. 74. *See also* Werle and Jessberger, *supra* note 50, p. 52.

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

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.[68]

Treaties can generate rules of customary international law and bind states beyond those that have ratified the document. The extent of ratification of a treaty may be relevant to ascertain a customary norm.[69] 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".[70] Additionally, the Statutes of the ICTY and International Criminal Tribunal for Rwanda (ICTR) are also acts of an international organisation as they were established pursuant to UN Security Council resolutions.[71] 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.[72]

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.[73] Often the same act reflects both a practice

68 Dunoff *et al.*, *supra* note 54, p. 75.

69 *See North Sea Continental Shelf Cases*, *supra* note 61, para. 73 and *Case Concerning Military and Paramilitary Activities in and against Nicaragua*, *supra* note 63, 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* Henckaerts and Doswald-Beck (ICRC), *supra* note 21, pp. xlii-xliv, Steiner *et al.*, *supra* note 15, p. 74.

70 *Case Concerning the Continental Shelf*, 3 June 1985, ICJ, ICJ Reports 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* D. Betlehem, 'The Methodological Framework of the Study', in E. Wilmshurst and S. C. Breau (eds.), *Perspectives on the ICRC Study on Customary International Humanitarian Law* (Cambridge University Press, Cambridge, 2007), p. 8.

71 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.

72 Gallant, *supra* note 67, p. 348, I. Bantekas, 'Reflections on Some Sources and Methods of International Criminal Law and Humanitarian Law', 6 *International Criminal Law Review* 121 (2006), p. 130.

73 Henckaerts and Doswald-Beck (ICRC), *supra* note 21, Introduction, pp. xxxix-xlii. *See also* Dunoff *et al.*, *supra* note 54, p. 75.

and legal conviction.[74] 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.[75] This was also emphasised in the *Tadic* case of the ICTY.[76]

The modern interpretation of custom is essentially conducted through a deductive process, focusing primarily on *opinio iuris* in the form of texts and statements, for example, 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.[77] 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".[78] Certain authors argue the important role of human dignity as a standard in measuring customary norms. Oscar Schachter, for instance, maintains that statements of condemnation are sufficient evidence of a customary norm if the conduct in question transgresses the basic concept of

74 Henckaerts, *supra* note 42, p. 182. For example, military manuals count as state practice and often reflect the legal conviction of the state at the same time.

75 Werle and Jessberger, *supra* note 50, p. 47.

76 *Prosecutor* v. *Dusko Tadic aka "Dule"*, 2 October 1995, ICTY, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, Case No. IT-94-1, <www.icty.org/x/cases/tadic/acdec/en/51002.htm>, visited on 10 November 2010, 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*, 2 August 2001, ICTY, Case No. IT-98-33-T, <www.icty.org/x/cases/krstic/tjug/en/krs-tj010802e.pdf>, visited on 10 November 2010, paras. 541 *et seq.*

77 L. Reydams, *Universal Jurisdiction, International and Municipal Legal Perspectives* (Oxford University Press, Oxford, 2003), pp. 7-8.

78 F. Kirgis, 'Custom on a Sliding Scale', 81 *American Journal of International Law* 146 (1987), p. 149. *See e.g.* The *Case of the S.S. Lotus* (*France* v. *Turkey*), 7 September 1927, PCIJ, Ser. A No. 10, <www.worldcourts.com/pcij/eng/decisions/1927.09.07_lotus/>, visited on 7 November 2010, p. 28 (states had not abstained from prosecuting wrongful acts aboard ships because they felt prohibited from doing so); *North Sea Continental Shelf Cases*, *supra* note 61, 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, *supra* note 42, p. 182. The Kirgis sliding scale was *e.g.* mentioned in the ICRC Study on Customary International Humanitarian Law. *See* Henckaerts and Doswald-Beck, *supra* note 21, Introduction, p. xlii.

human dignity.[79] 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*".[80] The ICJ has stressed the importance of norm-generating as opposed to aspirational language in documents as evidence of custom.[81] 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".[82]

This book 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 law as a source concern legal principles derived from the world's major legal systems.[83] 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".[84] The ICTY has noted:

> 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.[85]

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79 O. Schachter, 'International Law in Theory and Practice: General Course in Public International Law', 178 *Recueil des Cours* (1982), p. 336.

80 R. Jennings, 'What is International Law and How Do We Tell it When We See it?', in M. Koskenniemi (ed.), *Sources of International Law* (Ashgate, Dartmouth, 2000), p. 35.

81 *North Sea Continental Shelf Cases*, *supra* note 61, para. 72.

82 Charlesworth and Chinkin, *supra* note 33, p. 74. Emphasis added.

83 *See* Schachter, *International Law in Theory and Practice* (Martinus Nijhoff, Dordrecht, 1991), p. 50.

84 Article 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, *supra* note 53, p. 768.

85 *Prosecutor v. Furundzija, supra* note 28, para. 178. *See also* the discussion by Judge McDonald and Judge Vohrah in Erdemovic: "Although general principles of law are to be derived

General principles have been described as the "cardinal principles" of legal systems and "a core of legal ideas".[86] It is described as an enigmatic source, due, at times, to a lack of transparency in its application.[87] As opposed to customary international law, evidence of general principles is not located primarily in international practice but rather in national legal systems.[88] The rule does not necessarily have to meet a test of universal acceptance and it has never been indicated whether or not the principle should reach a certain quantitative or numerical test.[89] 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.[90]

General principles have been of considerable significance to international criminal law,[91] which in its current form has depended materially on national criminal law in the form of institutions, processes and substantive regulations and penalties.[92] 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 ex-

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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*, 7 October 1997, ICTY, Case No. IT-96-22-A, Appeal Judgment, Joint Separate Opinion of Judge McDonald and Judge Vohrah, <www.icty.org/x/cases/erdemovic/acjug/en/erd-asojmcd971119e.pdf>, visited on 10 November 2010, para. 57.

86 Bassiouni, *supra* note 53, p. 770.

87 Jennings, *supra* note 80, p. 39.

88 W. Schabas, *The UN International Criminal Tribunals: The Former Yugoslavia, Rwanda and Sierra Leone* (Cambridge University Press, Cambridge, 2006), p. 102. *See also* U. Fastenrath, 'Relative Normativity in International Law', in M. Koskenniemi (ed.), *Sources of International Law* (Ashgate, Dartmouth, 2000), p. 168, Schachter, *supra* note 83, 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, *supra* note 53, 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* W. N. Ferdinandusse, *Direct Application of International Criminal Law in National Courts* (Asser, The Hague, 2006), p. 6.

89 Bassiouni, *supra* note 53, p. 788.

90 *Prosecutor* v. *Furundzija*, *supra* note 28, para. 178.

91 Werle and Jessberger, *supra* note 50, p. 47.

92 R. Cryer *et al.*, *An Introduction to International Criminal Law and Procedure* (Cambridge University Press, Cambridge, 2007), p. 12 and p. 64.

tent 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".[93] The distinct characteristics of the arrangements include their values, philosophies, aims, subjects, norm-creation, enforcement mechanisms and their processes.[94] 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.[95] 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 private law as an indication of policy and principles rather than as directly importing these rules and institutions.[96]

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.[97]

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93 Jennings, *supra* note 80, p. 41.

94 C. Bassiouni, 'The Philosophy and Policy of International Criminal Justice', in L. C. Vohrah and F. Pocar *et al.* (eds.), *Man's Inhumanity to Man, Essays on International Law in Honour of Antonio Cassesse* (Kluwer Law International, The Hague, 2003), p. 65.

95 Schachter, *supra* note 79, p. 79.

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

97 *Barcelona Traction, Light and Power Company, Limited*, 5 February 1970, ICJ, ICJ Reports 1970, p. 33, para. 38. *See also Prosecutor* v. *Kupreskic*, 14 January 2000, ICTY, Case No. IT-95-16-T, <www.icty.org/x/cases/kupreskic/tjug/en/kup-tj000114e.pdf>, visited on 10 November 2010, 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

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, for instance, 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.[98]

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 human rights field, and that general principles may become "the most important and influential source of international law".[99] The extensive use of national law by way of reference has thus been caused by necessity because of the lacunas found in international law.[100]

General fears of an arbitrary and subjective application of principles have been raised.[101] However, it is generally understood that international tribunals will not create new rules, but rather bring latent rules to light by empirical means.[102] Charlesworth and Chinkin note with 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.[103] 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.[104]

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.

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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."

98 Bassiouni, *supra* note 53, pp. 768, 773. He notes that courts have not always been clear on the distinction between customary law and general principles. *See* 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". B. Simma and P. Alston, 'The Sources of Human Rights Law: Custom, Jus Cogens and General Principles', 12 *Australian Yearbook of International Law* 82 (1988-1989), p. 102.

99 Bassiouni, *supra* note 53, p. 769.

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

101 Bassiouni, *supra* note 53, p. 783.

102 *Ibid.*, p. 784.

103 Charlesworth and Chinkin, *supra* note, p. 79.

104 Boot, *supra* note 100, p. 57. Boot notes: "Confusion increases where differences between the various national, or international, jurisdictions are more profound."

*Judicial Decisions*

Judicial decisions and doctrine do not pronounce rules but serve as means of interpretation, thus providing a "law-determining" function.[105] Though judicial decisions are solely a subsidiary means for determining rules of law, the novelty 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.[106] This is not surprising considering the general lack of treaties in this body of law. It is generally understood that decisions by, for example, 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.[107]

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.[108] 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.[109] The tribunals frequently refer to a broad range of judicial authorities as well, such as the case law of the ECtHR, UN Committees and International Military Tribunal at Nuremberg (IMT)/International Military Tribunal of the Far East (IMTFE), not as binding precedents but as "persuasive and compelling authorities, deserving of serious

105 Bassiouni, *supra* note 53, p. 782.

106 Gallant, *supra* note 67, p. 349. *See also* Cryer, *supra* note 92, p. 64. Bantekas, *supra* note 72, p. 129, B. van Schaack, *Crimen Sine Lege: Judicial Lawmaking at the Intersection of Law and Morals* (ExpressO, 2008), p. 48, R. Cryer, *Of Custom, Treaties, Scholars and the Gavel: The Influence of the International Criminal tribunals on the ICRC Customary Law Study*, p. 244.

107 *The ICRC Study on Customary International Humanitarian Law*, *supra* note 21, p. xxxiv, Henckaerts, *supra* note 42, p. 179, *Prosecutor* v. *Kupreskic*, *supra* note 97, 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* R. Cryer, 'Of Custom, Treaties, Scholars and the Gavel: The Influence of the International Criminal tribunals on the ICRC Customary Law Study', 11:2 *Journal of Conflict and Security Law* (2006), p. 251.

108 Sir. G. Fitzmaurice, 'Some Problems Regarding the Formal Sources of International Law', in M. Koskenniemi (ed.), *Sources of International Law* (Ashgate, Dartmouth, 2000), p. 170. *See also Prosecutor* v. *Kupreskic*, *supra* note 97, para. 540. *See more* in chapter 4.1 on the discussion on the principle of legality.

109 *See* chapter 4.1 and, *e.g.*, *Prosecutor* v. *Zlatko Aleksovski*, 24 March 2000, ICTY, Case No. IT-95-14/1-A, Appeal Judgment, <www.icty.org/x/cases/aleksovski/acjug/en/ale-asj000324e.pdf>, visited on 10 November 2010, para. 107.

consideration".[110] Judge Shahabuddeen of the ICTR has 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."[111] 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.[112]

This work 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 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.[113] Soft law documents include UN General Assembly resolutions, declarations, agendas, programmes and platforms of action and general comments

110 Schabas, *supra* note 88, p. 110. Antonio Cassese has directed criticism at the ad hoc tribunals' embracement of the jurisprudence of the ECtHR. A. Cassese, 'The Influence of the European Court of Human Rights on International Criminal Tribunals – Some Methodological Remarks', in M. Bergsmo (ed.), *Human Rights and Criminal Justice for the Downtrodden, Essays in Honour of Asbjorn Eide* (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, supra* note 97, 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, *supra* this note, pp. 21 and 24.

111 *The Prosecutor* v. *Laurent Semanza*, ICTR-97-20-A, ICTR, Decision, Separate Opinion of Judge Shahabuddeen, 31 May 2000, <www.unictr.org/Portals/0/Case/English/Semanza/decisions/310500.pdf>, visited on 10 November 2010, para. 25.

112 Bantekas, *supra* note 72, p. 130.

113 Dunoff *et al.*, *supra* note 54, p. 70.

by UN organs, and are articulated in a non-binding form.[114] Traditional sources may be seen as being too rigid and slow in responding to current needs.[115] 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.[116] The relationship between hard law and soft law documents in international law can be described as a "dynamic interplay",[117] which is particularly common in the field of international human rights law in interpreting the extent of obligations.[118] Such sources serve to provide a modern, contemporary reading of "hard law" documents that may not explicitly elaborate on the topic at hand.[119] They thus fill the lacunas in international law and serve an interpretive role.[120] Such documents have on occasion also provided statements of *opinio iuris* to an emerging customary norm and have assisted in specifying its content.[121]

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.[122] 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".[123] 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.

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114 *See e.g.* C. Chinkin, 'Normative Development in the International Legal System', in D. Shelton (ed.), *Commitment and Compliance: The Role of Non-Binding Norms in the International Legal System* (Oxford University Press, Oxford, 2000), p. 30. J. Klabbers, 'The Redundancy of Soft Law', in M. Koskenniemi (ed.), *Sources of International Law* (Ashgate, Dartmouth, 2000), p. 168.

115 Dunoff *et al.*, *supra* note 54, p. 87.

116 *Ibid.*

117 Shelton, *supra* note 13, p. 10.

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

119 I denote treaties and customary international law as "hard law".

120 Klabbers, *supra* note 114, p. 168.

121 Shelton, *supra* note 13, p. 1, Dunoff *et al.*, *supra* note 54, p. 89.

122 Dunoff *et al.*, *supra* note 54, p. 89.

123 Chinkin, *supra* note 114, p. 22.

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 text, 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.[124] The classic positivist view regards law as a unified system of rules emanating from state will. It relies heavily on the consent of states for its legal validity. Moral validity is thus not significant.[125] 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.[126] 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".[127] 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.[128]

However, the primary form of method employed in this text 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 includes *e.g.* domestic legislation and judicial decisions, with increased importance of judgments from

124 *Ibid.*, p. 293.

125 K. E. Himma, *Law, Morality, and Legal Positivism: Proceedings of the 21st World Congress* (Franz Steiner Verlag, München, 2004), p. 14, J. Raz, *The Authority of Law: Essays on Law and Morality* (Oxford University Press, Oxford, 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.

126 B. Simma and A. L. Paulus, 'The Responsibility of Individuals for Human Rights Abuses in Internal Conflicts: A Positivist View', Vol. 93, No. 2 *American Journal of International Law* (April 1999), p. 304.

127 *Ibid.*, p. 306.

128 Fastenrath, *supra* note 88, p. 155.

international tribunals.[129] This view also holds soft law to be an important device for interpreting the meaning of rules and for spurring on legal change.[130] 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 not aim to lead to clear legal conclusions, but rather serves to challenge the perceived objectivity of international law.[131] Because of the, at times, clearly political agenda, this method may be perceived to be unscholarly.[132] 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".[133] 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.[134]

The feminist approach does not answer the main question of this book – 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".[135] Beyond this precept, there is no uniform approach among feminists, rather "feminism is not a single 'theory', 'school' or 'methodology'".[136] Several approaches exist, including that of the liberal/equality femi-

129 Simma and Paulus, *supra* note 126, p. 307.

130 *Ibid.*, p. 308.

131 H. Charlesworth, 'Feminist Methods in International Law', 93 *American Journal of International Law* (1999), p. 379.

132 *Ibid.*, p. 380.

133 Simma and Paulus, *supra* note 126, p. 316.

134 Charlesworth, *supra* note 131, p. 392.

135 N. Quénivet, *Sexual Offenses in Armed Conflict & International Law* (Transnational Publishers, Ardsley, NY, 2005), p. xi.

136 A. X. Fellmeth, '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* R. E. Dobash and R. P.

nist 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 international law, as well as the vocabulary of such norms.[137] Feminists hold that rights are "defined by the criterion of what men fear will happen to them".[138] In consequence, the subject matter considered appropriate for international regulation reflects male priorities. In international law, the latter feminist approach takes the viewpoint 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.[139] 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.[140] Basic concepts such as "state responsibility" or "conflict" are analysed to reveal a gendered nature.[141] The dual critique therefore analyses both how law is made and the content of existing regulations. Consequently:

> [I]n 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

Dobash, 'Cross-Border Encounters: Challenges and Opportunities', in R. E. Dobash and R. P. Dobash (eds.), *Rethinking Violence against Women* (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.

137 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, *supra* note 131, p. 379.

138 H. Charlesworth, 'What are "Women's International Human Rights?"', in R. Cook (ed.), *Human Rights of Women* (University of Pennsylvania Press, Philadelphia, 1994), p. 71.

139 H. Charlesworth *et al.*, 'Feminist Approaches to International Law', 85 *American Journal of International Law* 613 (1991).

140 S. Ratner and A.-M. Slaughter, 'Appraising the Methods of International Law: A Prospectus for Readers', *American Journal of International Law*, Vol. 93, No. 2 (April 1999), p. 294, H. Charlesworth, *Feminist Methods in International Law*, p. 381.

141 Charlesworth and Chinkin, *supra* note 33, p. 49.

> 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.[142]

Within the realm of feminism, most pertinent to this book 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.[143] 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.[144] However, this work moves beyond a strictly feminist legal method and applies a gender legal method where appropriate.[145] 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, for example, 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.[146]

## 1.7 Structure of the Book

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

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142 K. Bartlett, 'Feminist Legal Methods', 103 *Harvard Law Review* 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." *See* p. 843.

143 R. Holtmaat, '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 C. Benninger-Budel (ed.), *Due Diligence and its Application to Protect Women from Violence* (Martinus Nijhoff, Leiden, 2008), p. 77.

144 F. Ni Aolain, 'Rethinking the Concept of Harm and Legal Categorizations of Sexual Violence During War', 1 *Theoretical Inquiries in Law* 307 (2000), p. 309.

145 J. Pilcher and I. Whelehan, *50 Key Concepts in Gender Studies* (Sage Publications, London, 2004), p. xii, E.-M. Svensson, *Genus och Rätt – En Problematisering av Föreställningen om Rätten* (Iustus, Uppsala, 1997), p. 19.

146 Pilcher and Whelehan, *supra* note 145, pp. xii *et seq*.

*Part II*: In order to enhance the discussion on international obligations to define rape, the book 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 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 book – 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 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.[147]

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

*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.

# Part II:

## Elements of the Crime of Rape: A Contextual Approach

# 2 The Prohibition of Rape in Domestic Criminal Law: An Historical 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 derives largely from its worldwide criminalisation.[148] 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 upon general principles of law arising from domestic criminal codes. The development at the national level of the criminalisation of rape therefore becomes a matter of interest.

While the act of rape has been criminalised by various legal systems for more than two thousand years, its definition has continually changed at the national level in accordance with society's understanding of sexual morality. Changes have developed foremost 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 constantly re-evaluated. Which acts are deemed to be 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 it did not provoke a comprehensive discussion of reform until the general women's movement of the 1970s that occurred in many Western states.[149] 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. This chapter only briefly points to certain general trends in criminalising rape at the

148 P. Viseur Sellers, 'Sexual Violence and Peremptory Norms: The Legal Value of Rape', 34 *Case Western Reserve Journal of International Law* (2002), p. 302.

149 C. Spohn and J. Horney, *Rape Law Reform, A Grassroots Revolution and its Impact* (Plenum Press, New York, 1992), p. 20.

domestic level. The historical aspects of international regulations are included in the chapters on international law.[150]

## 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 of determining whether or not a woman had a reasonable excuse for committing the wrongful acts of adultery or fornication. Women were regarded as legal minors in most Western states. Such inequality between the sexes was founded in part on biological reasons of strength and proposed differences in intellect.[151] In this context, rape devalued wives and daughters and threatened the patrilineal system of inheritance.[152] The criminal law on rape was thus another instrument of social control for regulating the transfer of property.[153] If a woman was raped, compensation was paid to the appropriate male in charge – the woman's father or husband. The sum would depend on the woman's economic position and other determining factors, with rape being classified as a crime of theft.[154] This was evident in the first written law prohibiting rape found in the ancient Babylonian Code of Hammurabi around 1750 BC.[155] In societies such as Babylonia and Assyria, the severity of the offence depended on the social and marital status of the victim.[156] Illicit sexual activities were divided into 1) adultery, 2) intercourse with an unmarried woman or widow or 3) such intercourse with coercion

150 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.

151 L. Clark and D. Lewis, 'Women, Property and Rape', in S. Caffrey and G. Mundy (eds.), *The Sociology of Crime and Deviance: Selected Issues* (Greenwich University Press, 1995), p. 151.

152 Rhode, *supra* note 25, p. 244.

153 *Ibid.*, p. 154.

154 *Ibid.*, p. 154. D. Dripps, 'Beyond Rape: An Essay on the Difference Between the Presence of Force and the Absence of Consent', 92 *Columbia Law Review* 1780 (1992), p. 1780, S. Sungi, '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', 9 *European Journal of Law Reform* 113 (2007), p. 116, C. McNamee, 'Rape', in R. J. Simon (ed.), *A Comparative Perspective on Major Social Problems* (Lexington Books, Lanham, Oxford, 2001), p. 2.

155 J. Brundage, *Law, Sex, and Christian Society in Medieval Europe* (Chicago University Press, Chicago, 1990), p. 10. In ancient Judaism, rape was considered a civil wrong rather than a moral offence. The wrong was considered to be 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. K. Burgess-Jackson, *A Most Detestable Crime: New Philosophical Essays on Rape* (Oxford University Press, Oxford, 1999), p. 16. McNamee, *supra* note 154, p. 3.

156 Rhode, *supra* note 25, p. 245.

or force.[157] Consequently, the rape of a virgin was an economic matter with all the characteristics of a property crime, while the rape of a married woman often was viewed as an excuse to avoid execution for adultery.[158] Consent was only an issue to the extent that it delineated the various crimes – that is, 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 came second to that of her marital and social status. Rape within marriage was not a concept, since a husband was presumed to have 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.[159]

Similarly, under Roman law rape was viewed as a property crime against the husband or father of the victim. The public's interest in punishing rape was a matter of regulating competing male interests in controlling sexual access to women.[160] The crime of *raptus* constituted capturing a woman through the use of force. The woman was thus removed from the person under whose authority she lived.[161] As Roman law developed, *raptus* could either contain abduction *or* sexual relations by force, thus developing into a sexual crime. In general, apart from in warfare, the crime of rape was largely ignored and subsumed under other forms of illicit sexual intercourse.[162] Certain categories of women could not be raped – for example, prostitutes.[163] The Justinian Code extended protection to unmarried women, widows and nuns, who would be devalued by the act since "chastity once polluted cannot be restored".[164] Accordingly, women

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

158 Dripps, *supra* note 154, p. 1780, McNamee, *supra* note 154, p. 3.

159 D. Moses, 'Livy's Lucretia and the Validity of Coerced Consent in Roman Law', in A. Laiou (ed.), *Consent and Coercion to Sex and Marriage in Ancient and Medieval Societies* (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, *supra* note 154, p. 3.

160 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. A. Borkowski, *Textbook on Roman Law* (Blackstone Press, London, 1994), p. 102. *See also* Dripps, *supra* note 154, 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 further* Brundage, *supra* note 155, p. 14.

161 Burgess-Jackson, *supra* note 155, p. 16, C. Saunders, 'The Medieval Law of Rape', 11 *Kings College Law Journal* 19 (2000), p. 20. The Justinian classification of *raptus* thus included rape but was not a necessary element.

162 Saunders, *supra* note 161, p. 22.

163 *Ibid.*, p. 16.

164 *Ibid.*, p. 21.

could not be viewed as autonomous agents in relation to something they did not own – their sexuality.

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 was "only one form of legitimate sexual relationship between man and woman; everything outside that is illegitimate".[165] Under Byzantian canon law, the idea of consent was more prominent than it was in Roman law.[166] The early codification in the Ecloga defined the crime as "illicit carnal knowledge without consent".[167] It was envisaged that only certain categories of women could be raped: unmarried girls or nuns, but not married or widowed women.[168] The Christian Church was an important influence in the development of the principle of individual responsibility and with this came the concept of personal 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.[169] As regards the understanding of consent, the Byzantines appear to have placed greater importance on objective rather than subjective factors. Circumstances such as weapons and accomplices, as well as the location of the act, were understood to negate free consent. Women had to offer the utmost resistance even up to the point of death, since it was presumed that they could avoid rape.[170]

## 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.[171] As feudalism expanded in Europe and developed into organised caste-bound agricultural societies, laws prohibiting rape gradually underwent change and acknowledged direct compensation to the victim.[172] However, since feudalism was a class-built social construction centred on servitude, the laws distinguished between victims from different feudal classes and the amount of compensation was relative to the class to which the in question woman

165 Laiou, *supra* note 157, p. 132, E. Levin, *Sex and Society in the World of the Orthodox Slavs, 900-1700* (Cornell University Press, 1989), p. 217.

166 Laiou, *supra* note 157, p. 111.

167 *Ibid*., p. 125.

168 Burgess-Jackson, *supra* note 155, p. 17, E. Levin, *Sex and Society in the World of the Orthodox Slavs, 900-1700* (Cornell University Press, 1989), pp. 218 *et seq*., Laiou, *supra* note 157, p. 125.

169 Laiou, *supra* note 157, p. 196.

170 *Ibid*., p. 173. The psychological injury to the victimised woman was considered, but primarily as a form of harm to her marriage prospects.

171 Saunders, *supra* note 161, p. 20.

172 H. Schwendinger and J. Schwendinger, *Rape and Inequality* (Sage Publishers, Beverly Hills, 1983), p. 97.

belonged. Injury to a servant under this system would be valued less than that of a woman who was a ward of the king.[173]

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.[174] The principle of personal responsibility was embraced by the church. Secular and ecclesiastic legislators began to concurrently transform legal conceptions of sexual violence. 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 crimes of property from offences against the person. Rape was defined as "unlawful coitus, related to sexual corruption".[175] Four elements of rape gradually evolved: abduction, coitus, violence and a lack of free consent on the part of the woman.[176] A burgeoning view of the woman's autonomy therefore became evident, together with the concept of individual possession of rights regardless of social status. However, canon law still excluded marital rape.[177] According to Brundage, medieval canon law played a central role in shaping laws on sexuality in Western countries, leading to increased control by governments in matters of sexual conduct, especially with regard to non-marital and extra-marital relations.[178]

## 2.4 Corroboration of Complaints

The French revolution was important in its recasting rape as an offence against the individual rather than a crime against a "guardian", thus focusing on injury rather than theft – as made evident in the Penal Code of France in 1791. This was a result of greater emphasis placed on self-determination.[179] However, this was in many respects

173 *Ibid.*, p. 97.

174 *Ibid.*, p. 102.

175 Burgess-Jackson, *supra* note 155, p. 16.

176 Schwendinger, *supra* note 172, 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.

177 Burgess-Jackson, *supra* note 155, 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* B. J. Cling, *Sexualized Violence against Women and Children* (The Guilford Press, New York, 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 […]". J. Allison and L. Wrighstman, *Rape – The Misunderstood Crime* (Sage Publications, London, 1993), p. 196. Rape and abduction were seen as similar acts.

178 Brundage, *supra* note 155, p. xx.

179 G. Vigarello, *A History of Rape: Sexual Violence in France from the 16th to the 20th Century* (Polity Press, Cambridge, Oxford, 2001), p. 88. It belonged to the code under the heading

only a theoretical development and was not equalled in practice.[180] The law that developed both in common law and civil law countries continued to limit the definition of rape to certain categories, most notably containing a marital exemption and exclusion of the male victim. Lord Justice Hale of England in the 17th 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".[181] Black's law dictionary also defined rape as "the act of sexual intercourse committed by a man with a woman not his wife".[182] The notion that certain forms of rape were less harmful prevailed and continues to be reflected in domestic views on the harm of rape.[183] 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.[184] In many cases the harm sustained was 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 18th century rape was defined by Blackstone in the United Kingdom as "the carnal knowledge of a woman forcibly and against her will".[185] The injury caused still related to the family. For example, the law gave the victim the opportunity of nullifying the perpetrator's sentence through marriage, thereby portraying the family in a more favourable light.[186] Similar provisions were also seen in civil law systems. Though a coherent approach to the crime of rape cannot be traced in such states, most laws in Europe have converged on the use of force.[187]

Criminal laws on rape that developed in many countries continued to be dominated by the perceived threat of female fabrication.[188] Because it was believed that

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of "crimes and attacks against persons".

180 *Ibid.*, p. 88.

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

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

183 *See more below* on the discussion on harm in chapter 3.

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

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

186 Dripps, *supra* note 154, p. 1780. The marital exemption still exists in a large number of countries.

187 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.

188 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 had an added incentive to invent 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 accordingly be treated differently from other crimes.[189] As Lord 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".[190] 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".[191] The legal standards were frequently influenced by medical experts asserting that women had the physical means to avoid rape if they wished, by using hands, limbs and pelvic muscles.[192] Anthropologists in the 1960s supported the contention 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".[193] Such beliefs included the idea that a woman who became pregnant as a result of alleged rape must have consented, regardless of her clearly expressing non-consent, since a woman could only conceive as a result of experiencing lust and excitement.[194]

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"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 J. Temkin, *Rape and the Legal Process* (Oxford University Press, Oxford, 2002), p. 10.

189 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." J. H. Wigmore, *A Treatise on the Anglo-American System of Evidence in Trials at Common Law*, 3rd ed. (J. H. Chadbourn, revised edition 1978) (Boston: Little, Brown & Co), 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". L. Cuklanz, *Rape on Trial* (University of Pennsylvania Press, Philadelphia, 1996), p. 19.

190 Hale, *supra* note 181, p. 634.

191 Wigmore, *supra* note 189, vol. 3A, sec. 924a.

192 J. McGregor, *Is it Rape?: On Acquantaince Rape and Taking Women's Consent Seriously* (Ashgate, Aldershot, 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".

193 M. Mead, *Male and Female: A Study of the Sexes in a Changing World* (Penguin, Harmondsworth, 1962), p. 203.

194 Temkin, *supra* note 188, 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 then declare it to be rape. An author in the *Yale Law Journal* in the 1950s claimed that there was an "unusual inducement to malicious or psychopathic accusation inherent in the sexual nature of the crime [of rape]".[195] The writer further argued that women rarely know what they want nor are they sincere and often require force to have a pleasurable experience.[196] Havelock Ellis, who revolutionised views on sexuality at 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 to offer resistance even though in reality she consents to the act.[197] Ellis concluded that men are characteristically active, aggressive, sexually insistent and easily aroused.[198] 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".[199] 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".[200] As a result, many jurisdictions have at some stage required a display of physical resistance on the part of the victim, requiring her to "resist to the utmost" or display "such earnest resistance as might reasonably be expected under the circumstances".[201]

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

196 *Ibid*.

197 S. Larsson, '"Fina Flickor" Kan Inte Våldtas', in Görel Granström (ed.), *Den Onda Cirkeln* (Uppsala Publishing House (2004), p. 144.

198 H. Ellis, *Studies in the Psychology of Sex*, Volume 3 (Random House, New York, 1936).

199 Wigmore, *supra* note 189.

200 Rhode, *supra* note 25, p. 247.

201 McGregor, *supra* note 192, p. 35, M. Anderson, 'Reviving Resistance in Rape Law', *University of Illinois of Law Review* 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". *Brown* v. *State*, 127 Wisc. 106 N.W 536, 538 (1906), in J. Kaplan *et al*. (eds.) *Criminal Law: Cases and Materials* (Aspen Publishers, New York, 2004), p. 903. 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), discussed in C. Spohn and J. Horney, *Rape*

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 she was of a bad or promiscuous character, for example, a prostitute, and therefore likely to have consented. Historically, evidence of hitchhiking, smoking and excessive drinking, seductive clothing and the use of bad language have all been taken into consideration in assessing the character of the victim – factors that still exist in certain jurisdictions.[202] In certain countries the complainant may even be required to submit to a medical examination to ascertain virginity prior to the attack.[203] Other jurisdictions require the injured party to file a complaint promptly after the alleged violation.[204]

The rationale of admitting evidence on the woman's previous sexual history 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. This approach was demonstrated in a case from 1838 in a New York court, where the judge was of the opinion that one must distinguish between a woman "who has already submitted herself to the lewd embraces of another, and the

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*Law Reform, A Grassroots Revolution and its Impact* (Plenum Press, New York, 1992), p. 23. 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, *supra* note 192, p. 30.

202 Temkin, *supra* note 188, 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, *supra* note 188, p. 10. *See further R.* v. *Gammon*, (1959) 43 Cr App Rep 153, in J. Temkin, *Rape and the Legal Process* (Oxford University Press, Oxford, 2002), p. 43. During the trial in 1959 in the UK, the judge stated: "[W]e 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."

203 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.

204 *See e.g.* laws in Massachusetts, USA, discussed in *Commonwealth v. King*, 445 Mass. 217 (2005), M. Anderson, 'The Legacy of the Prompt Complaint Requirement, Corroboration Requirement, and Cautionary Instructions on Campus Sexual Assault', 84 *Boston University Law Review* 945 (2004).

coy and modest female severely chaste and instinctively shuddering at the thought of impurity".[205] A corroboration warning, that is, instructions that additional evidence is required, has frequently been given by trial judges to juries in various countries. In Canada prior to its legislative reform in 1983, such instructions were provided only in cases of sexual offences involving a female victim.[206]

Certain jurisdictions have further required corroboration of eyewitnesses, particularly in countries abiding by a certain interpretation of Sharia law.[207] Islamic law requires a rape charge to be corroborated by the witness testimony of four male witnesses.[208] The evidentiary rule requires the observation of the actual penetration during sexual intercourse. Under 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.[209] 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.[210]

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205 *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* K. Askin, *War Crimes against Women; Prosecution in International War Crimes tribunals* (Brill, The Hague, 1997), p. 220.

206 S. 142, The Criminal Code, Canada: "[T]he 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* L. K. Sullivan, 'The Anatomy of Rape', 40 *Saskathchewan Law Review* (1976-1977), p. 27.

207 For example, Pakistan, Sudan, Afghanistan.

208 Previous law in Pakistan, Hudood Ordinance, Article 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."

209 S. Joseph and A. Najmadabi, *Encyclopedia of Women & Islamic Culture: Family, Law and Politics*, Vol. 2 (Brill, Leiden, 2005), p. 698.

210 A. Quraishi, 'Her Honor: An Islamic Critique of the Rape Laws of Pakistan from a Woman-Sensitive Perspective', 18:287 *Michigan Journal of International Law* (Winter 2007), 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 by reporting the rape she had already confessed to sex out of wedlock. Pregnancy is also used as evidence of *zina*, adultery. A number of rape trials have been reported where the female complainant has been convicted of

## 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 general personal development and growth for women.[211] The concerns of the 1970s were mainly related to the political participation of women and economic equality in the work place, as well as their participation in the development process in certain regions of the world.[212] As the UN Special Rapporteur on Violence against Women concluded, the issue of such violence has been treated in isolation from the wider concerns of women's rights and equality.[213] In the Rapporteur's opinion, this arises 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 also formed a part of a general gender inequality in society. The effects of male stereotyping were especially evident in criminal laws on rape.

According to feminist thinking, criminal laws prohibiting rape may display a cultural expectation of proper female behaviour. A regulation that only condemns sexual violence accompanied by force enhances male opportunities for coercive sex, increases women's dependence on male protectors and reinforces their dominant position.[214] 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 its perception in many states by focusing on what the victimisation of rape entailed for women. Cathy Roberts observes that 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."[215] Rather than explaining the existence of rape as an expression of individual aberration, the feminist movement declared it to be a

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*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.

211 L. Kelly and J. Radford, 'Sexual Violence Against Women and Girls, An Approach to an International Overview', in R. E. Dobash and R. P. Dobash (eds.), *Rethinking Violence against Wome*n (Sage Publications, London, 1998), p. 53.

212 UN Doc. E/CN.4/1995/42, *supra* note 34, para. 20.

213 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.

214 C. MacKinnon, *Toward a Feminist Theory of the State* (Harvard University Press, Cambridge, 2001), p. 25.

215 S. Schulhofer, *Unwanted Sex: The Culture of Intimidation and the Failure of Law* (Harvard University Press, Cambridge, 1998), p. 24.

structural problem. Since women as a social group in many cultures are symbolically connected to sexuality in the form of reproduction or honour, such restraint had in this view led to the control of women.[216]

The 1970s represented a movement in many states that aimed at liberalising public attitudes on sexuality and ridding society of previous taboos. One intention was to liberate the individual's natural approach to sexuality from cultural oppression, resulting in greater gender equality.[217] With the increased liberalisation of sexuality women would break free from previous stereotypes of appropriate behaviour for men and women, leading to an acknowledgement that also women possessed the 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 seek to protect the same interests because 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.[218] The movement brought a social acceptance of women consenting to sexual relations outside of marriage in many states. However, contradictory attitudes, particularly towards women and the proper boundaries of behaviour, are still discernable in definitions of rape in many parts of the world, reflecting distrust of 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 this freedom, since women are allowed to, and do, consent to sexual relations. Meanwhile, both the perpetrator and the legal systems of many countries regard the victim very much to be sexually liberated, presuming consent in situations that previously would have been considered as forceful.[219] The threshold for acceptable behaviour has in this sense risen.

Fundamental reforms of legislation on both the definition of rape and procedural rules occurred 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 chiefly concerned the introduction of new types of offences with an emphasis on rape as a crime of violence in the form of sexual expression, rather than an act motivated by sexual satisfaction.[220] Many states introduced reforms concerning the elements of "non-consent" and "force", as well as widening the scope of potential victims – for example, the inclusion of marital rape. The reforms in many cases sought to

216 K. Berglund, *Straffrätt och Kön* (Iustus, Uppsala, 2007), p. 90.

217 *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, *supra* note 138, pp. 58 and 61.

218 Berglund, *supra* note 216, p. 249.

219 McGregor, *supra* note 192, p. 95.

220 Temkin, *supra* note 188, p. 149, M. Torrey, 'Feminist Legal Scholarship on Rape: A Maturing Look at One Form of Violence Against Women', in B. Taylor *et al.* (eds), *Feminist Jurisprudence, Women and the Law: Critical Essays, Research Agenda, and Bibliography* (Rothamn Publisher, Buffalo, 1998).

broaden the range of the *actus reus* beyond the traditionally narrow focus of vaginal penetration to include other forms of sexual acts.[221] The objectives of such reforms were simultaneously to improve the legal process for rape victims, including willingness to report the crime, as well as to influence social attitudes. Such goals were emphasised by legislators in many jurisdictions.

The purpose of Michigan Criminal Sexual Conduct Statute of 1974 was 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".[222] In Australia, the reform in New South Wales was constructed to "serve an educative function in further changing community attitudes to sexual assault".[223] That 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."[224] Reform in Canada intended to lessen the humiliation suffered by the victim in a rape trial and to constitute a symbolic educational message to society.[225] In Sweden the 2005 legal reform of the criminal law aimed to "improve protection against sexual violations and further enhance sexual integrity and the right of self-determination".[226] Deterrence and contributing to changing people's perception of the harms sustained by sexual violence were mentioned as overarching goals.[227]

The purpose of these reforms has also in part been to liberalise sexuality from cultural constraints and societal taboos and to demonstrate that sexual experiences *per se* are not harmful to the interests of the individual. For instance, rape provisions were 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".[228] The term "sexual assault" was perceived as not being imbued with the same level of stigma. It could be said that the word rape attaches itself to certain stereotypical notions, for instance that rape is an attack by a stranger and that severe physical force is a necessary component, leading

221 *See* discussion in chapter 4.2.7.

222 Temkin, *supra* note 188, p. 150.

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

224 N. Naffine, *An Inquiry into the Substantive Law of Rape* (Women's Adviser's Office, Dept. of the Premier and Cabinet, South Australia, 1984), p. 11.

225 Temkin, *supra* note 188, p. 151.

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

227 *Ibid*.

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

to greater reluctance by the court or jury to convict a defendant.[229] Many jurisdictions have now reconsidered the remodelling of rape in terms of sexual assault. Though the attached 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 aggrieved person would arguably be mitigated by designating it "sexual assault".[230]

Though the effects of such law reforms seldom demonstrate a significant decrease in attrition rates,[231] the merit of a reassessment of the definition can also be sought on a moral level as influencing society's view on gender roles and on appropriate limits in sexual relations. As Susan Estrich asserts: "[T]he 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 message communicated to the public by the law."[232] Legal provisions are an essential part of the public's attitude towards sexual relations and gender. Naturally, society's attitude to what is considered rape, on 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 effect study.[233] Schulhofer points out that especially criminal law never functions independently of the culture in which it is set and though sexual culture has changed since the 1970s, it has not developed at the same pace as the regulations and aspirations of feminist legal scholars.[234]

So, 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 rec-

229 Temkin, *supra* note 188, p. 177.

230 *Ibid.*, p. 178.

231 The results vary depending on the extent of the reform, and though statistics are ambivalent on whether a reformed rape definition actually leads to higher conviction rates, it is clear that there is no dramatic difference in most cases. *See e.g.* Rhode, *supra* note 25, p. 252, Schulhofer, *supra* note 215, p. 38, S. Estrich, 'Rape', 95:6 *Yale Law Journal* (1986), pp. 1134, 1159-1160, Spohn and Horney, *supra* note 149, Temkin, *supra* note 188, WHO World Report on Violence and Health, 2002, p. 170, BRÅ 2005:7, p. 51. The deterrent 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, *supra* note 92, pp. 21-22.

232 Estrich, *supra* note 231, p. 1160.

233 Spohn and Horney, *supra* note 149, p. 175.

234 Schulhofer, *supra* note 215, p. 39.

ognition of the importance of these goals and the machinery for further development. Certain aspects of the early criminalisation of rape are still prevalent in many societies. Among them are the restriction on possible rape prosecutions to certain classes of women, the 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.[235] As this book will demonstrate, intrusion into the domestic sphere of regulating private sexual conduct has increased. This has further encouraged development towards the protection of the sexual autonomy of the individual and at the international level placed obligations on states to transform their domestic criminal laws prohibiting rape.

235 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*, 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.[236] 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.[237] 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.[238] For example, in the preamble of the Rome Statute of the International Criminal Court (ICC) it is asserted that the state parties are "[…] determined to put an end to impunity

236 H. Stewart, 'Harms, Wrongs and Set-Backs in Feinberg's Moral Limits of the Criminal Law', 5:47 *Buffalo Criminal Law Review* (2002), p. 47. Cryer, *supra* note 92, p. 20. According to Kenneth Gallant: deterrence, retribution, incapacitation and rehabilitation. *See* Gallant, *supra* note 67, p. 26.

237 A. Simester and A. T. H. Smith, 'Criminalization and the Role of Theory', in A. Simester and A. T. H. Smith (eds.) *Harm and Culpability* (Clarendon Press, Oxford, 1996), p. 4.

238 Cryer, *supra* note 92, p. 17.

for the perpetrators of these crimes and thus to contribute to the prevention of such crimes".[239] Comparable language has been used in case law of regional human rights courts obliging states to adopt criminal law as a means of protecting persons from violence.[240] 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.[241] 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.[242] 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.[243] The issue

239 Preambular para. 5.

240 *See e.g. M.C.* v. *Bulgaria*, 4 December 2003, ECtHR, No. 39272/98, <cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=M.C.%20%7C%20v.%20%7C%20Bulgaria&sessionid=61867803&skin=hudoc-en>, visited on 9 November 2010, and discussion in chapter 6.4.6.

241 J. Feinberg, *Harm to Others*, *The Moral Limits of Criminal Law* (Oxford University Press, Oxford, 1984), p. 31 *et seq.* 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." J. Feinberg, *Offense to Others*, *The Moral Limits of Criminal Law* (Oxford University Press, Oxford, 1985), p. 154. A. von Hirsch, 'Extending the Harm Principle: "Remote" Harms and Fair Imputation', in Simester and Smith (eds.), *Harm and Culpability* (Clarendon Press, Oxford, 1996), p. 260. *See also* H. Gross, *A Theory of Criminal Justice* (Oxford University Press, Oxford, 1979), p. 114. Gross 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".

242 Feinberg, *Harm to Others, supra* note 241, pp. 33 *et seq.*

243 J. Gardner and S. Shute, 'The Wrongness of Rape', in J. Horder (ed.) *Oxford Essays on Jurisprudence*, Fourth Series (Oxford University Press, Oxford, 2000), p. 205.

of the harm of rape also aims to answer questions 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, such as the harm to the community in cases of genocide. Harm in such cases is thus group based. The issue will also resurface in the discussion on cultural relativism further on. 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".[244] A limit to this concept is that a set-back to interests is not harmful if it has been voluntarily consented to.[245] It has also been described as "an untoward occurrence consisting in a violation of some interest of a person".[246] 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.[247] This has, however, been criticised 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.[248]

The notion of harm is directly related to personal freedom and the autonomy to make free choices.[249] 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 "our sense of self-respect and self-worth".[250] 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

244 Feinberg, *Harm to Others*, *supra* note 241, pp. 35-36.

245 Stewart, *supra* note 236, p. 62.

246 Gross, *supra* note 241, p. 115.

247 V. Munro, 'Devil in Disguise? Harm, Privacy and the Sexual Offences Act 2003', in V. Munro and C. F. Stychin (eds.), *Sexuality and the Law, Feminist Engagements* (Routledge-Cavendish, Oxon, 2007), p. 13.

248 *Ibid.*, p. 12.

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

250 McGregor, *supra* note 192, p. 15. Protection against harm in criminal law is often related to civil liberties found in human rights catalogues. *See* Berglund, *supra* note 249, p. 14.

and choices. Harm, however, is not synonymous with "hurt".[251] While the question of how women experience sexual violence is strictly empirical, the question of what constitutes the harm of rape is theoretical.[252] 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.[253] 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".[254]

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 hand 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.[255] Consensual sex outside of marriage may for

251 H. E. Baber, 'How Bad is Rape?', 2:2 *Hypatia* (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, *supra* note 241, p. 120.

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

253 *Ibid.*, p. 100.

254 *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. J. Murphy, 'Some Ruminations on Women, Violence and the Criminal Law', in J. Coleman and A. Buchanan (eds.), *In Harm's Way* (Cambridge University Press, Cambridge, 1994), 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. P. Westen, *The Logic of Consent; The Diversity and Deceptiveness of Consent As a Defense to Criminal Conduct* (Ashgate, Aldershot, 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.

255 C. Bassiouni, *Crimes against Humanity in International Criminal Law*, 2nd ed. (Kluwer, The Hague, 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, *supra* note 249, p. 17.

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."[256] 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.[257] 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 voluntary 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 example public morals seeking to restrain the liberalisation of sexuality.[258] 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.[259] By removing moral evaluations of the autonomous individual, decriminalisation of homosexuality and criminalisation of rape in marriage has been a result.[260] 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 humilia-

256 Berglund, *supra* note 249, p. 17.

257 A. T. Spence, 'A Contract Reading of Rape Law: Redefining Force to Include Coercion', 37 *Columbia Journal of Law & Social Problems* 57 (2003), p. 76.

258 N. Jareborg, *Allmän Kriminalrätt* (Iustus, Uppsala, 2001), p. 71.

259 Berglund, *supra* note 216, p. 57. Homosexual acts *per se* cannot accordingly be criminalised, regardless of morals that consider homosexuality a sin.

260 Homosexual acts were decriminalised in 1944 and rape within marriage 1964. *See* discussion in Berglund, *supra* note 249, p. 15.

tion of the victim and the sense of power and dominance over the woman or man that produces the satisfaction.[261] 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"[262] and a consequence of "power, dominance and humiliation" rather than of sexual gratification.[263]

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".[264] 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

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

262 Wertheimer, *supra note 252, p. 4. See however* R. Thornhill and C. Palmer, *A Natural History of Rape: Biological Bases of Sexual Coercion* (The MIT-Press, Cambridge, 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 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.

263 Quénivet, *supra* note 135, 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* C. MacKinnon, 'Feminism, Marxism, Method, and the State: Toward Feminist Jurisprudence', in S. Harding (ed.), *The Feminist Standpoint Theory Reader* (Routledge, New York, 2004), p. 141, R. Copelon, 'Surfacing Gender: Reconceptualizing Crimes Against Women in Time of War', in A. Stiglmeyer (ed.), *Mass Rape: The War against Women in Bosnia-Herzegovina* (University of Nebraska Press, 1994), p. 213.

264 J. Halley, 'Rape in Berlin: Reconsidering the Criminalisation of Rape in the International Law of Armed Conflict', 9 *Melbourne Journal of International Law*, Issue 1 (May 2008), p. 113.

rape.[265] 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 differently as opposed to other forms of physical assault.[266] 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.[267] 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.[268] 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".[269] The experience of non-consensual engagement in sex has been described as being "overtaken, occupied, displaced and invaded" by the physical urgency of another.[270] 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

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

266 *See* the studies on the following pages, including footnote 274.

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

268 Seifert, *The Second Front*, *supra* note 261, 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.

269 A. Dworkin, *Pornography: Men Possessing Women* (Dutton, New York, 1989), p. 243.

270 R. West, 'Jurisprudence and Gender', in K. Bartlett and R. Kennedy (eds.), *Feminist Legal Theory, Readings in Law and Gender* (Westview Press, Boulder (1991), p. 222.

could be contended that sexual relationships make the participants more vulnerable and exposed than in other relationships.[271]

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".[272] UN Secretary-General Ban Ki-Moon holds that "sexual violence is deeply dehumanizing, inflicts intense mental and physical trauma, and is often accompanied by fear, shame and stigma".[273] 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.[274] The World Health Organization (WHO) points out that sexual violence also can affect the social well-being of victims, for example through stigmatisation and family ostracism.[275] 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.[276] 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 Focault 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 Focault, 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

271 *Ibid*., p. 224.

272 UN Doc. E/CN.4/1997/47, *supra* note 203, para. 19.

273 UN Doc. S/2009/362, *supra* note 12, para. 4.

274 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." W. Young, *Rape Study – A Discussion of Law and Practice*, Dept. of Justice and Institute of Criminology, Wellington, New Zealand, 1983. F. Norris and K. Kaniasty, 'Psychological Distress Following Criminal Victimization in the General Population: Cross-Sectional, Longitudinal, and Prospective Analyses', 62:1 *Journal of Consulting and Clinical Psychology* (1994), pp. 111-123, S. Ayers *et al*., *Cambridge Handbook of Psychology, Health and Medicin*e, 2nd ed. (Cambridge University Press, Cambridge, 2007), p. 840, Wertheimer, *supra* note 252, 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, *supra* note 251, p. 130.

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

276 McGregor, *supra* note 192, p. 219.

organ isn't like a hand, hair or nose".[277] 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.[278] 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.[279] 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.[280]

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".[281] Accordingly, definitions of rape are often patronising towards women, continually cast in the role of victim, rather than advancing equality.[282] 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.[283] Proponents of equat-

277 M. Focault, 'Confinement, Psychiatry, Prison', in M. Foucault, *Politics, Philosophy, Culture, Interviews and Other Writings* (Routledge, New York, 1988), p. 201.

278 Baber, *supra* note 251, 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." C. Paglia, *Sex, Art, and American Culture: Essays* (Vintage, New York, 1992), p. 64.

279 Murphy, *supra* note 254, p. 214.

280 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.* V. Weihe and A. Richards, *Intimate Betrayal: Understanding and Responding to the Trauma of Acquaintance Rape* (Sage Publications, Thousand Oaks, 1995), D. Kilpatrick *et al.*, 'Rape in Marriage and Dating Relationships: How Bad Is It for Mental Health?', in Q. Prentky (ed.), *Human Sexual Aggression: Current Perspectives* (Annals of the New York Academy for Sciences, New York, 1988), Temkin, *supra* note 188, p. 52, McGregor, *supra* note 192, p. 67.

281 S. Brownmiller, *Against Our Will* (Fawcett, New York, 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.

282 McGregor, *supra* note 192, p. 76.

283 Torrey, *supra* note 220, p. 309.

ing 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.[284] 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.[285] 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.[286]

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.[287] By concentrating on the violent aspects of the assault, it was also intended to demonstrate that the legislator did 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 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.[288]

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284 P. F. Marshall, 'Violence Against Women in Canada by Non-state Actors: the State and Women's Human Rights', in K. Mahoney and P. Mahoney (eds.), *Human Rights in the Twenty-First Century: A Global Challenge* (Martinus Nijhoff Publishers, Dordrecht, 1993), p. 322.

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

286 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.

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

288 Temkin, *supra* note 188, 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.

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".[289] 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".[290] It would also lead to difficulties in prosecuting rape lacking physical force or violence.[291]

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 minimalised. 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 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.[292] 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.[293] 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

289 R. Tong, *Women, Sex, and the Law* (Rowman and Littlefield Publishers, Savage, 1994), p. 117.

290 C. MacKinnon, *Feminism Unmodified: Discourses on Life and Law* (Harvard University Press, Cambridge, 1987), p. 86.

291 Torrey, *supra* note 220, p. 308.

292 UN Doc. E/CN.4/1997/47, *supra* note 203, 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", W. Young and M. Smith, New Zealand, Dept. of Justice and 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.

293 Temkin, *supra* note 188, pp. 153-154.

construction would fail to reflect that fact.[294] Furthermore, it does not address the *particular* wrong of rape as opposed to all forms of assault.[295]

## 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 Universal Declaration of Human Rights (UDHR) as well as the International Covenant on Economic, Social and Cultural Rights (ICESCR) and the International Covenant on Civil and Political Rights (ICCPR).[296] 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 person […]".[297] 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."[298] The notion of dignity is also frequently referred to in international humanitarian law (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

294 *See e.g.* Wertheimer, *supra* note 252, p. 91, T. Scalzo, 'Prosecuting Rape Cases', in R. Hazelwood and A. Wolbert Burgess (eds.), *Practical Aspects of Rape Investigation, A Multidisciplinary Approach*, 4th ed. (CRC Press, Boca Raton, 2009), p. 373, C. and A. Bartol, *Introduction to Forensic Psychology* (Sage Publications, Thousand Oaks, 2004), p. 207.

295 Gardner and Shute, *supra* note 243, p. 211.

296 *See* Universal Declaration of Human Rights, G.A. Res. 217A, Preamble, Article 1, 22-23, UN GAOR, 3rd Sess, 1st plen. mtg., UN Doc. A/810 (10 December 1948); International Covenant of Economic, Social and Cultural Rights (ICESCR), G.A. Res. 2200A(XXI), Preamble, Article 13, UN Doc. (3 January 1976); International Covenant on Civil and Political Rights (ICCPR), G.A. Res. 2200A(XXI), UN Doc. A/6316 (23 March 1976), Article 10.

297 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.

298 O. Schachter, 'Human Dignity as a Normative Concept', 77 *American Journal of International Law* 848 (1983), p. 849.

arguments".[299] 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.[300] 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.[301] As Sir Isaiah Berlin declared: "[I]f 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 […]."[302]

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."[303] 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.[304] The law is certainly not designed to assure sexual access of the individual. Rather, the law aims to protect negative sexual autonomy, meaning

299 M. Bagaric and J. Morss, 'In Search of Coherent Jurisprudence for International Criminal Law: Correlating Universal Human Responsibilities with Universal Human Rights', 29 *Suffolk Transnational Law Review* 157 (2006), p. 170.

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

301 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.

302 I. Berlin, 'Two Concepts of Liberty', in *Four Essays on Liberty* (Oxford University Press, Oxford, 1969), pp. 136-137.

303 Schachter, *supra* note 298, 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 and Shute, *supra* note 243, p. 205.

304 *See below* the discussion on the right to privacy in chapter 7.3.

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.[305] 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.[306] 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-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".[307] Westen also emphasises that harms to dignity are never the primary harms in criminalising behaviour.[308] 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".[309] 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.[310] 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

305 Schulhofer, *supra* note 215, p. 15, McGregor, *supra* note 192, 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* p. 81.

306 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, *supra* note 215, p. 279.

307 MacKinnon, *supra* note 263, p.170.

308 Westen, *supra* note 254, 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.

309 S. Schulhofer, 'Taking Sexual Autonomy Seriously: Rape Law and Beyond', 11 *Law & Philosophy* 35 (1992), p. 94.

310 Schulhofer, *supra* note 215, p. x.

number of feminist scholars even consider this to be a further instance of a paternalistic attitude.[311] 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.[312]

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.[313] 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.[314] 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.[315] 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.[316] 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.[317] Thus the essential wrong of rape is that sexual relations are *non-consensual*, not the force used to obtain sex.[318] This is based upon the

311 *See e.g.* V. Berger, 'Not So Simple Rape', 7 *Criminal Justice Ethics* 69 (1988), p. 77.

312 D. Roberts, 'Rape, Violence and Women's Autonomy', 69 *Chicago – Kent Law Review* 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.

313 Prop. 2004/705:45.

314 Seifert, *The Second Front*, *supra* note 261, p. 41.

315 *M.C. v. Bulgaria, supra* note 240.

316 S. Cowan, 'Freedom and Capacity to Make a Choice, A Feminist Analysis of Consent in the Criminal Law of Rape', in V. Munro and C. F. Stychin (eds.), *Sexuality and the Law, Feminist Engagements* (Routledge-Cavendish, Oxon, 2007), p. 52.

317 McGregor, *supra* note 267, p. 233.

318 Berglund, *supra* note 249, 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*". C. Shafer and M. Frye, 'Rape and Respect', in M. Vetterling-Braggin (ed.), *Feminism and Philosophy* (Littlefield, Adams, 1977), 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". L. Henderson, 'Getting to Know: Honoring Women in Law and Fact', 2 *Texas Journal of Women and Law* 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

theories of harm as a wrong to 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 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.[319]

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.[320] 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."[321] 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 the European Court of Human Rights (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

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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 and Shute, *supra* note 243, p. 205. *See also* discussion in McGregor, *supra* note 267, p. 233.

319 UN Doc. E.CN.4/1997/47, *supra* note 203, 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".

320 Dripps, *supra* note 154, p. 1797 and Schulhofer, *supra* note 309, 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.

321 Schulhofer, *supra* note 309, p. 42.

on the possibility of establishing international obligations in relation to the elements of the crime of rape. The ideas of Focault 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.[322] 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 International Criminal Tribunal for Rwanda (ICTR) to widen the scope of the definition of rape to include also such acts.[323] 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 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.[324] 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.[325] 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 do men".[326] 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

322 McGregor, *supra* note 267, p. 235.

323 *The Prosecutor* v. *Jean-Paul Akayesu*, *supra* note 30.

324 McGregor, *supra* note 192, p. 223.

325 A. Coughlin, 'Sex and Guilt', 84 *Virginia Law Review* 1 (1998), pp. 6-7.

326 Baber, *supra* note 251, p. 136.

the female victim's culpability.[327] 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.[328] 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.[329] 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.[330] 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.[331] Failure to consider the context could, according to certain feminist authors, lead to harm being 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."[332] The context of the power

327 A. Cahill, 'Foucault, Rape, and the Construction of the Feminine Body', 15:1 *Hypatia* (2000), p. 44.

328 Murphy, *supra* note 254, p. 214.

329 Berglund, *supra* note 249, p. 20.

330 Murphy, *supra* note 254, 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, *supra* note 252, p. 1.

331 Seifert, *War and Rape: a Preliminary Analysis*, *supra* note 261, p. 57.

332 Berglund, *supra* note 249, 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, *supra* note 1, 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 ex-

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.[333] 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 International Criminal Tribunal for the former Yugoslavia (ICTY), the Tribunal noted that the mental harm of rape can be more severe in particular social and cultural contexts.[334] 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 violation – an especially sensitive issue in Rwandan culture.[335] 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

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ists or whether a harm has occurred, then can the law comprehend and adequately redress women's experiences of harm?"

333 Berglund, *supra* note 249, A. Thacker, *Women & the Law* (Deakin University Press, Geelong, 1998), p. 20.

334 *Prosecutor* v. *Delalic et al. (Celebici Camp)*, ICTY, 16 November 1998, Case No. IT-96-21-T, <www.icty.org/x/cases/mucic/tjug/en/981116_judg_en.pdf>, visited on 10 November 2010, 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."

335 *The Prosecutor v. Jean-Paul Akayesu, supra* note 30, 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. J. Gardam and M. Jarvis, *Women, Armed Conflict and International Law* (Kluwer International Law, The Hague, 2001), p. 221.

rapist.[336] 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"[337] 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.[338] 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.[339] In Costa Rica, the offender can be exonerated even if the victim refuses the offer of marriage.[340] The honour of the female 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.[341] 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".[342] 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.[343]

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

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336 *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, 10 March 1999.

337 A. E. Mayer, 'Issues Affecting the Human Rights of Muslim Women', in K. Askin and D. Koenig (eds.), *Women and International Human Rights Law*, Vol. 3 (Transnational Publishers, Ardsley, NY, 2001), p. 373.

338 *Ibid.*, p. 373. *See also* Quaraishi, *supra* note 210.

339 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).

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

341 Wertheimer, *supra* note 252, 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. *See* p. 113.

342 Gardner and Shute, *supra* note 243, p. 210.

343 *See* chapter 9.3.5.

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, for instance, through preventing births.[344] 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.[345] 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.[346]

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.[347] 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.[348]

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

344 *See e.g. The Prosecutor v. Jean-Paul Akayesu, supra* note 30, discussed in chapter 9.2.

345 R. Dixon, 'Rape as a Crime in International Humanitarian Law: Where to from Here?', 13:3 *European Journal of International Law* (2002), pp. 703 *et seq.* Dixon raises the point that this, however, can lead to an "etnicization" of the harms of rape.

346 *Ibid.*, p. 705.

347 *Ana, Beatriz, and Celia González Pérez (Mexico)*, 4 April 2001, Inter-American Commission on Human Rights, Case 11, 565, Report No. 53/01, <www.cidh.oas.org/Indigenas/Mexico.11.565.htm>, visited on 9 November, para. 95.

348 A. Edwards, 'Violence against Women as Sex Discrimination: Judging the Jurisprudence of the United Nations Human Rights Treaty Bodies', 18 *Texas Journal of Women & The Law* 1 (2008), p. 51.

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.

# 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, international humanitarian 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, such as 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. This 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.[349]

349 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 jurisidiction 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

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.[350] A vague definition of a crime may in practice lead to retroactive punishment. The principle also prohibits the establishment of punishment by analogy.[351] 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.[352] 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.[353] The principle of legality assumes that the deterrent effect of a law and its power to influence the decision-making of an 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.[354] 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

by law is permitted. *See* Gallant, *supra* note 67, p. 11. The principle is codified in both human rights law and IHL/ICL: Article 11 UDHR, Article 15 ICCPR, Article 7 ECHR, Article 9 ACHR, Article 7(2) ACHPR, Article 65 of Geneva Convention IV, Article 99 Geneva Convention III, Article 75(4)(c) Additional Protocol I, Article 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, *supra* note 100.

350 Ferdinandusse, *supra* note 88, p. 222, R. Haveman, 'The Principle of Legality', in R. Haveman *et al.* (eds.) *Supranational Criminal Law: A System Sui Generis* (Intersentia, Antwerp, Oxford, New York, 2003), p. 50.

351 Haveman, *supra* note 350, p. 40.

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

353 Bassiouni, *supra* note 255, p. 124. Gallant, *supra* note 67, 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, *supra* note 100, p. 85.

354 Werle and Jessberger, *supra* note 50, p. 32. Gallant, *supra* note 67, p. 38.

be observed in all circumstances by national and international tribunals."[355] It serves both as a legislative constraint and as a rule of judicial interpretation.[356]

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.[357] It is therefore expected that each state reformulates its international obligations, when implementing crimes, according to domestic rules of legality.[358] 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, for example, considered overriding concerns in the Nuremberg trials.[359] This is apparent even in the European Convention on Human Rights and the International Covenant on Civil and Political

355 T. Meron, *War Crimes Law Comes of Age* (Oxford University Press, Oxford, 1998), p. 244. The principle also forms part of human rights law, as stated in UDHR (Article 11(2)), ICCPR (Article 15(1)), the African Charter on Human and Peoples' Rights (Article 7(2)), the American Convention on Human Rights (Article 9) and the European Convention on Human Rights (Article 7). *See further* discussion in C. Bassiouni, 'Principles of Legality in International and Comparative Criminal Law', in C. Bassiouni (ed.), *International Criminal Law* (Brill, Leiden, 2008), van Schaack, *supra* note 106, Haveman, *supra* note 350.

356 Bassiouni, *supra* note 355, p. 73. An example of the latter is the use of analogy of crimes.

357 *See e.g.* Cryer, *supra* note 92, p. 11, who argues 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.

358 Bassiouni, *supra* note 355, pp. 88 and 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.

359 The Nuremburg 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

Rights (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".[360] 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 fairness".[361] It lacks a central criminal court and the specification of its substance has been decentralised.[362] 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.[363] Owing to the sporadic development of this field of law, much of the substance has been uncodified 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 International Criminal Court (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 International Criminal Tribunal for the former Yugoslavia (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 […]."[364] However,

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wrong, and so far from it being unjust to punish him, it would be unjust if his wrong was allowed to go unpunished." *Nuremburg IMT Judgment 1947*, 41 AJIL 172, at 217.

360 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."

361 Bassiouni, *supra* note 94, 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* p. 88.

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

363 Bassiouni, *supra* note 255, p. 144. Further, the statutes and treaties have frequently been drafted by diplomats, rather than specialists in ILC, lacking technical drafting skills. *See* van Schaack, *supra* note 106, p. 17.

364 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), supra* note 334, para. 402.

the *ad hoc* tribunals have invoked a mixture between "immorality, illegality, and criminality" in their case law.[365] The ICTY has stated:

> [I]t 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.[366]
>
> 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.[367]

Similarly, the International Criminal Tribunal for Rwanda (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".[368] 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.[369] The ICTY for example has stated:

> The Tribunal is not bound by precedents established by other international criminal courts such as the Nuremburg 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

365 Van Schaack, *supra* note 106, p. 15. According to Beth van Schaack, the current *ad hoc* tribunals are "updating and expanding historical treaties and customary prohibitions, upsetting arrrangements 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.

366 *Prosecutor v. Delalic et al. (Celebici Camp), supra note 334, para. 403.*

367 *Ibid.*, paras. 404-405.

368 *The Prosecutor* v. *Karemera*, 11 May 2004, ICTR, Decision on the Preliminary Motions by the Defence of Joseph Nzirorera, Edouard Karemera, André Rwanakakuba and Methieu Ngirumpatse Challenging Jurisdiction in Relation to Joint Criminal Enterprise, Case No. ICTR-98-44-T, <www.unictr.org/Portals/0/Case/English/Karemera/trail/040511.pdf>, visited on 10 November 2010, para. 43.

369 Ferdinandusse, *supra* note 88, p. 113.

> 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 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.[370]

Does this mean that the tribunals have been given free rein to disregard previous case law? The ICTY discussed this question in the *Aleksovski* case, stating: "[I]n 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."[371] 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.[372]

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 individual criminal responsibility. The European Court of Human Rights (ECtHR) interprets the European Convention "in the light of present-day conditions", maintaining a dynamic

370 *Prosecutor v. Kupreskic, supra* note 97, para. 540.

371 *Prosecutor* v. *Zlatko Aleksovski*, *supra* note 109, para. 107.

372 *Ibid*., paras. 108-110.

approach which for example considers the evolution of morals in relation to sexuality.[373] 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.[374]

A similar approach has been adopted by the Inter-American Court of Human Rights.[375] 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.[376] According to the principle of specificity, criminal rules must be as detailed as possible, concerning both the objective and subjective elements of any crime.[377] The principle requires a clear and unambiguous identification of the prohibited conduct.[378] In international criminal law the basic principle of legality

373 *Christine Goodwin* v. *The United Kingdom*, 11 July 2002, ECtHR, No. 28957/95, <cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=Christine%20%7C%20Goodwin%20%7C%20v.%20%7C%20The%20%7C%20United%20%7C%20Kingdom&sessionid=61867803&skin=hudoc-en>, visited on 9 November 2010, paras. 74-75. *See also Tyrer v. United Kingdom*, 25 April 1978, ECtHR, No. 5856/72, <cmiskp.echr.coe.int/tkp197/view.asp?item=2&portal=hbkm&action=html&highlight=Tyrer%20%7C%20v.%20%7C%20United%20%7C%20Kingdom&sessionid=61867803&skin=hudoc-en>, visited on 9 November 2010, para. 31, *Selmouni* v. *France*, 28 July 1999, ECtHR, No. 25803/94, <cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=Selmouni%20%7C%20v.%20%7C%20France&sessionid=61867803&skin=hudoc-en>, visited on 9 November 2010, para. 101.

374 *Christine Goodwin* v. *The United Kingdom*, *supra* note 373, para. 74.

375 Inter-American Court of Human Rights, Advisory Opinion of OC-10/89, 14 July 1989, para. 37: "[I]t 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."

376 Gallant, *supra* note 67, p. 357.

377 Cassese, *supra* note 362, p. 41.

378 Bassiouni, *supra* note 355, p. 100.

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."[379]

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.[380]

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.[381]

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 an-

379 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, *supra* note 67, p. 304.

380 *Case of Veeber* v. *Estonia (No. 2)*, 21 January 2003, ECtHR, No. 45771/99, <cmiskp.echr.coe.int/tkp197/view.asp?item=2&portal=hbkm&action=html&highlight=Case%20%7C%20of%20%7C%20Veeber%20%7C%20v.%20%7C%20Estonia&sessionid=61867803&skin=hudoc-en>, visited on 9 November 2010, para. 31.

381 *Prosecutor* v. *Vasiljevic*, 29 November 2002, ICTY, Case No. IT-98-32-T, <www.icty.org/x/cases/vasiljevic/tjug/en/vas021129.pdf>, visited on 10 November 2010, para. 193.

other indefinite and must be interpreted.[382] Definitions of crimes tend to be formulated in abstract terms to cover a multitude of scenarios and interpretation is therefore a natural exercise.[383] 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.[384] 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."[385]

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".[386]

382 Boot, *supra* note 100, 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."

383 Haveman, *supra* note 350, p. 45.

384 Gallant, *supra* note 67, p. 223. *See also* Bassiouni, *supra* note 355, 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. *See* p. 361.

385 Gallant, *supra* note 67, p. 360.

386 *Prosecutor* v. *Zlatko Aleksovski*, *supra* note 109, paras. 127-128. 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, <www.icty.org/x/file/Legal%20Library/jud_supplement/supp41-e/milutinovic-a.htm>, visited on 10 November 2010, 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:

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".[387] 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 reasonably foreseeable development of the law."[388] 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.[389]

The ECtHR has clearly applied a more teleological interpretative approach, focusing on the aim of the regulation.[390] 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

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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*, 26 April 1979, ECtHR, No. 6538/74, <cmiskp.echr.coe.int/tkp197/view.asp?item=2&portal=hbkm&action=html&highlight=the%20%7C%20sunday%20%7C%20times&sessionid=62785383&skin=hudoc-en>, visited on 9 November 2010, para. 49.

387 *C.R.* v. *The United Kingdom,* 22 November 1995, ECtHR, No. 20190/92, <cmiskp.echr.coe.int/tkp197/view.asp?item=2&portal=hbkm&action=html&highlight=C.R.%20%7C%20v.%20%7C%20The%20%7C%20United%20%7C%20Kingdom&sessionid=61867803&skin=hudoc-en>, visited on 9 November 2010, para. 34.

388 *Ibid*., para. 41.

389 *Ibid.,* para. 42.

390 *See more* on various interpretative methods in Haveman, *supra* note 350, p. 46.

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.[391]

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:

> [T]he 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 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.[392]

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 Yugoslavia. 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.[393] 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

391 *Prosecutor* v. *Furundzija*, *supra* note 28, 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*, *supra* note 387, and *Furundzija*. *See* M. Shahabuddeen, 'Does the Principle of Legality Stand in the Way of Progressive Development of Law?', 2 *Journal of International Criminal Justice* 1007 (December 2004), p. 1016.

392 C. Greenwood, 'The Development of International Humanitarian Law by the International Criminal Tribunal for the Former Yugoslavia', Vol. 2 *Max Planck Yearbook of United Nations Law* (1998), pp. 132-133.

393 Gallant, *supra* note 67, p. 356, Cryer, *supra* note 92, p. 14.

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.[394]

The possibility of applying the legality principle to such sources has been met with concern by some, due to their often vague content.[395] 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.[396] 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.[397]

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, for example, 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.[398]

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394 *Prosecutor* v. *Hadzihasanovic*, 16 July 2003, ICTY, Case No. IT-01-47-AR72, Decision on Interlocutory Appeal Challenging Jurisdiction in Relation to Command Responsibility, <www.icty.org/x/cases/hadzihasanovic_kubura/acdec/en/030716.htm>, visited on 10 November 2010, para. 34. *See also* Bassiouni, *supra* note 355, p. 99.

395 Boot, *supra* note 100, 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 multiplicty of states coupled with their subjective attitudes toward the practice. *See* van Schaack, *supra* note 106, p. 43.

396 Meron, *supra* note 355, pp. 263-264.

397 van Schaack, *supra* note 106, p. 45.

398 Ferdinandusse, *supra* note 88, p. 242, quoting the US Supreme Court, Ex Parte Quirin, 1943, 317 US 1, pp. 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

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".[399] 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".[400] 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.[401] 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.[402] 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 important contributions.[403] As mentioned, the Rome Statute

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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 jeapardising the principle of legality. *Jackie Arklöv*, Stockholms tingsrätt, mål nr. B 4084-04, 18 December 2006, <www.iclklamberg.com/files/Arklovdomen.pdf>, visited on 10 November 2010. *See* discussion in M. Klamberg, 'Fråga om Tillämpning av Legalitetsprincipen Beträffande Folkrättsbrott', *Svensk Jurist Tidning* 2007-08 Nr. 1.

399 Shahabuddeen, *supra* note 391, p. 1007.

400 *Ibid.*, p. 1010.

401 Gallant, *supra* note 67, p. 362. How states or courts interpret or measure foreseeability is, however, not always specified. *See also* Cryer, *supra* note 92, p. 15, where it is argued: "[C]larification of the ambit of offences through case law does not inherently fall foul of the nullum crimen principle. Judicial creation of crimes […] would."

402 *C.R.* v. *The United Kingdom*, *supra* note 387.

403 D. McGoldrick *et al.*, *The Permanent International Criminal Court: Legal and Policy Issues* (Hart Publishing, Portland, 2007), p. 46.

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".[404] 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 what elements such as "force", "threat of force" or "coercion" entail in relation to rape.[405]

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. It is therefore 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, for instance, 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.[406] 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 its definition, domestically and internationally, will be discussed with a view to providing more substance to the analysis on rape as a violation of international law. Naturally, it is not only the formal enactment of certain elements of the crime of rape at the domestic level that is of relevance in this analysis. The application and interpretation of the elements may also reinforce a gender-bias, resulting in ineffective protection or exclusion of certain groups. Thus the discussion on the elements of the crime 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 confronted with

404 Broomhall, *supra* note 352, p. 189.

405 Haveman, *supra* note 350, p. 62.

406 Ferdinandusse, *supra* note 88, p. 263.

many of the dilemmas in defining rape as those faced by domestic judicial systems.[407] 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.[408] 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 establish, for example, 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 that of intercourse.[409] This has caused concern that the tribunals have relied particularly on certain legal traditions. For instance, the ICTY in the *Kunarac* case, a case which has had a substantial impact in developing the elements of the crime of rape at the international level, arguably relied heavily on the definition of rape in common law countries.[410] Because of the clear influence of domestic law, and bearing in mind the relatively recent development at 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 briefly be raised where appropriate, as it 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 United Nations (UN) treaty bodies have elaborated on the elements of rape, and that these have primarily concerned the issue of "non-consent" or "force".[411] International criminal law tribunals/courts have on the other hand greatly expounded upon the elements of the offence in great many cases, intermittently adopting a wide, conceptual approach or mechanical descriptions of the *actus reus*, and developing approaches on the basis of either force, non-consent or coercion. The particular context in which rape occurs has informed the various adopted constructions

407 K. Fitzgerald, 'Problems of Prosecution and Adjudication of Rape and other Sexual Assaults under International Law', 8 *European Journal of International Law* 638 (1997), p. 638.

408 Cassese, *supra* note 362, p. 7.

409 *See e.g. The Prosecutor v. Jean-Paul Akayesu, supra* note 30, *Prosecutor* v. *Furundzija, supra note 28, Prosecutor* v. *Kunarac, Kovac and Vukovic*, 22 February 2001, ICTY, Case No. IT-96-23 and 23/1, <www.icty.org/x/cases/kunarac/tjug/en/kun-tjo10222e.pdf>, visited on 10 November 2010.

410 *Prosecutor* v. *Kunarac, Kovac and Vukovic*, *supra* note 409, paras. 453 *et seq*. *See* discussion in A. Kalosieh, 'Consent to Genocide? The ICTY's Improper Use of the Consent Paradigm to Prosecute Genocidal Rape in Foca', 24 *Women's Rights Law Reporter* 121 (2002-2003), p. 132.

411 *M.C.* v. *Bulgaria*, *supra* note 240, 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), paras. 333-334. In the *Case of the Miguel Castro-Castro Prison* v. *Peru*, 25 November 2006, Inter-American Court of Human Rights, Series C No. 160, <www.corteidh.or.cr/docs/casos/articulos/seriec_160_ing.pdf>, visited on 9 November 2010, the *actus reus* of rape is also discussed in a limited fashion.

and provided evidence as to the elements, such as whether it was committed during an armed conflict or captivity, or consisted of acts that went beyond intercourse such as the insertion of objects in the genital areas. Such factors as the cultural taboo in publicly recanting the events of the sexual assault have also 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 those discussed in domestic laws. All international crimes in the Rome Statute of the ICC contain specific qualifications – for example, 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.[412] These contextual elements often create presumptions regarding coercion. Rape in international criminal law is therefore often discussed in different terms than in peacetime because the prevailing circumstances and motives of perpetrators are deemed to influence the definition of the crime. A chapter on contextual approaches often referred to concerning rape, that is, 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*), that is, 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 components describe the awareness of the perpetrator of non-consensual/forceful sexual acts.[413] These parts are also mentioned with regard to the definition of rape in international law.

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 pressure. Force has been accorded various interpretations, from restricting the movements of a person to requiring actual physical assault, and in certain jurisdictions viewing it in a manner similar to non-consent.[414] Coercion, in certain domestic laws, is restricted to force but it may also include non-physical forms of pressure.[415] 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 – that is, coercion.[416] Force and non-consent frequently overlap. Certain jurisdictions judge non-consent based upon the

412 Articles 6-8 of the Rome Statute.

413 M. Jefferson, *Criminal Law*, 7th ed. (Pearson, Harlow, 2006), p. 41, W. Schabas, 'Mens Rea and the International Criminal Tribunal for the Former Yugoslavia', 37 *New England Law Review* 1015 (2002-2003), p. 1015.

414 Schulhofer, *supra* note 215, p. 98, Westen, *supra* note 254, p. 342 and the Swedish Penal Code (Brottsbalken) 6:1, which solely requires the restriction of movement.

415 Spence, *supra* note 257, p. 59.

416 Westen, *supra* note 254, G. Dingwall, 'Addressing the Boundaries of Consent in Rape', 13 *Kings College Law Journal* 31 (2002), Spence, *supra* note 257, p. 61.

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.[417] Certain states find that pressure beyond force solely constitutes the crime of "sexual coercion" rather than rape.[418] A study from 2009 on criminal laws on rape in Europe found an even split between legislation basing its definition upon force and non-consent. However, many states maintain such a broad understanding of force that definitions are becoming progressively similar and cover the same sort of behaviour as non-consent.[419] For example, though it is generally understood that definitions focusing on non-consent are wider in scope, Sweden, albeit in defining rape in terms of force, is understood to have one of the broadest definitions of the crime in Europe.[420]

The elements of the crime of rape are continually subject to reform in domestic jurisdictions, and 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 too is the grey area expanded of appropriate sexual behaviour. To a certain extent, the vagueness of the concept of rape is part of its *proper* use.[421] The constant re-evaluation and restructuring of the definition of rape, whether in domestic criminal legislation or international law, is therefore a natural exercise because to a certain extent it 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, thereby allowing adaptation to contemporary views on sexuality.

How then is a determination to be made of what are legitimate ways of expressing sexual autonomy in a constantly 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 founded on beliefs about its legitimacy or legality. To do so one would then enter a zone of questioning the moral aspect of various encounters.[422]

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417 K. Boon, 'Rape and Forced Pregnancy under the ICC Statute: Human Dignity, Autonomy, and Consent', 32 *Columbia Human Rights Law Review* 625 (2001), p. 655.

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

419 *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.

420 *Ibid*., p. 101. The definition or rape is: "A person who, by violence or threat involving or appearing to the treatened 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 regareded as equivalent to rape by threat or violence." *See* Chapter 6 §1 of the Swedish Penal Code.

421 E. Reitan, 'Rape as an Essentially Contested Concept', 16:2 *Hypatia* (Spring 2001), p. 45.

422 R. Felson, *Violence and Gender Re-Examined* (American Psychological Association, Washington DC, 2002), p. 122.

The definition would then become an exercise in creating distinctions based upon the morality of such forms of pressure as economic and authoritarian power, which may influence an individual's decision to engage in sex. Then the question remains of where to draw the line between mere immorality and illegal coercion. When does immoral behaviour reach the limit of what society must necessarily criminalise?

Part of the difficulty in setting the limit 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 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 with consensual sexual activity.[423] An additional difficulty in determining what is a "normal" interaction is that it changes over time and depends not only on the culture in question but also on *who* defines what normal behaviour is. 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 centred on "force", whereas legal systems that view sexual violence as mainly an intrusion of the sexual autonomy place the definition on the individual's non-consent.[424] The penalisation of rape has also been frequently influenced by other disciplines such as psychology, sociology and anthropology in order to ascertain its harm and consequences. 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.[425] 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".[426]

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423 *Ibid*., p. 123.

424 Gardner and Shute, *supra* note 243. *See also Prosecutor v. Kunarac, Kovac and Vukovic, supra* note 409, paras. 457 *et seq.*

425 Schulhofer, *supra* note 215, 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 (December 1952) p. 67.

426 Fitzgerald, *supra* note 407, p. 644. *See also M.C.* v. *Bulgaria*, *supra* note 240.

### 4.2.3 Non-Consent

"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."[427]

The concept of consent embodies what it means to be an autonomous moral agent. Therefore: "If 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."[428] Competent adults have an autonomous right to control what happens to their bodies, which is also evident in the ability to consent to sexual activity. Consent in some ways forms an authorisation for another person to act. It is a common basic principle in criminal law in the sense that it is a useful mechanism with which to measure "border-crossings" of body or property.[429]

Consent has been described as possessing "moral magic", in that it has the power to change the moral and legal relationships between persons who engage in a certain act.[430] Consent can be said to transform crimes into non-crimes, such as rape into sexual intercourse and theft into giving a belonging to another person.[431] Petter Asp finds that the term "transformative" is a misrepresentation in that 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.[432] 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.[433] 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, as it changes the rights and obligations of those involved.[434] Consent must therefore satisfy certain criteria in order to ascertain that appropriate prerequisites for such consenting existed. Certain circumstances will undermine the ability to give consent by incapacitating the victim. Heavy consumption of alcohol, for example, as well as external constraints may affect the possibilities of genuinely consenting, such as the context of an armed conflict.[435]

427 E. Sherwin, 'Infelicitous Sex', *Legal Theory* 2 (1996), p. 229.

428 H. Hurd, 'The Moral Magic of Consent', 2 *Legal Theory* (1996), p. 124.

429 McGregor, *supra* note 192, p. 107.

430 Hurd, *supra* note 428, p. 121.

431 Wertheimer, *supra* note 252, p. 119.

432 P. Asp, 'M.C. v. Bulgaria – A Swedish Perspective', *Scandinavian Studies in Law*, Volume 54, Criminal Law, Stockholm Institute for Scandinavian Law (2009), p. 208.

433 Westen, *supra* note 254, p. 22.

434 Wertheimer, *supra* note 252, pp. 2-3.

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

#### 4.2.3.1 Performative and Subjective Consent

Defining the concept of "consent" is a complicated exercise because it entails manifestly different understandings in national jurisdictions. In short, it refers to the response by an individual to sexual interactions. The appraisal of this from an outside perspective, however, is 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 indeterminate nature.[436]

The difficulty in defining "consent" is partly owing 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. It can be used both *factually* to refer to certain empirical factors as well as *legally*.[437] Peter Westen delineates two forms of *legal* consent – *prescriptive* and *imputed* consent – which are employed in various forms by legal systems in defining rape.[438] *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 consent into a legally valid concept – for example, that such acquiescence is formed with competence, knowledge and freedom. A thirteen-year old acquiescing to intercourse is factually, but not legally, consenting because of her age. 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. For instance, athletes in organised competitions are deemed to have consented to the risk of certain forms of physical injury as part of the sport. Only legal consent can transform crimes into non-crimes. A form of acquiescence by an individual thereby constitutes *legal* consent if it partially or 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, such as gunpoint, that negate a person's autonomy. 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.[439] 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". Most

436 Fitzgerald, *supra* note 407, p. 643.

437 Westen, *supra* note 254, p. 294.

438 *Ibid.*, p. 107.

439 Westen, *supra* note 254, p. 15.

penal codes that define rape as non-consensual sex fail to clarify whether they are referring to mental states or expressions of acquiescence.[440]

The legal form of consent is solely of relevance in this study and the question of 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 person'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, to define 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".[441] There is a tendency among those 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.[442]

What kinds of internal motivation are then required to determine that an individual has consented? Attitudinal consent may range from desire to grudging acquiescence.[443] Consent does not inevitably mean that the act of sexual intercourse is to be considered enjoyable for both parties. Valid consent may be given for reasons other than sexual arousal, such as affection, feelings of obligation within a marriage, or sympathy. Studies demonstrate that people, particularly in relationships, do in fact consent to sexual acts despite not actually experiencing a genuine will.[444] 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 that person may still be willing to engage in intercourse. An indecisive person on the other hand feels that the decision whether to have sex does matter, and cannot be seen as consenting.[445]

Certain scholars suggest that because the legal concept of consent is a normative expression of personal autonomy, its definition should dwell on his or her mental state. It is proposed that this serves the function of basing the offence of non-consent upon

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440 *Ibid*., p. 169.

441 *Ibid*., p. 338.

442 *Ibid*., p. 148.

443 P. Kazan, 'Sexual Assault and the Problem of Consent', in S. French *et al*., *Violence against Women, Philosophical Perspectives* (Cornell University Press, Ithaca, 1998), p. 28.

444 A Swedish study showed that as many as 28 per cent of women and 15 per cent of men had engaged in sexual activities that they in fact 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 indicated that as many as 90 per cent of men and women had engaged in unwanted sexual activity on at least one occasion. The most common reasons included were that they had been enticed, that it was an altruistic act towards their partner, or they were intoxicated. *See also* Felson, *supra* note 422, p. 126.

445 Westen, *supra* note 254, p. 30.

the actual harm administered to the victim, which is not a physical invasion alone, but perhaps more of a psychological injury.[446] Thus the victim's feelings determine whether he or she has suffered the harm that the criminalisation seeks to prevent.[447] 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 someone who had received no indication that the sex act was non-consensual. As Bryden submits, if one defines consent purely subjectively: "then the physical act of rape would be indistinguishable from ordinary intercourse; criminality would turn on the parties' subjective states of mind".[448] Critics have raised concern over the fact that an individual's feelings towards engaging in sex can be most indecisive, and that such a base for criminal responsibility is indeterminate.[449] Some feminist legal scholars furthermore insist 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, the wearing of revealing clothes and promiscuity, to evince whether the person displays 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.[450]

The understanding of consent as *performative* recognises the difficulty in judging the mental state of an alleged victim and requires a clear manifestation of his or her wishes. Certain jurisdictions use such terminology as "communicative consent", "manifest consent" or "express consent".[451] By dissociating performative consent from

446 *Ibid.*, p. 146.

447 In, for example, Canada, a woman must subjectively acquiesce to the act of sexual intercourse for legal consent to exist. The Supreme Court has stated: "[F]or the purposes of the *actus reus* […] consent means that the complainant in her mind wanted the sexual touching to take place". *R* v. *Ewanchuk*, Supreme Court of Canada, (1999) 1 S.C.R. 330, <csc.lexum.umontreal.ca/en/1999/1999scr1-330/1999scr1-330.html>, visited on 10 November 2010, 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. *See Regina* v. *Olugboja, Court of Appeal (Criminal Division)*, (1982) QB 320, <www.law.berkeley.edu/centers/kadish/gala/Westen%20olugboja%20case.pdf>, visited on 10 November 2010. *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).

448 D. Bryden, 'Redefining Rape', 3 *Buffalo Criminal Law Review* 317 (2000), fn. 376. *See also* N. Naffine, '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".

449 Bryden, *supra* note 448, pp. 382-383.

450 Kazan, *supra* note 443, p. 29.

451 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 in-

the subjective, it is in fact to be concluded that a person can grant permission against his or her will. An individual can thereby consent to something that is not wanted.[452] Similarly, one might experience sexual desire and thus subjectively consent but withhold performative consent – on the basis of, for example, morality.[453] 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 persons can adjust their conduct. 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 authorization […]".[454] The burden on the victim to prove non-consent through actions which do not exist to the same extent in crimes such as 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.[455]

However, performative consent paves the way for difficulties in determining which actions consist such manifestations. Naturally, all expressions presuppose social conventions and social roles.[456] Two people may have varying assumptions of what constitutes consent. Furthermore, it is not uncommon for the aggrieved party to appear to consent, the chief reason being to avoid injury – for example, based upon general fear or experience of previous abuse.[457] Evaluating non-consent becomes an exercise in reviewing a victim's behaviour formed on the stereotypical behaviour of a woman or man in a 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".[458] However, in many legal systems it has been intimated from silence or non-resistance of the victim. Nevertheless, the resistance requirement in particular has been abolished in an increasing number of jurisdictions. The question also arises as to which standpoint such a manifestation should be interpreted – what does the observer actually understand or *should* understand? This overlaps with the

tercourse 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).

452 Kazan, *supra* note 443, p. 31.

453 *Ibid.*, p. 31.

454 J. Feinberg, *Harm to Self, The Moral Limits of Criminal Law* (Oxford University Press, Oxford, 1989), p. 173. *See also* N. Brett, 'Commentary', in A. Bayefsky (ed.), *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]".

455 Estrich, *supra* note 231, p. 1126.

456 Westen, *supra* note 254, p. 68.

457 Quénivet, *supra* note 135, p. 31.

458 Feinberg, *supra* note 454, p. 176.

concept of *mens rea*. An approach adopted in several domestic laws, and implied in the jurisprudence of the ICTY, is the examination of circumstances set against the standards of a reasonable man. A normative element of observing social conventions for expressing preferences is then implied.[459]

Certain feminist writers argue that sexual intercourse should only occur after verbal permission has been granted. According to this view, consent is then an *affirmative* choice of the individual, whereas in practice it is often presumed unless otherwise shown.[460] 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".[461] 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.[462] Silence and ambivalence would therefore not constitute permission, and it would be the partner's responsibility to proceed only after he or she has received those signals.

Requiring an affirmative response would perhaps best acknowledge an individual's right to sexual autonomy. This idealistic definition presumes an understanding in communication between two partners. How this would function practically in determining whether miscommunication had occurred remains unexplored. As Heidi

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459 *Prosecutor* v. *Kunarac, Kovac and Vukovic*, *supra* note 409, para. 646. *See also* discussion in Westen, *supra* note 254, p. 77, McGregor, *supra* note 192, p. 202, D. Hubin and K. Healy, 'Rape and the Reasonable Man', 18:2 *Law and Philosophy Journal* (March 1999).

460 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* H. Malm, '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: "[O]nly 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". L. A. Remick, 'Read her Lips: An Argument for a Verbal Consent Standard in Rape', 141 *University of Pennsylvania Law Review* 1103 (1993), 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, *supra* note 231, p. 1127.

461 L. Pineau, 'Date Rape: A Feminist Analysis', in K. Weisberg (ed.), *Applications of Feminist Legal Theory to Women's Lives* (Temple University Press, Philadelphia, 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".

462 Remick, *supra* note 460, p. 1105, S. Schulhofer, 'The Feminist Challenge in Criminal Law', 143 *University of Pennsylvania Law Review* 2151, p. 2181.

Malm asserts, a law that defines all sexual activity as rape if it is not preceded with a question and answer period would be both farcical and unrealistic.[463] This interpretation has only been applied in a limited manner by domestic jurisdictions and by no international adjudicatory bodies.[464]

#### 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 caused the potential victim. If harm is viewed as a wrongful set-back to a person's interests, the question remains as to which acts lead to such set-backs. The issue is only in part resolved by such elements as "force" or "non-consent", since the prohibited conduct subsumed under such terminology is somewhat 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 take the view that this can only be fulfilled in a society where economic and social equality prevails between genders, and that genuine consent does not exist under current conditions of inequality.[465] Other imbalances of power beyond gender also endure – for instance, 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 morally reprehensible beyond force. This is where the concepts of non-consent and coercion frequently overlap.

463 Malm, *supra* note 460, 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".

464 In the Washington statute consent is defined thus "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).

465 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, *supra* note 214, p. 192. MacKinnon also argues that we cannot draw a line between acceptable behaviour and abuse because "rape is defined as distinct from intercourse, while for women it is difficult to distinguish the two under conditions of male dominance". *See* p. 174. *See further* K. Burgess-Jackson, 'Statutory Rape: A Philosophical Analysis', Vol. VIII, No. 1 *Canadian Journal of Law and Jurisprudence* (Januray 1995), p. 149: "[C]onsent 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. *See e.g.* Henderson, *supra* note 318, p. 56. It is argued that such theories could impede legal reforms rather than advance them because 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, *supra* note 215, p. 56.

Certain scholars emphasise the need to focus on the *surrounding environment* of a sexual encounter to determine if it is conducive to genuine consent.[466] This would result in a contextual approach where these circumstances provide evidence regarding such things as coercion or non-consent. According to this view, compliance in simple terms amounts to behaviour caused by legitimate antecedents. Alan Wertheimer, for example, disapproves of the importance that experts place on defining "non-consent", instead arguing that the main question is that of which *pressures* negate consent and are morally reprehensible.[467] Other scholars agree that "force" or "non-consent" are redundant concepts and should be supplanted by the issue of which pressures have been employed.[468] Westen declares that the whole normative discussion on whether the main requirement should be "force" or "non-consent" rests 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 types of pressure to which a person has been subjected. In the end, jurisdictions necessarily as a matter of course make judgments on which pressures are wrongful.[469] The line between sex and legally reprehensible intercourse therefore becomes an exercise in determining the kinds of pressure – physical and mental – that are unacceptable. This leads to an examination of the antecedents of the sexual act as well as the surrounding circumstances.

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466 C. MacKinnon, 'Defining Rape Internationally; A Comment on Akayesu', 44 *Columbia Journal of Transnational Law* 940 (2006), p. 956.

467 Wertheimer, *supra* note 252, p. 4. *See also* V. Tadros, 'No Consent: A Historical Critique of the Actus Reus of Rape', 3 *Edinburgh Law Review* 326 (1999), p. 334.

468 P. Westen, 'Some Common Confusions About Consent in Rape Cases', 2:1 *Ohio State Journal of Criminal Law* (2004), p. 357. Westen contends 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 regard 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".

469 Westen, *supra* note 254, 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, *supra* note 154, fn. 30.

Which precise actions are illegitimate prior to intercourse is a cause for disagreement. In most jurisdictions, the *violent* constraint of sexual autonomy has principally been the focus of criminal law. It is not generally well accepted that psychological pressure can be equally invalidating as physical force.[470] Schulhofer maintains that most existing laws place virtually no restriction on assertive male sexuality so long as it steers clear of physical violence.[471] Though sexual mores and approaches 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.[472] However, it is difficult to establish whether consent is formed without any outside pressure. This will ultimately require that the law specifies that the presence or absence of certain conditions is relevant for a determination of whether or not a person's choices are autonomous.[473]

For example, a wide variety of coercive but non-forcible sexual encounters are included in a non-consent based standard. This leads to a definitional quagmire where one has to distinguish sexual coercion from non-coercive means applied 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 to 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. 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 adopted to influence a person's decision to have sex are similar to those used for any form of social

470 S. Conly, 'Seduction, Rape, and Coercion', 115 *Ethics* (October 2004), p. 98.

471 Schulhofer, *supra* note 215, p. x.

472 Spence, *supra* note 257, p. 74.

473 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 have sexually abused the woman in question. It begs the question whether true voluntary consent in fact exists for any individual. Schulhofer, *supra* note 215, 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. *See* Spence, *supra* note 257, 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 protection against violence. Rather than focusing solely on bodily injury, we should thus evaluate meaningful consent based upon the notion of human dignity. Forceful behaviour would only be one relevant point, and all acts that violate freedom of choice would be included. Dripps, *supra* note 154, p. 1787 and Schulhofer, *supra* note 309, p. 70.

influence: persuasion, deception and the exchange or promise of rewards.[474] If there is a difference in power involved it is even more difficult to determine the coercive factor, such as a teacher who threatens to lower a student's grade unless she grants certain sexual favours. In that instance, most jurisdictions might view it as sexual coercion and not rape. It must be remembered that autonomy as a legal entitlement does not consider inequality in matters for which the individual, or her sexual partner, is neither directly nor indirectly responsible for – such as economic disparity or weakness of will.[475] The question remains as to the extent of declaring sexual relations illegal at the point at which one of the partners has greater 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".[476] 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 that they do so in a neutral environment.[477] It is clear that external factors affect the person's ability to make choices and courts have recognised the importance of such factors when determining if consent has been voluntarily given in fields such as torts and contract law.[478] Minimal requirements for providing valid consent to sexual intercourse must be an assurance of a certain level of freedom and that consent is not the result of either wrongful threats or oppression. Regardless of the interpretation of the concept of consent, it is often understood that consent must be 1) deliberate and 2) voluntarily given.[479] A certain level of knowledge is also required in order to establish a voluntariness of acquiescence. Deception about facts that are relevant to individual consent is included. [480] Deliberate consent may either take the form of verbal assent or that a lack thereof is made evident from a person's gestures.

Voluntary consent presupposes an autonomous individual in non-coercive circumstances who freely decides whether or not to engage in sexual relations. This excludes certain categories of persons traditionally judged to be unable to form such

474 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, *supra* note 422.

475 *Ibid.*, pp. 110 *et seq.*

476 Schulhofer, *supra* note 215, p.14.

477 *Ibid.*, p. 654.

478 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, *supra* note 417, p. 654.

479 Quénivet, *supra* note 135, p. 21.

480 Westen, *supra* note 254, 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.

opinions. These include the elderly, persons under a certain age or those with mental disabilities.[481] 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 conflict. The ICTY has noted that consent must "be given voluntarily, as a result of the victim's free will, assessed in the context of the surrounding circumstances".[482] 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 preclude the possibility of forming genuine consent. This would indicate that persons would cease to be 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 individual decision-making, it is dependent on social interactions.[483] 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 the fact that men are stronger, immune to pregnancy, have greater economic resources than women and are the "beneficiaries of millennia of assumptions that they belong on top".[484] Similarly, women will frequently allow "sexual access under terms of emotional, physical, and financial disadvantage".[485] A feminist approach to consent would thus centre on questions of freedom and the 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. It can include psychological intimidation, extortion or other threats.[486] A coercion-based definition of rape sees such violation as essentially a crime of in-

481 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 it.

482 *Prosecutor* v. *Kunarac, Kovac and Vukovic, supra* note 409, para. 460.

483 Cowan, *supra* note 316, p. 52. Consent can thus be interpreted as a narrow liberal idea, based upon the subject as a rational choice maker, or with feminist values, as also encompassing mutuality, relational choice and communication. *See* p. 53.

484 L. Hirshman and J. Larson, *Hard Bargains: The Politics of Sex* (Oxford University Press, Oxford, 1998), p. 262.

485 *Ibid.*, p. 262.

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

equality, either by way of physical force, status or relationship.[487] It is, however, defined inconsistently in many states, with certain jurisdictions equating it with physical force.[488] Certain countries separate rape from the crime of coercive sexual relations, which is viewed as something less grave.[489] Coercion might also proceed to a contextual evaluation, both regarding the surrounding circumstances and such facts as the relational history of the two involved – for example, whether it was marked by violence.[490] MacKinnon finds a coercion-based standard particularly appropriate, as it contextualises sexual violence and views it against objective surrounding realities. In armed conflicts it may be such factors as rape being employed as a military tactic and in peacetime societal gender inequality.[491] The gravity of coercive circumstances such as detention or prison settings has also been emphasised by regional human rights courts.[492] A *strict* non-consent-based standard would accordingly concentrate on the acts of the victim rather than on the coercive antecedents leading to consent.[493]

The definition of rape during armed conflict will often place 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 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.[494] An outward appearance of consent under such circumstances

487 MacKinnon, *supra* note 466, p. 941.

488 Spence, *supra* note 257.

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

490 Kazan, *supra* note 443, p. 38.

491 MacKinnon, *supra* note 466. 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 should be considered coerced, claims of unwanted sex should be interpreted against the context of gender inequality. *See also* C. MacKinnon, *Women's Lives, Men's Laws* (Harvard University Press, Cambridge, 2007), p. 247. MacKinnon argues that rape should be understood as a physical attack of a sexual nature under coercive circumstances. *See further* Estrich who contends that a gender-sensitive interpretation of coercion would include the abuse of power, economic and psychological pressure, fraud and misrepresentation, in S. Estrich, *Real Rape* (Harvard University Press, Cambridge, 1988).

492 *Aydin* v. *Turkey,* 25 September 1997, ECtHR, No. <cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=Aydin%20%7C%20v.%20%7C%20Turkey&sessionid=61867803&skin=hudoc-en>, visited on 9 November 2010, *The Miguel Castro-Castro* Case, *supra* note 411. *See* discussion in chapter 7.2.

493 Tadros, *supra* note 467, p. 328.

494 The Elements of Crimes of the ICC, Article 7(1)(g)-1 and 2. *The Prosecutor* v. *Akayesu*, *supra* note 30, 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."

might instead represent an expression of survival and would not constitute genuine consent.[495] The *ad hoc* tribunals and the ICC have stated that captivity, for example, in so-called rape camps, is inherently coercive.[496] This may indicate that the consent expressed or implied was not deliberate. For example, in the *Kunarac* case the ICTY assessed the whole situation in order to evince coercion, noting that the raped women in question 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.[497]

Stiglmayer 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 further injury.[498] As a consequence, non-consent as the basis of a rape definition in war-time settings has been considered inappropriate within the limited case law of the *ad hoc* tribunals, as well as by certain legal scholars.[499] Arguably, the existence of an armed conflict, genocide or a widespread or systematic attack has been judged as "almost universally coercive" and sufficient to automatically vitiate consent.[500] The notion that non-consent should be evaluated in this context, considering the gravity of the international crimes, for example, genocide, has caused offence to some authors.[501] It is apparent that under circumstances of coercion or threats, which put the victim in a state

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495 *Prosecutor* v. *Kunarac, Kovac and Vukovic*, *supra* note 409, para. 464: "[W]here 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.

496 *See below* chapter 9.

497 *Prosecutor* v. *Kunarac, Kovac and Vukovic*, 12 June 2002, ICTY, Case No. IT-96-23 and IT-96-23/1-A, Appeal Judgment, <www.icty.org/x/cases/kunarac/acjug/en/kun-aj020612e.pdf>, visited on 10 November 2010, para. 132.

498 A. Stiglmayer, 'The Rapes in Bosnia-Herzegovina', in A. Stiglmeyer (ed.), *Mass Rape: The War Against Women in Bosnia-Herzegovina* (University of Nebraska Press, 1994), pp. 90-91.

499 *See e.g.* Kalosieh, *supra* note 410, p. 121.

500 *The Prosecutor* v. *Jean-Paul Akayesu*, *supra* note 30. However, force has also 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*, *supra* note 409.

501 *See below* chapter 9.2.

of fear, the person's ability to consent is clearly diminished. However, it is in general somewhat perilous to deduce an individual's subjective intentions from surrounding circumstances alone. This could result in speculation on how the "normal" woman would react in certain situations. Though it is, of course, important to examine events preceding intercourse in respect of whether they affected the individual's consent, such events cannot be the only standard.

### 4.2.5 Force or Threat of Force

As with non-consent and coercion, an 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 in 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, for instance, the Swedish regulation, which covers situations where the perpetrator impedes the victim's movements by pinning down the victim's arms or body, applying body weight or forcing the victim's legs apart.[502] 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.[503] However, most statutes prohibiting rape do not consider non-physical forms of force.[504] Certain states have created lesser offences where force or the threat of force are not included, designating the act sexual assault or sexual coercion rather than rape.[505] 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 going beyond the acts involved in intercourse.[506] Thus it does not refer to the general use of force in sex, which may be consented to, but rather to force applied to overcome an individual's non-consent.[507] 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 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".[508] However, certain jurisdictions have expanded the "force" requirement to entail that which is intrinsic to non-consensual

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

503 Westen, *supra* note 254, p. 342.

504 Spence, *supra* note 257, p. 59. Westen, *supra* note 254, p. 209.

505 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 (Strafgezetsbuch).

506 Schulhofer, *supra* note 215, p. 4, Westen, *supra* note 254, p. 229.

507 Westen, *supra* note 468, p. 350.

508 Schulhofer, *supra* note 215, p. 279.

sex.[509] 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.[510] 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.[511]

### *4.2.6 Implications of Non-Consent or Force Standards*

What are the implications of a non-consent-based standard? Critics of the practice of defining rape as non-consensual sex argue that legal proceedings will ultimately concentrate on the victim and his or her behaviour preceding intercourse in order to determine whether or not consent was expressed.[512] An individual's consent is often inferred from actions and non-verbal behaviour, and may even arise in the face of verbal non-consent. This could lead to increased weight being placed on such things as the way in which the woman dressed, or the nature of their previous relationship, if any, and divert attention from the behaviour of the accused.[513] This severely limits the scope of a person's actions, since he or she, in order to maintain the legal right to sexual autonomy, must refrain from certain conduct that might be interpreted as consent, or assume the risk of non-consensual intercourse. In cases of non-stranger

509 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).

510 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, 415 Pa.Super. 505, 609 A.2d 1338 (1992), in J. Samaha, *Criminal Law*, (Thomson/Wadsworth, 2008). Similarly, the Supreme Court of North Carolina in *State* v. *Alston* reversed a rape conviction, 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 conviction was quashed. *See State* v. *Alston*, 310 N.C 399, 312 S.E2d 470, (1984), <international.westlaw.com.db.ub.oru.se/find/default.wl?rs=WLIN10.10&fn=_top&sv=Split&findjuris=00001&mt=WLILawSchool&cite=310+N.C+399%2c+312+S.E2d+470&utid=5&vr=2.0&rp=%2ffind%2fdefault.wl&sp=intorebo-000>, visited on 10 November 2010.

511 Wertheimer, *supra* note 252, p. 18.

512 UN Doc. E/CN.4/1995/42, *supra* note 34, para. 182.

513 SOU 2001:14, p. 126.

rape, an even broader range of behaviour may be considered in support of establishing consent. Importance will be placed on such factors as if the victim and the accused had been dating, if she allowed the man home, or had previously engaged together in sexual intercourse. In fact, most of the feminist reformers in the US during the 1970s argued that the most victim-friendly approach would be to remove the requirement of non-consent from the statutes. This idea was also examined in the work of certain later feminist scholars.[514] Such authors have also insisted that true consent is not possible since women occupy a subordinate position in society.[515] However, similar issues are also of importance in jurisdictions where force is the main requirement. Furthermore, the claim that the main consideration 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 renders the complainant's consent *invalid*, necessitating an inquiry into his actions. An example is whether consent is offered in response to impermissible threats.[516]

As mentioned, particularly in the context of an armed conflict, the argument has been raised that a non-consent-based definition of rape is inappropriate because the coercive circumstances of a conflict causes a presumption of non-consent, making such an inquiry superfluous.[517] 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 assertion is that rape should be considered in the same manner as other sub-categories of the international crimes such as torture and enslavement, which do not require an analysis of the non-consent of the victim.[518]

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514 Schulhofer, *supra* note 215, p. 31. MacKinnon finds the consent standard disturbing as "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 in fact 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* C. MacKinnon, 'Reflections on Sex Equality Under Law', 100 *Yale Law Journal* 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, *supra* note 467, p. 327.

515 Torrey, *supra* note 220, p. 306.

516 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 resolved through other means, such as changing the procedural rules pertaining to corroboration and the sexual history of the victim.

517 UN Doc. E/CN.4/Sub.2/1998/13, *supra* note 10, para. 25. *See also* the discussion below on the jurisprudence from the *ad hoc* tribunals.

518 W. Schomburg and I. Peterson, 'Genuine Consent to Sexual Violence Under International Criminal Law', 101 *American Journal of International Law* 121 (January 2007), p. 128. *See also* Kalosieh, *supra* note 410, p. 121, MacKinnon, *supra* note 466, p. 952, A.-M. De Brou-

However, later case law from the *ad hoc* tribunals has affirmed the necessity of applying a non-consent-based standard because it places emphasis on the sexual autonomy of the individual.[519]

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 an assault on 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 alone acknowledges the harm of physical injury but does not ensure the right to sexual self-determination. Statistics from various countries show that acts beyond force are frequently employed in rape and that weapons are seldom used.[520] 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 it thus: "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".[521] The ICTY in the *Kunarac* case rejected a force-based standard on the grounds that certain situations would not be covered, such as the victim being reduced to a state of inability to resist, having a physical or mental incapacity, or being deceived by surprise or misrepresentation.[522] As such, force may be one indication of non-consent but other forms of coercive behaviour can also lead to unwanted sexual relations. Restricting a definition to force alone would exclude many acts that the victim experienced as rape. 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",[523] and "the prohibition of 'force' or 'forcible compulsion' ends up being defined in terms of a woman's resistance".[524] In fact, the force standard "makes clear that the responsibil-

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wer, *Supranational Criminal Prosecution of Sexual Violence: The ICC and the Practice of the ICTY and the ICTR* (Intersentia, Antwerpen, Oxford, 2005), p. 121.

519 *Prosecutor* v. *Kunarac, Kovac and Vukovic*, *supra* note 409.

520 *See further* chapter 3.

521 Remick, *supra* note 460, p. 1118.

522 *Prosecutor* v. *Kunarac, Kovac and Vukovic*, *supra* note 409, para. 458.

523 Estrich, *supra* note 231, p. 1118

524 Estrich, *supra* note 491, 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, *supra* note 318, p. 52. According to Joan McGregor, force and resistance is *evidence* of the fact that there was no consent but that there is a continuum of illegal behaviour. *See* McGregor, *supra* note 267, p. 239.

ity and blame for [intimidating] seductions belong with the woman".[525] 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",[526] 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 it is mainly these elements of the offence that have been controversial and are sensitive to the question of context – for example, the difference in character of IHL/international criminal law and international human rights law. This matter will be given 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 necessarily involves those physical acts of a sexual nature that reach the requisite levels of harm.[527] A great variety of definitions exist domestically in addition to the jurisprudence of international tribunals regarding such questions as to whether rape is to be confined to heterosexual penetration or is to include acts between two persons of the same sex, and whether or not it incorporates anal or oral sex, or the insertion of objects.

The definition of rape is often considered broader in countries founded on civil law in comparison with 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 – that is, a female victim and male perpetrator.[528] In such cases, forced acts of anal or oral sex would fall outside 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.[529] 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".[530] Most forms of male rape would in effect thus be exclud-

525 Estrich, *supra* note 231, p. 1118.

526 UN Doc. E/CN.4/1995/42, *supra* note 34, para. 182.

527 Jefferson, *supra* note 413, p. 41.

528 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.

529 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. 6, para. 20.

530 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.

ed.[531] In fact, in many countries homosexual acts are not included in their rape definitions but may be criminalised in a separate provision. For instance, in Albania rape is defined as "violent, unlawful sexual intercourse with adult women".[532] 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".[533] Previously in the Democratic Republic of Congo there was even a requirement of ejaculation, defining rape as "a male organ penetrated a female organ with ejaculation".[534] The South African Constitutional Court in 2007 discussed whether the definition of rape should be widened from vaginal intercourse to include anal penetration of either female or 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 which only included females as possible victims.[535] 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.[536]

It is argued in many states that penetration, not restricted solely to vaginal penetration, is more traumatic than other forms of sexual acts and that such deeds must be distinguished, whether in the way of gradation or other legislative solutions.[537] In Sweden it was previously held by the legislator that intercourse was the most harmful kind of sexual violence that a woman could experience.[538] Temkin argues that the sole preoccupation with vaginal penetration that occurs in many jurisdictions might be attributed to the early origins of defining rape and its perceived harm. Historically, criminal laws on rape were chiefly concerned with the theft of a woman's virginity.[539] Other types of sexual acts were therefore dismissed or charged as offences of lesser gravity. Furthermore, the UN Special Rapporteur on Sexual Slavery affirms: "the historic focus on the act of penetration largely derives from a male preoccupation with as-

531 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.

532 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.

533 Article 197, Romanian Penal Code, Slovak Republic, para. 241 Penal Code: "[A]ny 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.

534 Irin PlusNews, 'DRC: Help and Justice for Raped, Displaced Women', 1 August 2006.

535 *Masiya* v. *Director of Public Prosecutions Pretoria and Another* (CCT54/06), 10 May 2007, <www.saflii.org/za/cases/ZACC/2007/9.html>, visited on 10 November 2010. A bill was, however, introduced following the case to include male rape in the definition of rape.

536 *See e.g.* Afghanistan, Yemen (The Yemen Personal Status Act No. 20 of 1992), Ethiopia.

537 Temkin, *supra* note 188, p. 157. Sweden 6:1 Brottsbalken.

538 SOU 1953:14, p. 231.

539 J. Temkin, *Rape and the Legal Process*, p. 57.

suring women's chastity and ascertaining paternity of children".[540] The consequences, for example 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 actual 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".[541] 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 kinds of sexual violence inflicted on women.

Several jurisdictions, however, have revised the definition to include acts that go beyond vaginal penetration, emphasising the demeaning and violent nature of rape rather than its unvarnished sexuality.[542] A shift can be detected towards a focus on the sexual autonomy of the person.[543] Most European states now have gender-neutral definitions of rape.[544] Such amendments also concern *e.g.* the inclusion of penetration through the insertion of objects, thus still concentrating on a form of penetration.[545]

A limited number of countries have removed any requirement of penetration, for instance, the Polish Criminal Code which states: "any act intended to satisfy some sexual needs in the attacker is sufficient".[546] Certain laws are wide in their description of the *actus reus*, as with 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."[547] This includes oral, anal sexual relations or penetration by objects.[548] The wider scope of the *actus reus* in many states has led to challenges in determining which types of conduct are of a *sexual* nature. In Sweden, acts that are equivalent to inter-

540 UN Doc. E/CN.4/Sub.2/1998/13, *supra* note 10, para. 24.

541 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.

542 UN Doc. E/CN.4/1995/42, *supra* note 34, para. 180.

543 De Brouwer, *supra* note 518, p. 110.

544 *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.

545 *E.g.* Articles 222-223 of the French Penal Code and 6:1 Brottsbalken (Sweden).

546 Article 168 (1), Council of Europe, Proceedings of the Forum: Ending Domestic Violence: Action and Measures, Bucharest Nov. 26-28, 1998, p. 63.

547 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.

548 *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.

course "based on the nature of the violation or the prevailing conditions" are included in the *actus reus*.[549] This has resulted in problems of interpretation, raising concerns of possible gender biases. For example, the forceful penetration of the vagina with fingers has been considered to be rape, whereas the forceful masturbation of a man by another man did not reach the level equivalent to intercourse.[550] It is held that penetration is more harmful and a more serious violation of sexual autonomy.[551] The fact that the emphasis lies on penetration has been criticised as basing the definition of rape upon a traditional heterosexual male perspective.[552]

In Canada, sexual assault is subsumed under all forms of assault and is thus a gender-neutral offence and contains various forms of acts, such as rape, incest and sexual touching. It does not state which specific types of conduct are included, *e.g.* penetration, oral sex, intrusion by an object, in order not to restrict the assault to specific body parts but is rather to be determined by the level of applied violence. Anal sex, however, is a separate offence.[553] Though Canadian law aims to equate rape with the usual acts of physical assault, sexual assaults are still separated as a category and carry heavier penalties. This raises a particular problem in that sexual assault is not defined separately yet offers harsher sentences, which has led to many of cases where the courts have had the task of determining when an assault is sexual.[554]

In certain countries the link to morality is explicit, as 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 […]".[555] In Croatia, sexual offences

549 6:1 Brottsbalken (Sweden).

550 *NJA 2008 s. 482 I and II*, <lagen.nu/dom/nja/2008s482>, visited on 10 November 2010. *See* discussion in P. Asp, 'Grader av Kränkning – Våldtäkt eller Sexuellt Tvång?', *Juridisk Tidskrift*, 2008-09, Nr. 1.

551 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 being included. *See* Prop. 2004/05:45 pp. 46, 59, 135.

552 Asp, *supra* note 550, p. 81.

553 Canadian Criminal Code, section 265.

554 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 upon the view of the reasonable person. Again, the body parts involved were less important than the surrounding circumstances and in this case, the touching of the woman's breasts was considered sexual assault. *R* v. *Chase*, (1987) 37 CCC (3d) 97 (SCC).

555 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 a la pudeur*. *See* UN Doc. S/2009/362, *supra* note 12, 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: "[T]he coercion of another to extra-marital intercourse", excluding marital rape and oral/anal rape. In the German Strafgesetzbuch, sexual violence

were previously specified as "criminal offences against dignity and morality" until the reform of the Criminal Act classifying such crimes as "criminal offences against sexual freedom and sexual gender distinction".[556] This emphasises the protection of a woman's honour and in a number of states ensuing provisions have permitted the exoneration of the rapist if the woman marries the offender, thus removing the stain of dishonour.[557] Similarly, though not distinctly related to the *actus reus* of the offence, rape in the 1949 Geneva Conventions is prohibited as a violation against a woman's honour.[558]

The debate at the international law level, as discussed by the various *ad hoc* tribunals and the Elements of Crimes of the ICC, has concerned itself with whether to restrict the definition to specific body parts or to construct a wider clarification that might encompass various forms of acts while focusing on the *nature* of sexual violence.[559] According to the latter argument, the specific modes of conduct that occur are subsidiary to the harm caused and the intention of the act, as evidenced in the *Akayesu* case.[560] In those proceedings rape was defined as a physical invasion of a sexual nature under coercive circumstances. Such a determination clearly takes a victim-friendly approach in that the experience suffered by the victim becomes the focus of the definition, not body parts. For example, in the Rwanda conflict, it was common practice to insert objects such as weapons, bottles or branches into the victim's vagina. 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 expected that a detailed inquiry during trial into the specific sexual acts, such as penetration, would not be necessary.[561] However, the lack of clarity and foreseeability of the *Akayesu* decision, and laws similar to it, have been reproved for not enabling the individual to adjust his or her behaviour accordingly. Concern has also been raised that it might well deter some people from making a complaint, since the injured party may be uncertain as to whether the particular assault experienced is contained within the provision.[562] The provision in that sense becomes unrelatable

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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.

556 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, November 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 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, EG (2001), p. 198.

557 HRC, General Comment No. 28, UN Doc. CCPR/C/21/2 Rev.1/Add.10 (2000), para. 24.

558 Article 27 of the Fourth Geneva Convention. *See further* discussion in chapter 8.5.

559 *See* chapter 9.

560 *The Prosecutor* v. *Jean-Paul Akayesu*, *supra* note 30, paras. 687 *et seq.*

561 Temkin, *supra* note 188, p. 160.

562 *Ibid.*, p. 161.

to the victim, and the discretion of the police and the legal system made 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*, portraying it as a physical invasion of the victim's vagina or anus, by a penis or an object. Oral sex is also included.[563] Similarly, the Elements of the Crimes of the ICC are more specific in the details of the *actus reus* of rape.[564] Gender-neutrality in its definition has been stressed by the tribunals and the ICC. As opposed to certain domestic regulations the definition pertains equally to all persons and does not exclude certain groups such as spouses.

### *4.2.8* Mens Rea *and Criminal Responsibility*

Apart 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 specific crime. The purpose of requiring substantiation of the *mens rea* of the perpetrator is that it is generally believed to be unjust to punish a person without the requisite frame of mind and culpability.[565] In general, the requirement of *mens rea* in a rape definition entails that the perpetrator proceeded while knowing or believing that the sexual act was non-consensual or, alternatively, that the sexual act occurred through the application of force.[566] If the person was not aware of this, he or she may not be convicted of rape. In a sense, the focus of interest is removed from the harm experienced by the victim to the perpetrator's perception of whether or not there was acquiescence. However, depending on the particular legal system, forms of mental states other than intent can be sufficient. The *mens rea* can consist of a range of subjects – purpose, knowledge, recklessness or negligence in relation to the act and the non-consent of the putative victim.[567] The penal code on rape in Norway, for example, covers not only specific conduct where intent can be proved, but also acts where gross negligence has occurred.[568] This would arguably more closely examine the actions of the perpetrator rather than those of the victim in evaluating what the person con-

563 *Prosecutor* v. *Furundzija*, *supra* note 28, *Prosecutor* v. *Kunarac, Kovac and Vukovic*, *supra* note 409.

564 Article 7(1)(g)-(1). Rape as a crime against humanity.

565 J. Van der Vyver, 'The International Criminal Court and the Concept of Mens Rea in International Criminal Law', 12 *University of Miami International & Comparative Law Review* 57 (2004), p. 57.

566 Jefferson, *supra* note 413, p. 41.

567 McGregor, *supra* note 267, p. 197, Van der Vyver, *supra* note 565, 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.

568 Norwegian Penal Code (Straffeloven), section 19, § 192. It carries a lesser sentence than other forms of rape.

cerned should have realised. Certain crimes are strict liability offences, for example, statutory rape, which entails that a crime is committed when a person has sexual relations with an individual under a specific age, regardless of whether he or she believed that the person in question was older.[569]

The evaluation of *mens rea* can be exemplified by the Canadian justice system, where it is understood as the knowledge, recklessness or negligence of the actor in disregard of the fact that the other party was not subjectively acquiescing. In that 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 makes clear that:

> [t]here 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.[570]

*Mens rea* raises similar questions as non-consent – that is, whether to perform a subjective or objective appraisal. 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, as a subjective test would prevent the conviction of a person who honestly held unreasonable and sexist beliefs.[571] From a practical standpoint, the *actus reus* has frequently been deemed to have proved the *mens rea*, particularly in jurisdictions having a force-based standard. Thus if the defendant used or threatened force to obtain sex, it is evident that he or she knowingly had non-consensual sexual relations.[572] *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.[573] Some hold that a *reasonable* mistaken belief is exculpatory and can

569 Schabas, *supra* note 413, p. 1015.

570 *R.* v. *Ewanchuk, supra* note 447, para. 48.

571 C. Byrnes, 'Putting the Focus Where it Belongs: Mens Rea, Consent, Force, and the Crime of Rape', 10 *Yale Journal of Law & Feminism* 277 (1998), p. 295.

572 K. Kinports, 'Rape and Force: The Forgotten Mens Rea', 4 *Buffalo Criminal Law Review* 755 (2001), p. 759.

573 Primarily in common law countries. Temkin, *supra* note 188, p. 127, T. Illsley, 'The Defence of Mistaken Belief in Consent', *South African Journal of Criminal Justice*, (2008).

be evinced from the words or conduct of the complainant.[574] The reasonable belief standard rests on the belief of the average man in any community. The "reasonable man" standard has received ample criticism.[575] 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.[576]

A particular problem with a felony such as rape is the fact that the inherent physical contact involved is by its very nature present in regular sexual relations. Again, the difficulty in inferring reasonableness is 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 found fault with the use of *mens rea* as a defence to rape. According to MacKinnon, women are raped by men who know perfectly well the meaning of their

574 *See e.g. DPP* v. *Morgan,* (1976) AC 182, <wings.buffalo.edu/law/bclc/web/ukmorgan.htm>, visited on 10 November 2010. 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 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 upon 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 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*, Supreme Court of Canada, (1980) 2 S.C.R.120, <csc.lexum.umontreal.ca/en/1980/1980scr2-120/1980scr2-120.html>, visited on 10 November 2010, 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 party 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.

575 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 upon the reasonable woman, rather than the average man. McGregor, *supra* note 267, p. 246. The "reasonable" man standard has in fact been supplanted by the "reasonable person" concept. *See* Hubin and Haely, *supra* note 459.

576 D. Brody *et al.*, *Criminal Law* (Aspen Publication, Gaithersburg, 2000), p. 428.

acts and that furthermore women are violated on a daily basis by men who have no idea what their behaviour signifies to a woman, and consequently, such acts are described by the law as sex. Rape is then only an injury from the point of view of the woman.[577] According to this argument, from a legal standpoint, the experience of the abused person becomes less important than the beliefs of the attacker. Considering the social constructions of gender roles, where women are often believed to be the 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.[578]

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*, and more specifically the issue of non-consent or force. Only in international criminal law has the element been analysed in international law – though in a limited way.

No crimes of strict liability exist within international criminal law – that is, where *mens rea* does not have to be proved. *Mens rea* in international criminal law is, however, treated in a somewhat different fashion than it is under domestic law. Since rape is included in the *chapeau* of all three international crimes, the *mens rea* refers both to the specific intent of, for example, genocide, but also that pertaining particularly to rape. Torture requires that the act was carried out with the specific intention of obtaining information, to punish or discriminate against the victim, *etc.*, which entails that in order for rape to constitute torture, it must also be conducted in pursuit of any of these particular objectives.

In the Rome Statute of the ICC, it is required that the elements of the transgression are committed with intent and knowledge.[579] This may be inferred from relevant facts and circumstances.[580] Intent is defined as a) in relation to conduct, that person means to engage in such conduct, b) in relation to a consequence, such person means to

577 MacKinnon, *supra* note 214, p. 180.

578 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*, Supreme Court of Canada, (1995) 2 SCR 836, <csc.lexum.umontreal.ca/en/1995/1995scr2-836/1995scr2-836.html>, visited on 10 November 2010, paras. 38 and 51.

579 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* H. von Hebel and M. Kelt, 'Some Comments on the Elements of Crimes for the Crimes of the ICC Statute', 3 *Yearbook of International Humanitarian Law* (2000), p. 279.

580 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."

cause that consequence or is aware that it will occur in the ordinary course of events.[581] Knowledge necessitates an "awareness that a circumstance exists or a consequence will occur in the ordinary course of events".[582] Additionally, the international crimes may require a particular knowledge, for instance, that the act occurred in the context of a widespread or systematic attack concerning crimes against humanity.[583] The accused must know "the broader context in which his act occurs".[584] 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".[585] As for war crimes, the perpetrator must be "aware of the factual circumstances that established the existence of an armed conflict".[586] Varying levels of knowledge and intent may also depend on the extent of participation of the individual – for example, whether he is prosecuted for aiding and abetting the crime, for command responsibility, or for joint criminal enterprises.[587]

The *ad hoc* tribunals, unlike 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 offence.[588] The *mens rea* on 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".[589] In the *Kunarac* judgment, *mens rea* is discussed to some extent in relation to the proposed "mistaken belief" in consent by the defence. The accused held that a woman detained in a camp had seduced him and he therefore believed the sexual encounter was consensual. Here

581 Article 30(2) Rome Statute.

582 Article 30(3) Rome Statute.

583 Article 7 Rome Statute.

584 *Prosecutor* v. *Tadic*, 7 May 1997, ICTY, Case No. IT-94-1-T, <www.unhcr.org/refworld/type,CASELAW,,BIH,4027812b4,0.html>, visited on 10 November 2010, para. 656.

585 *See e.g.* Article 6 of the Rome Statute. There is no requirement of success, *i.e.* that the group was in actuality destroyed. Von Hebel and Kelt, *supra* note 579, p. 281.

586 Article 8 Introduction, Elements of Crimes. However, there is no requirement that the perpetrator makes a legal evaluation as to the existence of an armed conflict or whether it is international or national.

587 *See e.g. The Prosecutor* v. *Jean-Paul Akayesu*, *supra* note 30, paras. 488-491, *Prosecutor* v. *Furundzija*, *supra* note 28, para. 249, *Prosecutor* v. *Tadic*, 15 July 1999, ICTY, Case No. IT-94- 1-A, Appeal Judgment, <www.icty.org/x/cases/tadic/acjug/en/tad-aj990715e.pdf>, visited on 10 November, para. 229, *Prosecutor* v. *Kunarac, Kovac and Vukovic*, *supra* note 409, para. 512.

588 M. E. Badar, 'Drawing the Boundaries of Mens Rea in the Jurisprudence of the International Criminal Tribunal for the Former Yugoslavia', *International Criminal 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.

589 *The Prosecutor* v. *Jean de Dieu Kamuhanda*, 22 January 2004, ICTR, Case No. ICTR-95-54A-T, <www.unictr.org/Portals/0/Case/English/Kamuhanda/decisions/220104.pdf>, visited on 10 November 2010, para. 707, *Prosecutor* v. *Kunarac*, *supra* note 409, para. 460.

the Chamber appeared to apply a "reasonable man" evaluation in concluding that the captive state of the victim must have led Kunarac to assume that she was not consenting.[590] The knowledge that the sexual act occurred without consent could be inferred from the circumstances surrounding the events of an armed conflict, and the incarceration of Muslim women. This exemplifies the fact that courts and tribunals have often construed mental disposition based upon secondary evidence.[591] 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.[592] 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 all held to constitute facts of common knowledge.[593] Considering the fact that the tribunals have stated that the existence of genocide, crimes against humanity or an armed conflict in general constitute coercive circumstances entail that proof of coercion can easily be established in rape cases.[594] The fact that the context and surrounding facts serve to prove both non-consent and *mens rea* has been of substantial importance in such cases.

Another important aspect of the case law of the *ad hoc* tribunals is that a distinction between motive and intent has been emphasised.[595] This means that even if a perpetrator were to be partly driven by lust or other personal motives, it would not preclude a finding of intent to commit the crime in question, for example, genocide in the form of rape. This was raised as a defence in the *Kunarac* case, where the accused insisted that he had committed rape through sexual urgency rather than an intention to inflict torture. This, however, was disregarded by the ICTY, which clearly separated motive and intent as concepts, making plain 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".[596] 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

590 *Prosecutor* v. *Kunarac*, *supra* note 409, para. 646.

591 Van der Vyver, *supra* note 565, p. 69.

592 *The Prosecutor* v. *Gacumbitsi*, 7 July 2006, ICTR, Case No. ICTR-2001-64-A, Appeal Judgment, <www.unictr.org/Portals/0/Case/English/Gachumbitsi/judgement/judgement_appeals_070706.pdf>, visited on 10 November, para. 157.

593 *Prosecutor* v. *Karemera*, 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.

594 *See, e.g., Prosecutor* v. *Kunarac, Kovac and Vukovic*, *supra* note 497, para. 130, The *Prosecutor* v. *Gacumbitsi*, *supra* note 592, para. 155, *The Prosecutor* v. *Jean-Paul Akayesu*, *supra* note 30, para. 688.

595 P. Viseur Sellers and K. Okuizumi, 'Prosecuting International Crimes: An Inside View: Intentional Prosecution of Sexual Assaults', 7 *Transnational Law and Contemporary Problems* 61 (1997), p. 61, *Prosecutor* v. *Kunarac, Kovac and Vukovic*, Appeal Judgment of 12 June 2002, para. 155.

596 *Prosecutor* v. *Kunarac, Kovac and Vukovic*, *supra* note 409, para. 816.

crime against humanity may be committed for purely personal reasons.[597] Instead, the perpetrator must know that there is an attack on the civilian population and that his acts are part of this.[598]

These elements will be further discussed in the following chapters, particularly underscoring similar approaches or distinctions in the various branches of international law.

597 *Prosecutor* v. *Tadic*, *supra* note 587, paras. 248, 252.

598 *Ibid.*, para. 248.

# 5 Sexual Violence in Context

## 5.1 Introduction: Armed Conflict and Gender Hierarchies as Contextual Elements

As viewed, 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 international humanitarian law (IHL) and international criminal law. The role which sexual violence has served in the conflicts subject to the jurisdiction of the International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (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, for instance, 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 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.[599] 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".[600] Rape in the circumstances in which international crimes occur are

599 MacKinnon, *supra* note 466, p. 956.

600 *Ibid.*, p. 956.

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.[601]

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".[602] 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".[603] 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.[604] 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.[605]

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 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? This 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 interna-

601 Kalosieh, *supra* note 410, p. 132.

602 MacKinnon, *supra* note 466, p. 955. *See also* Copelon, *supra* note 263, pp. 212-213, who holds that "every rape is a grace violarion of physical and mental integrity […] Every rape is an expression of male domination and misogony […]". 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 and Dobash, *supra* note 136, p. 9.

603 Dobash and Dobash, *supra* note 136, p. 10.

604 UN Doc. E/CN.4/1995/42, *supra* note 34, para. 274.

605 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.

tional 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.[606] 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.[607] 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.[608] Women, finding themselves in the proximity of the fighting, are particularly vulnerable to indiscriminate attacks in non-international conflicts.[609] According to the United Nations (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.[610]

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.[611] 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

606 Askin, *supra* note 11, p. 9, UN Doc. E/CN.4/Sub.2/1998/13, *supra* note 10, para. 7, UN Doc. E/CN.4/1998/87, *supra* note 11, para. 33, UN Doc. S/2005/740, *supra* note 11, para. 3, SC Res. 1820 on Women, Peace and Security, UN Doc. S/RES/1820, 19 June 2008.

607 J. Gardam and M. Jarvis, 'Women and Armed Conflict: The International Response to the Beijing Platform for Action', 32 *Columbia Human Rights Law Review* 1 (2000), p. 6.

608 UN Doc. S/2005/740, *supra* note 606, para. 3.

609 C. Lindsey, 'The Impact of Armed Conflict on Women', in H. Durham and T. Gurd (eds.), *Listening to the Silences: Women and War* (Martinus Nijhoff Publishers, Leiden, 2005), p. 24. *See also* UN Doc. E/CN.4/1998/87, *supra* note 11, para. 31.

610 UN Doc. S/2005/740, *supra* note 11, para. 3.

611 UN Doc. E/CN.4/Sub.2/2004/12, *supra* note 529, p. 3, SC Resolution 1820, UN Doc. S/RES/1820, 19 June 2008, UN Doc. S/2009/362, *supra* note 12, para. 6, K. Parker, 'Human Rights of Women During Armed Conflict', in K. Askin and D. Koenig (eds.), *Women and International Human Rights Law*, Vol. 3 (Transnational Publishers, Ardsley, NY, 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, UN Doc. S/2005/740, *supra* note 11, para. 14.

military strategy.[612] 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.[613] 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".[614] Though women typically constitute only approximately 2 per cent of army personnel, they nevertheless suffer a disproportionate degree of violence.[615]

Women and men are violated in similar ways in times of war, such as being killed, tortured and displaced, but there are also forms of violence that more commonly target women and carry a clear gender component.[616] 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".[617] 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".[618] In fact, the Convention on the Elimination of All Forms of Discrimination against Women (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.[619]

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

612 In such conflicts, rape is often intended to humiliate whole communities and establish boundaries between groups. Coomaraswamy, *supra* note 11, p. 55, Bunch, *supra* note 340, p. 43.

613 Resolution 1670 (2009), Sexual Violence against Women in Armed Conflict, 20 May 2009, Parliamentary Assembly, Council of Europe, para. 2.

614 "Cost of Violence against Women 'Beyond Calculation', warns UN Chief", UN News, New York, 8 March, 2009.

615 UNDP, Human Development Report, Oxford University Press, (1995), p. 45.

616 *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.

617 Beijing Declaration and Platform for Action, Fourth World Conference on Women, UN Doc. A/CONF.177/20, 15 September 1995, para. 135.

618 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.

619 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).

there tends to be virtual impunity.[620] 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 instead of as war crimes.[621] 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".[622] 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.[623] 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 […]".[624] 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.[625] It is recognised that accountability is an indispensible component of peace-building, since conflicts are often rooted in a failure to repair previous harms.[626]

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.[627] The

620 UN Doc. E/CN.4/1998/87, *supra* note 11, 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.

621 "Rape must never be minimized as part of cultural traditions, UN envoy [Margot Wallström] says", UN News, *supra* note 5.

622 UN Doc. E/CN.4/Sub.2/2004/12, *supra* note 529, 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* K. Askin, 'The Jurisprudence of International War Crimes tribunals: Securing Gender Justice for Some Survivors', in H. Durham and T. Gurd (eds.), *Listening to the Silences: Women and War* (Martinus Nijhoff Publishers, Leiden, 2005), 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.

623 UN Doc. S/2009/362, *supra* note 12, para. 14.

624 *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.

625 UN Doc. S/2005/740, *supra* note 11, para. 12.

626 SC Res. 1888 on Women, Peace and Security, UN Doc. S/RES/1888, 30 September 2009. *See also* R. Lee, *The International Criminal Court: The Making of the Rome Statute – Issues, Negotiations, and Results* (Kluwer Law International, The Hague, 1999), p. 1.

627 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.

especially precarious position of women in armed conflicts has been acknowledged in UN Security Council Resolution 1325, which states: "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".[628] 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.[629] 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.[630] 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.[631] 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 […]".[632]

## 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

628 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.

629 UN Doc. E/CN.4/1998/87, *supra* note 11, para. 31.

630 SC Resolution 1820, UN Doc. S/RES/1820. *See also* UN Doc. S/2005/740, *supra* note 11, 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 UN Doc. S/2009/362, *supra* note 12.

631 SC Resolution UN Docs. S/RES/1820 (2008), S/RES/1888 (2009). *See also* UN Doc. S/2009/362, *supra* note 12, 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."

632 UN Doc. S/RES/1888 (2009).

often, as a rule of war, conferred upon the victor.[633] 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.[634] 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."[635]

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.[636] 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.[637] In certain conflicts, individuals belonging to a particular group, for instance, 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.[638] 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.[639] In civil wars in South America, *e.g.* Argentina,

633 Seifert, *War and Rape: A Preliminary Analysis*, *supra* note 261, p. 58, Askin, *supra* note 11, pp. 21 and 60, Bensouda, *supra* note 11, p. 402.

634 Lindsey, *supra* note 609, p. 45.

635 C. MacKinnon, 'Rape, Genocide and Women's Human Rights', 17 *Harvard Women's Law Journal* 5 (1994), p. 11. *See also* F. Pilch, 'The Crime of Rape in International Humanitarian Law', 9 *Journal of Legal Studies* 99 (1998), p. 101.

636 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 […]." UN Doc. E/CN.4/1995/42, *supra* note 34, 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. E. J. Wood, *Sexual Violence During War: Explaining Variation*, Presented at the Order, Conflict and Violence Conference at Yale University, April 30-May 1 (2004), p. 1.

637 Lindsey, *supra* note 609, p. 25.

638 UN Doc. E/CN.4/1996/68, *supra* note 12, 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.

639 *See e.g. Prosecutor* v. *Delalic et al. (Celebici Camp)*, *supra* note 334.

El Salvador and Peru, women were primarily sexually assaulted while detained, as a means of torture to elicit information.[640] In Sierra Leone, women and girls were kidnapped to become the "wives" of rebels and forced to provide sexual services.[641]

History contains abundant evidence of the use of sexual violence in armed conflicts.[642] 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".[643] The Nuremberg trial transcripts contain descriptions of mass rapes and sexual mutilations. Furthermore, as the Soviet Army advanced westward, soldiers raped women of various ethnicities, albeit mostly German.[644] 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".[645] The rapes were indiscriminate and the victims ranged from pre-pubescent girls to elderly women.[646] Various forms of sexual abuse of men also occurred, either rape by strangers or by

640 Wood, *supra* note 636, 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.

641 *Case No. SCSL-04-15-T against Sesay, Kallon, Gbao*, 2 March 2009, Special Court for Sierra Leone, <www.sc-sl.org/CASES/ProsecutorvsSesayKallonandGbaoRUFCase/TrialChamberJudgment/tabid/215/Default.aspx>, visited on 10 November 2010.

642 Evidence of rape, however at times anecdotal, exists of Russian and Belgian troops during the First World War. *See* J. Gottschall, 'Explaining Wartime Rape', 41:2 *The Journal of Sex Research* (May 2004), p. 130, De Than and Shorts, *supra* note 45, p. 347.

643 Askin, *supra* note 205, p. 125.

644 *Ibid.*, p. 60, N. Naimark, *The Russians in Germany: A History of the Soviet Zone of Occupation, 1945-1949* (Harvard University Press, Cambridge, 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, *supra* note, 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."

645 Seifert, *War and Rape: A Preliminary Analysis*, *supra* note 261, p. 64.

646 I. Chang, *The Rape of Nanking* (Penguin Books, New York, 1997), p. 90. Vaginas were impaled with wooden rods, twigs and weeds. *See* p. 94.

forcing them to undergo sexual intercourse with family members.[647] 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".[648] It is estimated that as many as 200,000 women were recruited by force, most of them Korean girls between the ages of 14 and 18 years and were located in various countries that contained Japanese military bases.[649] 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 on alcohol and weapons.[650] The 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.[651]

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, the United Nations Population Fund (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.[652] As mentioned, this is related to the fact that conflicts have taken on a more regional nature, targeting civilians, where

647 Wood, *supra* note 636, p. 4, Chang, *supra* note 646, p. 95.

648 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.

649 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, *supra* note 34, para. 288. An estimation of the extent of comfort women is difficult due to the destruction of documents by the Japanese government. *See* 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, *supra* note 636, 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.

650 UN Doc. E/CN.4/1996/53.Add.1, *supra* note 649, p. 6.

651 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.

652 United Nations Population Fund Press Release, 21 June 2006, First International symposium on sexual violence in conflict and beyond Opens Today in Brussels.

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.[653] The UN Secretary-General has also noted that armed conflicts have become more complex and that "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."[654]

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,[655] the majority in various forms of detention facilities such as local schools, factories or army apartments.[656] A large number of victims were Bosnian Muslims and Kosovo Albanians, and the perpetrators were in general Bosnian Serbs.[657] 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.[658] The purpose of forced pregnancies was chiefly to dilute the Muslim population.[659] 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.[660] Men were also victims of rape, in being forced to perform grave

653 *Ibid*.

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

655 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.

656 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).

657 *Ibid*., at I (D).

658 *Ibid*., at I (C).

659 J. Short, 'Sexual Violence as Genocide: The Developing Law of the International Criminal tribunals and the International Criminal Court', 8 *Michigan Journal of Race & Law* 503 (2003), p. 512.

660 UN Doc. S/1994/674/Add.2 *supra* note 656, at I (C).

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.[661]

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. Victims were chosen according to ethnicity and their vulnerability, or because of the message that abuse would be transmitted to the group, such as young girls, virgins or prominent female community members. For similar reasons of humiliation, injuries were at times inflicted on victims with the use of objects.[662] 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 […] You should do that and even if they have some illness, you should do it with sticks."[663]

The Sierra Leone conflict is particularly notorious for its rampant and brutal use of rape as a tactic of war. A survey by the United Nations Development Fund for Women (UNIFEM) reported that 94 per cent of displaced households in Sierra Leone had experienced sexual assault, including rape.[664] Another report detailed up to 64, 000 war-related incidents of sexual violence against women.[665] 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.[666] 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.[667] Cases included gang rapes, sexual assaults with objects such as firewood, umbrellas and sticks, and sexual slavery.[668] Women were at times placed in detention for long periods of time or abducted to serve rebel camps as sex slaves.[669]

661 *Ibid*., at I (C) & II (18).

662 UN Doc. E/CN.4/1996/68, *supra* note 12, para. 16. *See also* Women, War and Peace, UNIFEM, 2002, vol. 1, p. 9 and Bunch, *supra* note 340, p. 43.

663 *The Prosecutor* v. *Laurent Semanza*, 15 May 2003, ICTR, Case No. ICTR-97-20-T, <www.unictr.org/Portals/0/Case/English/Semanza/decisions/index.pdf>, visited on 10 November 2010, para. 253.

664 Women, War and Peace, UNIFEM, 2002, Vol. 1, p. 9.

665 Ellis, *supra* note 12, p. 226.

666 Amnesty International, Sierra Leone: Rape and Other Forms of Sexual Violence Must be Stopped, AI Index, AFR 51/048/2000, (2000).

667 Human Rights Watch, "We'll kill you if you cry", Sexual Violence in the Sierra Leone Conflict, New York, Jan. 2003.

668 UN Doc. E/CN.4/2001/73, *supra* note 651, para. 104.

669 Wood, *supra* note 636, p. 9, UN Doc. E/CN.4/2001/73 para. 106, UN Doc. S/2009/362, *supra* note 12, para. 13. *See further* below on the Special Court for Sierra Leone.

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.[670] 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'.[671]

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 public.[672] 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.[673] The Commission concluded that the degree of sexual violence suffered might amount to crimes against humanity, but it did not find

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670 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.

671 Report of the International Commission of Inquiry on Darfur, UN Doc. (S/2005/60), para. 333.

672 Short, *supra* note 659, 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."

673 UN Doc. A/HRC/6/19, 28 November 2007, p. 43.

conclusive evidence of genocide on the basis that the ethnic component of the conflict was arguably lacking.[674] The facts were subsequently referred by the Security Council to the International Criminal Court (ICC) with a view to prosecution, where several of the charges against the defendants were concerned with 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.[675] Both historical and anthropological evidence thus demonstrates that sexual violence has been a practice of war that has occurred in many different cultures and societies, and in all epochs.[676] Such benumbing figures reveal that despite increased international awareness, rape is still an inherent characteristic of warfare.[677]

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674 International Commission of Inquiry, UN Doc. S/2005/60, paras. 518, 634.

675 Ellis, *supra* note 12, p. 226, Parker, *supra* note 611, pp. 314-315, UN Doc. E/CN.4/2001/73, *supra* note 651, 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 S/2009/362, *supra* note 12, para. 12, it is reported that at least 200,000 cases of sexual violence have been recorded since 1996. *See also* Bunch, *supra* note 340, p. 43 and Gardam and Jarvis, *supra* note 607, 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, *supra* note 336, 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, *War and Rape: a Preliminary Analysis, supra* note 261, p. 12.

676 Gottschall, *supra* note 642, p. 130.

677 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, *supra* note 636, 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

## 5.4 Theories on the Existence of Sexual Violence in Armed Conflicts

It is generally accepted that all forms of violence against women increase during an armed conflict. This includes sexual slavery, rape and enforced pregnancy.[678] 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".[679] 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 vanquished.[680] Four main theories have been developed to further explain the phenomenon. They are:

1) The Gender Inequality Theory
2) The Psycho-Social and Economic Background Theory
3) The Strategic Rape Theory
4) The Biosocial Theory[681]

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.[682] 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".[683] 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

note that sexual violence has not been employed in all conflicts and is therefore neither an inevitable nor universal phenomenon.

678 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.

679 Use of Sexual Violence in Armed Conflict, Identifying Gaps in Research to Inform More Effective Interventions, *supra* note 605, p. 1.

680 UN Doc. E/CN.4/Sub.2/2004/12, *supra* note 529, p. 3.

681 Wood, *supra* note 636.

682 *Ibid.*, p. 16.

683 Seifert, *War and Rape: A Preliminary Analysis*, *supra* note 261, 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, *supra* note 281, p. 69.

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."[684] However, as reported by the UN, the discrimination and abuse that women experience in peacetime is magnified in armed struggles, expanding in "number, frequency and severity".[685] 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.[686]

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.[687] 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, for example, 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.[688] For example, in analysing the conflict in the Democratic Republic of Congo, 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.[689] 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, mi-

684 MacKinnon, *supra* note 635, p. 8. *See further e.g.* D. E. Buss, 'Going Global: Feminist Theory, International Law, and the Public/Private Divide', in S. Boyd (ed.), *Challenging the Public/Private Divide: Feminism, Law, and Public Policy* (University of Toronto Press, Toronto, 1997), p. 369, who argues that mass rape "represents one end of a continuum of violence".

685 UN Doc. E/CN.4/Sub.2/1998/13, *supra* note 10, para. 9.

686 Beijing Declaration and Platform for Action, paras. 132-137.

687 Seifert, *War and Rape, Analytical Approaches*, *supra* note 261.

688 Use of Sexual Violence in Armed Conflict, Identifying Gaps in Research to Inform More Effective Interventions, *supra* note 605, p. 2.

689 *Ibid.*

gration, war, foreign occupation or other situations where masculinities compete and power relations are altered in society".[690]

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.[691]

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.[692] 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.[693]

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.[694] The surrounding conflict may be interpreted as a social licence to rape, creating a sense of entitlement among young soldiers.[695] 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.[696] The following section will further explore the use of rape as a tactic of war.

690 Discrimination against women weakens all of society, UN Rights Chief, UN News, New York, 6 March, 2009.

691 Use of Sexual Violence in Armed Conflict, Identifying Gaps in Research to Inform More Effective Interventions, *supra* note 605, p. 3. This will be discussed further in chapter 5.5.

692 Thornhill and Palmer, *supra* note 262.

693 Radhika Coomaraswamy, for example, dismisses this claim as unsubstantiated. UN Doc. E/CN.4/2001/73, *supra* note 651, para. 23.

694 Wood, *supra* note 636, p. 14.

695 Copelon, *supra* note 263, p. 213.

696 Wood, *supra* note 636, p. 15. With the masculine aura of an armed conflict, rape further enhances the ideal of virility among soldiers. Seifert, *War and Rape: a Preliminary Analysis*, *supra* note 261, 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.

## 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.[697] 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.[698] 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 9 out of 13 completed cases of the ICTR, sexual violence was directed against civilians.[699] 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.[700] An array of reports from non-governmental organisations (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 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.[701] The UN Commission on Human Rights makes clear that rape in armed conflicts may "destroy families and communities".[702] 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".[703] Several authors have noted the connection between territoriality

697 *See* chapter 9.

698 Seifert, *War and Rape: a Preliminary Analysis*, *supra* note 261, p. 55.

699 UN Doc. S/2009/362, *supra* note 12, para. 10.

700 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* UN Doc. S/2009/362, *supra* note 12, para. 15.

701 R. Hayden, 'Rape and Rape Avoidance in Ethno-National Conflicts: Sexual Violence in Liminalized States', 102 *American Anthropologist* (2000), p. 36.

702 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.

703 UN Doc. E/CN.4/1998/54, *supra* note 336, paras. 12-13. *See further e.g.* Irene Khan, Secretary-General of Amnesty International, who argues: "[D]isparaging 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

and rape, in that the conquering of women's bodies is similar to the occupation of land.[704] 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 […] [T]he rape of the women in a community can be regarded as the symbolic rape of the body of this community."[705] Many victims are raped in public places in the presence of family members, members of the community or an ethnic group.[706] The public nature of the crime is intended to instil terror in the population, and to strengthen the bond between combatants.[707]

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".[708] 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.[709] The UN Special Rapporteur on Violence against Women has also observed:

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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, *supra* note 417, p. 632 argues: "The victims of sexual violence in war suffer as individuals and they suffer as members of a community."

704 Hayden, *supra* note 701, p. 32.

705 Seifert, *War and Rape: A Preliminary Analysis*, *supra* note 261, p. 63. *See also* V. Das, 'National Honour and Practical Kinship: Of Unwanted Women and Children', in V. Das (ed.), *Critical Events: An Anthropological Perspective on Contemporary India* (Oxford University Press, Oxford, 1995), p. 56, who holds: "[T]he woman's body […] became a sign through which they communicated with each other."

706 Boon, *supra* note 417, p. 632, Ni Aolain, *supra* note 144, p. 336.

707 Coomaraswamy, *supra* note 11, p. 55. *See further* Report of the Special Rapporteur on Violence against Women: Report of the Mission to Rwanda on the Issues of Violence against Women in Situations of Armed Conflict, 54 UN ESCOR, UN Doc. E/CN.4/1998/54/Add.1, (Mission to Rwanda), 4 February 1998, 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.

708 Askin, *supra* note 11, p. 298. *See also* Bensouda, *supra* note 11, p. 402.

709 Wood, *supra* note 636, p. 19, Seifert, *War and Rape: A Preliminary Analysis*, *supra* note 261, p. 63.

> 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.[710]

A similar finding was made by the Inter-American Commission on Human Rights:

> 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 […].[711]

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.[712] The judgment in the *Akayesu* case of the ICTR observed:

> [I]n 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.[713]

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".[714] Though it is difficult to verify the number of enforced pregnancies in the above mentioned conflicts, it estimated that

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710 UN Doc. E/CN.4/1998/54, *supra* note 336, para. 5.

711 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, 18 October 2006, Inter-American Commission on Human Rights, OEA/Ser.L/V/II., Doc. 67, para. 52.

712 *See further below* on the ICTY and ICTR in chapter 9.

713 *The Prosecutor* v. *Jean-Paul Akayesu*, *supra* note 30, para. 507.

714 *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,

between 1,000 and 2,000 women in former Yugoslavia became pregnant as a result of rape in 1993 and between 2,000 and 5,000 women in 1994 in Rwanda.[715] 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.[716] Because many cultures are patrilineal, the children born of rape are typically identified with the ethnic group of the father, such as in Rwanda, causing severe psychological trauma for the victimised woman, at times leading to matricide, suicide or rejection by society.[717]

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".[718] 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.[719] Reports from Darfur also present female rape victims being disowned by families.[720] Being shunned by their husbands or being physically and mentally un-

<www.haguejusticeportal.net/Docs/Court%20Documents/ICTY/Karadzic_Review_indictment_EN.pdf >, visited on 10 November 2010, paras. 94 and 95.

715 G. Halsell, 'Women's Bodies a Battlefield in War for "Greater Serbia"', *Washington Report on Middle East Affairs* (April/May 1993), pp. 8-9 and Human Rights Watch, Shattered Lives: Sexual Violence During the Rwandan Genocide and Its Aftermath (1996), p. 79.

716 C. R. Carpenter, 'Gender, Ethnicity, and Children's Human Rights, Theorizing Babies Born of Wartime Rape and Sexual Exploitation', in C. Carpenter (ed.), *Born of War* (Kumarian Press, Bloomfield, 2007), p. 1.

717 M. C. Mukangendo, 'Caring for Children Born of Rape in Rwanda', in C. Carpenter (ed.), *Born of War: Protecting Children of Sexual Violence Survivors in Conflict Zones* (Kumarian Press, Bloomfield, 2007), p. 42.

718 Short, *supra* note 659, 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: "[T]he 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*, *supra* note 714, para. 94.

719 K. Bennoune, 'Do We Need New International Law to Protect Women in Armed Conflict?', 38 *Case Western Reserve Journal of International Law* 363 (2007), p. 367.

720 S. Sackellares, 'From Bosnia to Sudan: Sexual Violence in Modern Conflict', 20 *Wisconsin Women's Law Journal* 137 (2005), p. 140.

able 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 the United Nations Children's Fund (UNICEF), of the women who survived the Rwandan genocide, 70 per cent of rape victims were estimated to have contracted HIV.[721] 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".[722]

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."[723] 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".[724] Furthermore, "[i]n 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."[725]

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 culture.[726] 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".[727]

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721 United Nations, Radio, 15 April 2009, Rwandan Children Born of Rape.

722 Mukangendo, *supra* note 717, p. 45.

723 M. A. Tetreault, 'Justice For All: Wartime Rape and Women's Human Rights', 3 *Global Governance* 197 (1997), p. 203.

724 Ellis, *supra* note 12, p. 226.

725 Charlesworth, *supra* note 131, p. 387.

726 B. Stephens, 'Humanitarian Law and Gender Violence: An End to Centuries of Neglect?', 3 *Hofstra Law & Policy Symposium* 87 (1999), p. 90.

727 *Prosecutor* v. *Erdemovic*, 29 November 1996, ICTY, Sentencing Judgment, Case No. IT-96-22-T, <www.unhcr.org/cgi-bin/texis/vtx/refworld/rwmain?page=search&docid=402765a27&skip=0&query=erdemovic>, visited on 10 November 2010, para. 28.

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".[728] 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: "[W]hile rampant sexual violence was an *underlying* crime directed against women, the perpetrators intended these violations […] to be a weapon of war."[729] 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 community.[730] 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.[731] 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."[732] 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

728 W. Schabas, *An Introduction to the International Criminal Court* (Cambridge University Press, Cambridge, 2001), p. 228.

729 Short, *supra* note 659, p. 504. Emphasis added.

730 Copelon, *supra* note 263, p. 198, Dixon, *supra* note 345, pp. 703 *et seq.*, Charlesworth, *supra* note 131, p. 387.

731 UN Doc. E/CN.4/Sub.2/1998/13, *supra* note 10, para. 96

732 Copelon, *supra* note 263, p. 198.

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 book, 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."[733] The 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.[734] 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".[735]

733 UN Doc. E/CN.4/Sub.2/2005/33, *supra* note 702, para. 6. It is stressed that rape during armed 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 and Morss, *supra* note 299, 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.

734 UN Doc. E/CN.4/1995/42, *supra* note 34, para. 277.

735 Boon, *supra* note 417, p. 632.

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 infringing the sexual autonomy of the victim violates his/her physical well-being, as well as the collective to which the victim belongs.[736]

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".[737] 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".[738] 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 geno-

736 Schomburg and Peterson, *supra* note 518, 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* S. Pieslack, 'Comment: The International Criminal Court's Quest to Protect Rape Victims of Armed Conflict: Anonymity as the Solution', 2 *Santa Clara Journal of International Law* (2003), p. 171.

737 C. Chinkin, 'Women: The Forgotten Victims of Armed Conflict?', in H. Durham and T. McCormack (eds.), *The Changing Face of Conflict and the Efficacy of International Humanitarian Law* (Martinus Nijhoff, Leiden, 1999), p. 41. *See also* Copelon, *supra* note 263, 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.

738 Copelon, *supra* note 263, p. 214.

cide contain this nexus in their definitions in the Rome Statute of the ICC.[739] 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".[740] Crimes against humanity must be committed as part of "a widespread or systematic attack directed against any civilian population, with knowledge of the attack".[741] 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".[742] While it is stated that the Court has jurisdiction "in particular" when such a connection to armed conflicts exist and it is thus not an absolutely necessary element, the prosecutor is directed to take these factors into account.

The crimes in the provisions of the Rome Statute are further defined in the document entitled Elements of Crimes.[743] 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".[744] A single criminal act of, for example, rape may amount to genocide if it was committed in such a context.[745]

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739 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.

740 Article 6 of the Rome Statute of the International Criminal Court. 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.

741 Article 7 of the Rome Statute.

742 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.

743 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.

744 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).

745 Von Hebel and Kelt, *supra* note 579, 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".[746] 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".[747] 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.[748] 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.[749] 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.[750] An attack against a single victim is hence included, provided it forms part of the widespread or systematic attack.[751] Single acts of rape can therefore qualify as international crimes depending on the context.

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:

746 Article 7(1)(g)-1 (4) of Elements of Crimes.

747 Article 7(2) of Elements of Crimes.

748 *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, 108 International Law Reports 53. 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* Article 5, ICTY Statute and *Prosecutor* v. *Tadic*, *supra* note 587, para. 248.

749 *Prosecutor* v. *Tadic, supra* note 584, para. 659.

750 *Prosecutor* v. *Tadic*, *supra* note 587, para. 251.

751 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* UN Doc. S/2009/362, *supra* note 12, fn. 3. In the judgment of *Prosecutor* v. *Mrksic*, the Tribunal delineated the scope of the criminal elements, stating: "[A]s 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*, *supra* note 748, para. 30.

> 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.[752]

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.[753] In the Elements of Crimes it is specified regarding the knowledge of an armed conflict, that "there is only a requirement for the awareness of the factual circumstances that established the existence of an armed conflict".[754]

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

752 *Prosecutor* v. *Tadic supra* note 584, para. 573. *See also The Prosecutor* v. *Kayishema and Ruzindana*, 21 May 1999, ICTR, Case No. ICTR-95-1-T, <www.unictr.org/Portals/o/Case/English/Kayishema_F/decisions/index.pdf>, visited on 10 November 2010, 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*, 6 December 1999, ICTR, Case No. ICTR-96-3-T, <www.unictr.org/Portals/o/Case/English/Rutaganda/judgement/991206.pdf, visited on 10 November 2010, 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".

753 "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* von Hebel and Kelt, *supra* note 579, p. 286.

754 Article 8 Introduction, Elements of Crimes.

committed as part of, or in the context of, the perpetrator's official duty.[755] Particular care will be taken when the perpetrator is a non-combatant.[756]

The rules of warfare in international humanitarian law do not apply exclusively to the conduct of military personnel.[757] 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.[758] In cases of rape both by and against a civilian, a determination would need to be made on the hypothesis "but for" the war, the rape would not have occurred.[759] 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".[760] 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."[761]

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755 *See* case law in footnotes 748-749. *See also* discussion in Schomburg and Peterson, *supra* note 518, p. 131.

756 *The Prosecutor* v. *George Rutaganda,* 26 May 2003, ICTR, Case No. ICTR-96-3-A, Appeal Judgment, <www.unictr.org/Portals/0/Case/English/Rutaganda/decisions/030526.pdf>, visited on 10 December 2010, para. 570.

757 *The Prosecutor* v. *Musema*, 27 January 2000, ICTR, Case No. ICTR-96-13-I, <www.unictr.org/Portals/0/Case/English/Musema/judgement/000127.pdf>, visited on 10 November 2010, 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, supra* note 663, 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."

758 Schomburg and Peterson, *supra* note 518, p. 99.

759 Askin, *supra* note 205, fn. 1034.

760 *Prosecutor* v. *Kunarac, Kovac and Vukovic, supra* note 497, para. 58.

761 *Ibid.*

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.[762] 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.[763] Though the sexual assaults conducted in the above-mentioned conflicts were largely part of an intentional plan, there were also single, isolated rapes.[764] 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 result of an official policy of ethnic cleansing but were committed because women were vulnerable as a result of the atmosphere of violence.[765]

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."[766] 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.[767] Such heightened levels

762 UN Doc. E/CN.4/1998/87, *supra* note 11, 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.

763 Askin, *supra* note 11, p. 1, E.-M. Condon, 'The Incoherent International Jurisprudence of Rape', 3:1 *Eyes on the ICC* (2006), p. 23.

764 C. Mullins, 'We are Going to Rape You and Taste Tutsi Women', *British Journal of Criminology* 49 (2009), p. 726. *See* witness testimony in The *Prosecutor* v. *Mikaeli Muhimana*, 28 April 2005, ICTR, Case No. ICTR-95-1B-T, <www.unictr.org/Portals/0/Case/English/Muhimana/judgement/index.pdf>, visited on 10 November 2010, para. 380, Askin, *supra* note 205, p. 288.

765 Askin, *supra* note 205, 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, supra 763, p. 25.

766 UN Doc. S/2009/362, *supra* note 12, para. 7. Reasons for this include the heightened level of violence, displacement, internally and across borders and general discrimination of women.

767 Copelon, *supra* note 263, p. 213, Mullins, *supra* note 764, p. 726, Wood, *supra* note 636, p. 14, Condon, *supra* note 763, p. 23, Askin, *supra* note 205, 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 and Palmer, *supra* note 262, p. 134.

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.[768] 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.[769] 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 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.[770] In contrast, in the *Kunarac* case of the 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.[771]

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.[772] 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.[773] 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".[774] 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.[775] The same is true for crimes against humanity so long as the violation or injury sustained formed part

768 Bennoune, *supra* note 719, p. 367.

769 Thornhill and Palmer, *supra* note 262, p. 134.

770 *The Prosecutor* v. *George Rutaganda*, *supra* note 756, para. 570.

771 *Prosecutor* v. *Kunarac, Kovac and Vukovic*, *supra* note 497. The problem of legally determining the nexus of "free-riders", *i.e.* individuals taking advantage of coercive circumstances for personal motives, is dicussed in C. Burchard, 'Torture in the Jurisprudence of the Ad Hoc tribunals', 6 *Journal of International Criminal Justice* 159 (May 2008), p. 180.

772 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. R. Provost, *International Human Rights and Humanitarian Law* (Cambridge University Press, Cambridge, 2002), pp. 101-102.

773 Condon, *supra* note 763, p. 23.

774 *The Prosecutor* v. *Jean-Paul Akayesu*, *supra* note 30, paras. 636 and 640.

775 *Prosecutor* v. *Tadic*, *supra* note 584, para. 634. *See further below* in chapter 9.

of a systematic attack, that the accused was aware of that fact, and the motivation was not *purely* personal.[776] The fact that torture was committed partly for personal reasons does not exclude a finding of the requisite level of *mens rea*.[777]

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.[778] It is still necessary to distinguish common crimes that should be dealt with by local jurisdiction, though committed during an armed conflict, such as theft or assault arising from a pub brawl.[779] 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.[780] 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 to war situations.[781] Hence common

776 *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."

777 *Prosecutor* v. *Kunarac, Kovac and Vukovic*, *supra* note 497, para. 155.

778 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.

779 Provost, *supra* note 772, p. 99.

780 *See e.g. M.C.* v. *Bulgaria*, *supra* note 240 and *Ana, Beatriz, and Celia González Pérez (Mexico)*, *supra* note 347.

781 *See e.g. The Prosecutor* v. *Jean-Paul Akayesu*, *supra* note 30, *Prosecutor* v. *Furundzija*, *supra* note 28, *Prosecutor* v. *Kunarac, Kovac and Vukovic*, *supra* note 497. Further discussed in chapter 9.

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.[782] 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.[783] 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 and negate the need for the prosecution to establish lack of consent as an element of the crime."[784]

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.[785] 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 Schomberg, 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

782 *Ibid*.

783 De Brouwer, *supra* note 518, p. 120, Schomburg and Peterson, *supra* note 518, p. 128, MacKinnon, *supra* note 466, p. 952, UN Doc. E/CN.4/Sub.2/1998/13, *supra* note 10, para. 25.

784 UN Doc. E/N.4/Sub.2/1998/13, *supra* note 10, para. 25.

785 Fitzgerald, *supra* note 407, p. 641.

interests of more than one person cannot be excluded on the basis of a non-consent-based standard.[786] 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."[787]

Furthermore, in certain *ad hoc* Tribunal cases, the ethnicity of the victim appears to have automatically informed the finding of non-consent.[788] It must, however, be taken into account that relationships can arise between consenting adults during armed conflicts, including those between members on opposing sides.[789] The question is particularly pertinent with regard to jurisprudence, demonstrating that single acts of rape can qualify as international crimes, 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".[790] 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 that all sexual relations to be forced without

786 Schomburg and Peterson, *supra* note 518, p. 125.

787 *Ibid.*, p. 125.

788 *The Prosecutor* v. *Gacumbitsi*, 17 June 2004, ICTR, Case No. ICTR-2001-64-T, <www.unictr.org/Portals/0/Case/English/Gacumbitsi/Decision/040617-judgement.pdf>, visited on 10 November 2010, para. 688: "[C]oercion 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*, *supra* note 592, para. 155: "[T]he Trial Chamber is free to infer non-consent from the background circumstances, such as an ongoing genocide campaign […]." *Prosecutor* v. *Kunarac, Kovac and Vukovic*, *supra* note 409, paras. 585 *et seq*.

789 Schomburg and Peterson, *supra* note 518, p. 126.

790 Hayden, *supra* note 701, p. 28.

inquiring into the issue of consent deprives women the capacity of autonomy. It turns all women's bodies collectively into property or territory.[791]

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, for example, pertaining to liaisons between 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.[792] However, because of the added component in armed conflicts of the collective as 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.[793] It often takes place in private settings and in-

791 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, *supra* note 701, p. 36.

792 C. Chinkin, 'Rape and Sexual Abuse of Women in International Law', 5 *European Journal of International Law* 326 (1994), 15 Years of the United Nations Special Rapporteur on Violence against Women, its Causes and Consequences, (1994-2009), p. 113.

793 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

tersects with domestic violence, stalking, forced marriage, trafficking and other forms of violence against women.[794] According to a UN global survey, between 20 and 40 per cent of women have experienced sexual assault by men other than partners.[795] 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 instances in industrialised countries such as the US, Iceland, Sweden and Northern Ireland.[796]

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).[797] In a major research study by the European Commission on attrition rates in rape cases of all European states, approximately 67 per cent of suspects were known to the victim, most frequently a current or ex-partner.[798] In a multi-country report by the World Health Organization (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.[799] 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).[800] 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).[801]

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existed of female suspects in this study, albeit most countries had a gender-neutral definition of the law.

794 Different Systems, Similar Outcomes? Tracking Attrition in Reported Rape Cases Across Europe, p. 112.

795 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.

796 UN Interregional Crime & Justice Research Institute, Criminal Victimisation 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.

797 *Ibid*., p. 80.

798 Different Systems, Similar Outcomes? Tracking Attrition in Reported Rape Cases Across Europe, p. 106. According to Wertheimer, *supra* note 252, pp. 90-91, approximately 75-80 per cent of rape victims know the perpetrator.

799 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.

800 *Ibid*., p. 43. Sexual violence was here understood as forceful sex or performing a sexual act that they did not want.

801 *Ibid*., p. 31.

The most common location of assaults is the private sphere, most frequently the home of the victim or suspect.[802] The overwhelming majority of victims report that the rapist does not use a weapon, numbers ranging from 1–8 per cent of the cases, with weapons used equally by strangers and partners.[803] Two-thirds of victims report no physical injury apart from the penetration itself.[804] Several additional surveys support the finding that while a substantial minority do incur serious physical injury, the large majority of victims do not.[805] 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.[806] 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.[807] 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.[808] Resistance by the victim may in fact increase the risk of being subjected to injuries.[809] 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.[810] 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 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.

802 Different Systems, Similar Outcomes? Tracking Attrition in Reported Rape Cases Across Europe, p. 106.

803 According to Criminal Victimisation in International Perspective, Key Findings from the 2004-2005 ICVS and EU ICS, p. 80, weapons were rarely used (8 per cent of assault cases). In Different Systems, Similar Outcomes? Tracking Attrition in Reported Rape Cases Across Europe, p. 106, weapons were used in 1-7 per cent of cases in all countries.

804 Wertheimer, *supra* note 252, pp. 90-91

805 Temkin, *supra* note 188, p. 167.

806 Different Systems, Similar Outcomes? Tracking Attrition in Reported Rape Cases Across Europe, p. 106.

807 Wertheimer, *supra* note 252, pp. 90-91.

808 SOU 2001:14, p. 123 and *M.C.* v. *Bulgaria*, *supra* note 240.

809 Spohn and Horney, *supra* note 149, p. 23, *M.C.* v. *Bulgaria, supra* note 240. 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, *supra* note 407, p. 644.

810 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, *supra* note 25, p. 247.

## 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.[811] 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 keep all women in a state of fear".[812] 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.[813] 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

811 *See e.g.* Brownmiller, *supra* note 281, Estrich, *supra* note 231, Dworkin, *supra* note 269, MacKinnon, *supra* note 491, Rhode, *supra* note 25, West, *supra* note 270, McGregor, *supra* note 192. *See* a general overview in Torrey, *supra* note 220. 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* S. Caringella, *Addressing Rape Reform in Law and Practice* (Columbia University Press, New York, 2009), p. 2. Much of the literature on the matter is thus from the 1990s or even earlier.

812 Brownmiller, *supra* note 281, p. 15. *See also* MacKinnon, *supra* note 491, p. 130, Berglund, *supra* note 216, p. 90.

813 C. Roberts, *Women and Rape* (New York University Press, New York, 1989), p. 38. According to certain studies, this fear is in fact greater than the actual occurrence of rape would warrant.

roles.[814] This intimidation weakens women's social achievement and empowers traditional gender roles that develop into social policy.[815]

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.[816] 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".[817] 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.[818]

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 attempting to represent the point of view of women".[819] 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.[820] 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".[821]

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

814 Roberts, *supra* note 312, p. 378.

815 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, *supra* note 327, p. 55.

816 Chinkin, *supra* note 737, p. 42.

817 Cahill, *supra* note 327, p. 45.

818 *Ibid.*, p. 45.

819 Quénivet, *supra* note 135, p. 15.

820 P. Novotny, 'Rape Victims in the (Gender) Neutral Zone: The Assimilation or Resistance?', 1 *Seattle Journal Social Justice* 748 (2002-2003), p. 745.

821 Finley, *supra* note 1, 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.

in everyday situations.[822] 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 transform most sexual acts that are experienced as rape into "sex" and non-crimes.[823] 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 also a presumption of moral guilt on the part of women.[824] 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.[825] 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.[826] 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.[827] 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.[828] These arguments have been criticised for incapacitating women, *i.e.* indicating that women cannot choose freely and for implying that women are not

822 A. Dworkin, *Our Blood: Prophecies and Discourses on Sexual Politics* (Harper & Row, New York, 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."

823 Henderson, *supra* note 318, p. 42.

824 *Ibid.*, p. 42.

825 McGregor, *supra* note 192, p. 7.

826 MacKinnon, *supra* note 214, p. 174.

827 S. Deevey, 'Such a Nice Girl', in N. Myron and C. Bunch (eds.), *Lesbianism and the Women's Movement* (Diana Press, Baltimore, 1975), p. 21.

828 *Ibid.*, p. 147.

reliable witnesses in rape proceedings.[829] 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 being insufficiently careful, rather than constructing social conditions where women need not fear male sexual aggression.[830] 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.[831] 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.[832] The myth that the female victim can always prevent a rape by screaming or resisting still remains in many jurisdictions.[833] 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.[834] Such gender imbalance has been criticised by various UN organs and the European Court of Human Rights in its case law.[835] In *C.R.* v. *the United*

829 Schulhofer, *supra* note 215, p. 83, G. Panichas, 'Rape, Autonomy, and Consent', 35 *Law & Society Review* 231 (2001), p. 247.

830 Roberts, *supra* note 312, p. 379.

831 R. D. Weiner, 'Shifting the Communication Burden: A Meaningful Consent Standard in Rape', 6 *Harvard Women's Law Journal* 143 (1983), p. 147.

832 Byrnes, *supra* note 571, p. 284.

833 Larsson, *supra* note 197, p. 145.

834 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.

835 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 February 1996, p. 37. European Court: *C.R.* v. *the United Kingdom*, *supra* note 387.

*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.[836] 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 "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".[837] 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, for example, 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.[838]

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".[839] Several of them advocate ensuring that inherent differences between the sexes be made "costless".[840] By placing offences of rape

836 *C.R.* v. *The United Kingdom*, *supra* note 387.

837 *Ibid.*, para. 42.

838 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 Argentian 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 February 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.

839 A. Medea and K. Thompson, *Against Rape* (Farrar, Straus and Giroux, New York, 1974), p. 11.

840 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* C. Littleton, 'Reconstructing Sexual Equality', in *Feminist Legal Theory: Readings in Law and Gender* (Westview Press, Boulder, 1991), p. 6. Schulhofer points out that a regulation

in a larger 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".[841]

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".[842] 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.[843] 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 consent on the part of the participants.[844] In general, at least, it is agreed that a resistance requirement is highly discriminatory and harmful.[845] Various understandings also exist as to the *mens rea* of the crime, certain authors favouring strict liability.[846] In this sense, feminist scholars have succeeded greatly in acknowledging the injuries of rape from a

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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, *supra* note 215, 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.

841 SOU 1995:60, p. 279: Kvinnofrid, huvudbetänkande av kvinnovåldskommissionen. 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, *supra* note 249, p. 23.

842 R. Cook, 'State Responsibility for Violations of Women's Rights', 7 *Harvard Human Rights Journal* 125 (1994), p. 138.

843 *See* discussions in *e.g.* McGregor, *supra* note 192, MacKinnon, *supra* note 491, Brownmiller, *supra* note 281, pp. 430-432, Estrich, *supra* note 491, Schulhofer, *supra* note 215. 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, *supra* note 26, p. 795.

844 Remick, *supra* note 460, p. 1111.

845 McGregor, *supra* note 192, p. 29, Estrich, *supra* note 491, p. 43, Schulhofer, *supra* note 215, p. 125, Burgess-Jackson, *supra* note 155, p. 75, Torrey, *supra* note 220, p. 303.

846 MacKinnon, *supra* note 491. *See also* Estrich, *supra* note 491, p. 98.

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.[847]

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.[848] 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.[849] 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 men as rapists".[850] 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

847 Quénivet, *supra* note 135, p. 2.

848 *See e.g.* M. Alvesson and Y. Due Billing, *Understanding Gender and Organizations*, 2nd ed. (Sage Publications, London 2009), p. 65.

849 Berglund, *supra* note 216, p. 234.

850 Podhoretz, Norman, *Rape in Feminist Eyes*, Commentary 93, (1992).

arena, whether during armed conflicts or peace.[851] 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".[852]

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 concerns with the existing bodies of law, for example in arguing that rape was indeed prohibited under IHL.[853] 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.[854] The CEDAW Committee has observed: "There 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."[855] 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.[856] 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, for example, interpreting domestic violence as torture and rape as a war crime.[857] While

851 *See e.g.* D. Dallmeyer (ed.), *Reconceiving Reality: Women and International Law* (ASIL, 1993), Charlesworth and Chinkin, *supra* note 33, Buss, *supra* note 684, Cook, *supra* note 842, H. Charlesworth, *Feminist Methods in International Law*, C. Chinkin, 'A Critique of the Public/Private Dimension', 10:2 *European Journal of International Law* (1999), R. Copelon, 'International Human Rights Dimensions of Intimate Violence: Another Strand in the Dialectic of Feminist Lawmaking', 11 *American University Journal of Gender, Social Policy & The Law* 865 (2003), K. Engle, 'International Human Rights and Feminisms: When Discourses Keep Meeting', in D. Buss and A. Manji (eds.), *International Law: Modern Feminist Approaches* (Hart Publishing, Portland, 2005), Fellmeth, *supra* note 136, Parker, *supra* note 611.

852 UN Doc. E/CN.4/2006/61, *supra* note 213, para. 57.

853 Engle, *supra* note 851, p. 52.

854 Engle, *supra* note 851, p. 50, C. Chinkin *et al.*, 'Feminist Approaches to International Law: Reflections from Another Century', in D. Buss (ed.), *International Law: Modern Feminist Approaches* (Hart Publishing, Oxford and Portland, 2005), p. 20.

855 CEDAW General Recommendation No. 23, Political and Public Life, 16th Session, UN Doc. A/52/38, (1997), para. 38.

856 Charlesworth, *supra* note 131, p. 386.

857 L. J. Peach, 'Are Women Human?', in L. Bell *et al.* (eds.), *Negotiating Culture and Human Rights* (Columbia University Press, New York, 2001), p. 159.

creative, where women's concerns diverge from "male" interests, for instance, 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.[858] 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 to violations of women's rights.[859] 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. For instance, international human rights law 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.[860] In that sense a dichotomy has been created between private and public harms, with only the latter being recognised by international law.[861] 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.[862]

858 Charlesworth, *supra* note 131, p. 381.

859 Steiner *et al*., *supra* note 15, 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.

860 Benninger-Budel, *supra* note 32, p. 1.

861 Engle, *supra* note 851, p. 53.

862 R. Copelon, 'Gender Violence as Torture: The Contribution of CAT General Comment No. 2', 11 *New York City Law Review* 229 (2007-2008), 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.[863] 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.[864] Violence against women, including sexual violence, has subsequently been interpreted as an expression of gender discrimination by the CEDAW Committee.[865] 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".[866]

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.[867] 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 violence during conflict has been invisible, as opposed to other forms of violence, precisely because it primarily targets women and girls.[868] 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".[869]

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863 UN Doc. A/61/122/Add.1, *supra* note 2, paras. 70-72.

864 H. Charlesworth, 'Alienating Oscar? Feminist Analysis of International Law', in D. Dallmeyer (ed.), *Reconceiving Reality: Women and International Law* (ASIL, Washington DC, 1993), pp. 4-5.

865 Declaration on the Elimination of Violence against Women, General Assembly, UN Doc. A/RES/48/104, 23 February 1994.

866 UN Doc. E/CN.4/2003/75, *supra* note 859, para. 65.

867 *See e.g.* J. Gardam and H. Charlesworth, 'The Need for New Directions in the Protection of Women in Armed Conflict', *Human Rights Quarterly* (2000), Chinkin, *supra* note 792, Copelon, *supra* note 263, Askin, *supra* note 205, K. Engle, 'Feminism and its (Dis) Contents: Criminalizing Wartime Rape in Bosnia and Herzegovina', *American Journal of International Law* 99 (2005), Gardam, and Jarvis, *supra* note 607, V. Oosterveld, 'The Making of a Gender-Sensitive International Criminal Court', 1 *International Law Forum du Droit International* 38 (1999), P. Viseur Sellers, *The Prosecution of Sexual Violence in Conflict: The Importance of Human Rights as a Means of Interpretation*, OHCHR, 2008, Seifert, *The Second Front*, *supra* note 261.

868 "Rape must never be minimized as part of cultural traditions, UN envoy [Margot Wallström] says", UN News, *supra* note 5.

869 "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.

Again, it was emphasised that rape impedes women's political, economic and social participation.[870] 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".[871] 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.[872]

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.[873] 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 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.[874] 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

870 *Ibid.*

871 Halley, *supra* note 264, p. 83.

872 *Ibid.*, p. 84.

873 Cook, *supra* note 842, p. 131.

874 UN Doc. E/CN.4/Sub.2/1998/13, *supra* note 10, para. 18.

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.[875] Many states classify male rape as "forcible sodomy" or "homosexual rape".[876] 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.[877] 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.[878] 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.[879] 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 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 consciously been constructed in a gender-neutral manner in international criminal law, both by the *ad hoc* tribunals and the Elements of Crimes of the ICC.[880] The WHO has warned against a narrow interest in the female victim of sexual abuse and declared:

875 UN Doc. E/CN.4/1995/42, *supra* note 34, para. 180.

876 S. Sivakumaran, 'Male/Male Rape and the "Taint" of Homosexuality', 27 *Human Rights Quarterly* 1274 (2005), p. 1286, Stephen Donaldson, *Article from the Encyclopedia of Homosexuality*, ed. Wayne R. Dynes, 1990, NY: Garland Publications, p. 1094.

877 Temkin, *supra* note 188, p. 70.

878 N. Abdullah-Khan, *Male Rape: The Emergence of a Social and Legal Issue* (Palgrave Macmillan, Basingstoke, 2008), p. 16.

879 UN Interregional Crime & Justice Research Institute, 2004-2005, p. 78.

880 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* C. P. M. Cleiren and M. E. M. Tijssen, 'Rape and Other Forms of Sexual Assault in the Armed Conflict in the Former Yugoslavia. Legal, Procedural, and Evidentiary Issues', in R. Clark and M. Sann (eds.), *The Prosecution of International Crimes* (Transaction Publishers, New Brunswick, 1996), p. 260.

> 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 […].[881]

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.[882] Male rape is in fact at times referred to as "homosexual rape", which allows society to view it as a form of violence that only concerns a small part of the population and therefore does not attach the proper level of severity to the offence.[883] 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.[884] The perpetrator may of course be a man or a woman.[885] For example, women more frequently participate in armed conflicts, and not solely as civilians.[886] Though the victims were female, a woman was convicted of rape by the Rwanda tribunal for ordering the commission of sexual violence.[887] Female sol-

881 World Health Organization, Reproductive Health During Conflict and Displacement, A Guide for Programme Managers, (2000), p. 111.

882 E. Stener Carlson, 'The Hidden Prevalence of Male Sexual Assault During War', 46 *British Journal of Criminology* 16 (January 2006), p. 18.

883 *Ibid.,* 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, *supra* note 491, p. 108.

884 *Ibid.*, p. 77.

885 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.

886 Lindsey, *supra* note 609, 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.

887 *The Prosecutor* v. *Pauline Nyiramasuhuko*, 1 March 2001, ICTR, Indictment, Case No. ICTR-97-21-T, <www.unictr.org/Portals/0/Case/English/Nyira/indictment/index.pdf>, visited on 10 November 2010.

dier Lynndie England was also convicted of "committing an indecent act" subsequent to sexual violence in the Abu Ghraib prison in Iraq.[888]

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.[889] Sivakumaran argues that evidence of male sexual assault in reports frequently has been treated as "mutilation" or "torture" rather than rape, which has reinforced the obscurity of male victims of rape.[890] 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.[891] 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.[892] 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.[893]

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.[894] It is estimated that more than 4,000 Croatian men were sexually abused by Serb militants during the conflict.[895] 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

888 Conviction in Fort Hood Court, 26 September 2005.

889 H. Zawati, 'Impunity or Immunity: Wartime Male Rape and Sexual Torture as a Crime Against Humanity', 17:1 *Torture: Journal on Rehabilitation of Torture Victims and Prevention of Torture* (2007), p. 35. Sivakumaran also found evidence of male rape in Argentina, Northern Ireland, Chechnya, and Turkey. *See* S. Sivakumaran, 'Sexual Violence Against Men in Armed Conflict', 18 *European Journal of International Law* 253 (April 2007), p. 258. P. Oosterhoff *et al.*, 'Sexual Torture of Men in Croatia and Other Conflict Situations: An Open Secret', *Reproductive Health Matters* 2004:12 (23), p. 69.

890 Sivakumaran, *supr*a note 889, p. 255.

891 *Ibid.*, p. 255.

892 Oosterhoff *et al.*, *supra* note 889, p. 68.

893 *Ibid.*, p. 68, Sivakumaran, *supra* note 889, p. 255.

894 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, *supra* note 889, p. 258.

895 Zawati, *supra* note 889, p. 34.

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 the forcing of prisoners to rape female detainees and performing fellatio on guards or one another.[896]

Several cases heard by the ICTY reveal abuse of men, ranging from positioning naked men in poses simulating intercourse[897] to forcing detainees to perform oral sex on other interns.[898] 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."[899] The *Cesic* trial also detailed how Cesic forced two detained Muslim brothers to perform fellatio on each other in front of other detainees.[900] Cesic was subsequently convicted of the rape as a crime against humanity.[901] 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.[902] 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.[903] Forced masturbation either on the victim or the perpetrator is also a common form of sexual assault.[904] In the Special Court for Sierra Leone

896 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* P. Viseur Sellers, Sexual Torture as a Crime under International Criminal and Humanitarian Law, 11 *New York City Law Review* 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.

897 *Prosecutor* v. *Stakic*, 31 July 2003, ICTY, Case No. IT-97-24, <www.icty.org/x/cases/stakic/tjug/en/stak-tj030731e.pdf>, visited on 10 November 2010, para. 241.

898 *Prosecutor* v. *Stevan Todorovic*, 31 July 2001, ICTY, Sentencing Judgment, Case No. IT-95-9/1-S, <www.icty.org/x/cases/todorovic/tjug/en/tod-tj010731e.pdf>, visited on 10 November 2010, paras. 39-40.

899 *Prosecutor* v. *Blagoje Simic, Miroslav Tadic and Siom Zaric*, 17 October 2003, ICTY, Case No. IT-95-9-T, <www.icty.org/x/cases/simic/tjug/en/sim-tj031017e.pdf>, visited on 10 November 2010, para. 728.

900 *Prosecutor* v. *Cesic*, 11 March 2004, ICTY, Sentencing Judgment, Case No. IT-95-10/1-S, <www.icty.org/x/cases/cesic/tjug/en/ces-tj040311e.pdf>, visited on 10 November 2010, paras. 13-14.

901 *Ibid.*, para. 33.

902 *Prosecutor* v. *Delalic et al. (Celebici Camp), supra* note 334, para. 1066.

903 OSCE, Human Rights in Kosovo: As Seen, As Told, Volume 1, October 1998 – June 1999, 5 November 1999, Chapter 7, p. 12.

904 Sivakumaran, *supra* note 889, p. 267.

male rape was recognised in a case where a man was forced to rape a woman. Both participants were considered to be victims.[905] Have the *ad hoc* tribunals fully acknowledged the 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.[906] In the Rwanda conflict men were subjected to sexual violence that involved mutilation of genitals, with the organs subsequently displayed in public.[907] 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.[908] 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".[909] 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".[910]

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 con-

905 *Case No. SCSL-04-15-T against Sesay, Kallon, Gbao*, *supra* note 641.

906 *Prosecutor* v. *Sikirica and others (Keraterm)*, 21 July 1995, ICTY Indictment, Case No. IT-95-8, <www.icty.org/x/cases/sikirica/ind/en/sik-ii950721e.htm>, visited on 10 November 2010, paras. 19-20.

907 De Brouwer, *supra* note 518, p. 13.

908 Sivakumaran, *supra* note 889. 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, *supra* note 878, p. 193.

909 Women, Peace and Security: Study Submitted by the Secretary-General Pursuant to Security Council Resolution 1325, (2000), para. 59.

910 Sivakumaran, *supra* note 889, 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 Stener Carlson, *supra* note 882. The lack of reporting of male victims in Croatia is also discussed in Oosterhoff *et al.*, *supra* note 889, p. 73.

flict, witness testimony at the ICTY relayed that the perpetrator jeered: "You'll never make Muslim children again", while injuring the victim's testicles.[911] The mental trauma of sexual abuse may result in psychological difficulties in relationships that may in turn lead to an inability to procreate.[912] 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.[913]

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.[914] 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 maintaining the gender component.[915] 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.[916]

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

911 *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina* v. *Serbia and Montenegro)*, Application of the Republic of Bosnia and Herzegovina, 20 March 1993, ICJ, <www.icj-cij.org/docket/index.php?p1=3&p2=3&k=f4&case=91&code=bhy&p3=0>, visited on 7 November 2010, paras. 44D(c), (h), 62.

912 Sivakumaran, *supra* note 889, 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 *et al.*, *supra* note 889, p. 71.

913 E. Kramer, 'When Men are Victims: Applying Rape Shield Laws to Male Same-Sex Rape', 73 *New York University Law Review* 293 (April 1998), pp. 296, 311.

914 *See e.g.* R. Leng, 'The Fifteenth Report of the Criminal Law Revision Committee: Sexual Offences – The Scope of Rape', *Criminal Law Review* 416 (1985), N. Naffine, 'Possession: Erotic Love in the Law of Rape', 57:1 *The Modern Law Review* (January 1994). *See* a review of the criticism in P. Rumney and M. Morgan-Taylor, 'Recognizing the Male Victim: Gender Neutrality and the Law of Rape: Part One', 26 *Anglo-American Law Review* 198 (1997).

915 MacKinnon, *supra* note 514, p. 1307, Abdullah-Khan, *supra* note 878, p. 5, B. Stellings, 'The Public Harm of Private Violence: Rape, Sex Discrimination and Citizenship', 28 *Harvard Civil Rights-Civil Liberties Law Review* 185 (1993), p. 196.

916 Quénivet, *supra* note 135, p. 17.

to a lesser extent is viewed as evidence of the gender component.[917] 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."[918] 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.[919] 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.[920] 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 crime and the treatment of the victim by the justice system.[921] 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.[922] 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 in the conflicts subject to the jurisdiction of the *ad hoc* tribunals.

917 *Ibid.*, p. 17.

918 J. Temkin, 'Towards a Modern Law of Rape', 45 *Modern Law Review* 299 (July 1982), pp. 400-401.

919 Leng, *supra* note 914, p. 417.

920 Sivakumaran, *supra* note 889, p. 260.

921 Temkin, *supra* note 188, p. 69.

922 Rumney and Morgan-Taylor, *supra* note 914, 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 book 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.[923] Most forms of violence against women occur in the so-called "private realm" by a private individual.[924] 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

923 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.

924 Charlesworth and Chinkin, *supra* note 33, p. 148. Peach, *supra* note 857, p. 158, R. Cook, 'Accountability in International Law for Violations of Women's Rights by Non-State Actors', in D. Dallmeyer (ed.), *Reconceiving Reality: Women and International Law*, (ASIL, Washington DC, 1993). Cook argues: "[W]omen's exposure to discrimination and other denials of human rights will originate through acts of private persons and institutions." *See* p. 94.

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 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.[925] 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.[926] 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.[927]

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]".[928] 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 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.[929] Similarly, it is recognised that states maintain prime responsibility in guaranteeing and implementing human rights standards. International human rights

925 Shelton, *supra* note 13, p. 5.

926 *Ibid.*, p. 6.

927 Clapham, *supra* note 300, pp. 218 *et seq.*

928 S. Pufendorf, *De Jure Naturae et Gentium Libri Octo* 1304, CH Oldfather & WA Oldfather Trans. (University of Chicago Press, Chicago, 1964).

929 Apart from international criminal law which concerns the responsibility of individuals. *See* Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries, International Law Commission, 2001.

obligations therefore constitute restraints on the actions of states but also inherently contain a responsibility to actively enforce rights.[930] 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.[931] 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.[932] 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.[933]

The traditional view on public international law has created a public/private dichotomy in which public crimes are solely acknowledged by international law, that is, violations perpetrated by or supported by the state.[934] 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

930 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 *et al.*, *supra* note 15, p. 186, J.-F. Akandji-Kombe, *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. 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.

931 OHCHR, Human Rights in the Administration of Justice: A Manual on Human Rights for Judges, Prosecutors and Lawyers, 2003, p. 775.

932 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.

933 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.

934 Charlesworth and Chinkin, *supra* note 33, p. 148.

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.[935] 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.[936] States are increasingly being held responsible for the actions of non-state actors. As will be observed throughout this book, 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.[937] The principles govern the circumstances under which a state can be held accountable for a 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.[938]

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 in-

935 *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* UN Doc. A/61/122/Add.1, *supra* note 2, 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.

936 D. Shelton, *Regional Protection of Human Rights* (Oxford University Press, Oxford, 2008), p. 311.

937 Draft Articles on Responsibility of States for Internationally Wrongful Acts, *supra* note 929, p. 141 (Article 56), M. Dixon, *Textbook on International Law* (Oxford University Press, Oxford, 2007), p. 243, Aust, *supra* note 28, p. 407.

938 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, *supra* note 851, p. 395.

juries to aliens.[939] 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.[940] 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, for example, treaties.[941] 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.[942]

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.[943] 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 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".[944]

The Draft Articles on State Responsibility as secondary rules apply to all areas within public international law, including human rights law.[945] The commentaries to the articles, in fact, frequently refer to the case law of the regional human rights courts

939 J. Crawford, *The International Law Commission's Articles on State Responsibility: Introduction, Text and Commentaries* (Cambridge University Press, Cambridge, 2002), p. 1.

940 Draft Articles on Responsibility of States for Internationally Wrongful Acts, *supra* note 929.

941 D. Bodansky, and J. Crook, 'Symposium: The ILC:s State Responsibility Articles, Introduction and Overview', 96 *American Journal of International Law* 773 (2002), p. 779.

942 *See also* D. Fleck and R. Wolfrum, 'Enforcement of International Humanitarian Law', in D. Fleck (ed.), *The Handbook of International Humanitarian Law* (Oxford University Press, Oxford, 2008), p. 678. The document also codifies and develops customary international law.

943 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.

944 Crawford, *supra* note 939, p. 2.

945 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.

to illustrate interpretations of the contents of the rules.[946] 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.[947] As Dominic McGoldrick insists, the principles on state responsibility are found in, illustrated by, and amplified by human rights law.[948] In fact, international human rights monitoring bodies in practice frequently apply the general rules of state responsibility but without expressly referring to them.[949] The African Commission, for instance, 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 its explicit support in, for instance, providing them with supplies.[950] 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. [951]

946 *See e.g.* Draft Articles on Responsibility of States for Internationally Wrongful Acts, *supra* note 929, p. 56 on fair trial, p. 57 on incompatible legislation, p. 59 on continuing wrongful acts.

947 M. Craven, 'For the "Common Good": Rights and Interests in the Law of State Responsibility', in M. Fitsmaurice and D. Sarooshi (eds.), *Issues of State Responsibility Before Judicial Institutions* (The Clifford Chance Lectures, Vol. VII, Hart Publishing, Portland, 2004), p. 107.

948 D. McGoldrick, 'State Responsibility and the International Covenant on Civil and Political Rights', in M. Fitsmaurice and D. Sarooshi (eds.), *Issues of State Responsibility Before Judicial Institutions* (The Clifford Chance Lectures, Vol. VII, Hart Publishing, Portland, 2004), pp. 162 *et seq*.

949 R. Lawson, 'Out of Control: State Responsibility: Will the ILC's Definition of the Act of the State Meet the Challenges of the 21st Century', in M. Castermans-Holleman *et al.* (eds.), *The Role of the Nation-State in the 21st Century: Human Rights, International Organisations and Foreign Policy* (Kluwer Law International, The Hague, 1998), p. 115: "[W]hile 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."

950 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, African Commission on Human and Peoples' Rights.

951 D. M. Chirwa, 'The Doctrine of State Responsibility as a Potential Means of Holding Private Actors Accountable for Human Rights', 5 *Melbourne Journal of International Law* 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." T. Meron, *Human Rights and Humanitarian Norms as Customary Law* (Oxford University Press, Oxford, 1991), 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

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, for example, in international human rights treaties. The ILC emphasises: "[I]t 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 consequences."[952] 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.[953] 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

governing state responsibility, the latter is mobilized to serve the former and to advance its effectiveness." *See* T. Meron, 'State Responsibility for Violations of Human Rights', 83 *American Society of International Law Procedure* 372 (1989), p. 372. *See also* Mzikenge, *supra* note, p. 9, C. Romany, 'State Responsibility Goes Private: A Feminist Critique of the Public/Private Distinction', in R. Cook (ed.), *International Human Rights Law, in Human Rights of Women* (University of Pennsylvania Press, Philadelphia, 1994), 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 and Crook, *supra* note 941, 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.

952 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:"Responsibility 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.

953 Article 2.

in principle exists between them.[954] 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.[955] It can likewise "involve relatively minor infringements as well as the most serious breaches of obligations under peremptory norms".[956] 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, for instance, refer to case law of the Inter-American Court and European Court of Human Rights (ECtHR).[957] The case law on state obligations has therefore further developed theories on state responsibility.

### 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.[958] 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."[959]

954 Draft Articles on Responsibility of States for Internationally Wrongful Acts, *supra* note 929, p. 35 (Article 2).

955 *Ibid*., pp. 55-56 (Article 12, commentary 3-6).

956 *Ibid*., (Article 12, commentary 6).

957 *Ibid*., pp. 60-61, (Article 14, commentary 4 and 9).

958 A. Cassese, *International Law*, 2nd ed. (Oxford University Press, Oxford, 2005), p. 217.

959 *Case of "The Last Temptation of Christ"* v. *Chile*, 5 February 2001, Inter-American Court of Human Rights, Series C No. 73, <www1.umn.edu/humanrts/iachr/C/73-ing.html>, visited on 9 November 2010 , para. 87. *Case of the "Five Pensioners"* v. *Peru*, 28 February 2003,

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.[960] 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.[961] For instance, the Inter-American Court on Human Rights 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 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".[962] 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.[963] 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".[964] 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.[965] Schwarzenberger notes: "It 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 ex-

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Inter-American Court of Human Rights, Series C No. 98, <www.corteidh.or.cr/docs/casos/articulos/seriec_98_ing.pdf>, visited on 9 November 2010, para. 164.

960 I. Brownlie, *Principles of Public International Law* (Oxford University Press, Oxford, 2008), p. 35, Interpretation of the Statute of the Memel Territory, 11 August 1932, PCIJ, Ser. A/B No. 49, <www.worldcourts.com/pcij/eng/decisions/1932.08.11_memel/>, visited on 7 November 2010 , p. 336.

961 Evans, *supra* note 38, p. 425.

962 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), 9 December 1994, Inter-American Court of Human Rights, Advisory Opinion OC-14/94, <www1.umn.edu/humanrts/iachr/b_11_4n.htm>, visited on 9 November 2010, para. 34.

963 *M.C.* v. *Bulgaria*, *supra* note 240 and *X and Y* v. *The Netherlands*, 26 March 1985, ECtHR, No. 8978/80, <cmiskp.echr.coe.int/tkp197/view.asp?item=2&portal=hbkm&action=html&highlight=X%20%7C%20Y%20%7C%20v.%20%7C%20The%20%7C%20Netherlands&sessionid=61867803&skin=hudoc-en>, visited on 9 November 2010.

964 *Certain German Interests in Polish Upper Silesia*, 25 May 1926, PCIJ, Ser. A. No. 6, <www.haguejusticeportal.net/eCache/DEF/6/361.TD1GUg.html>, visited on 7 November 2010, p. 19.

965 Brownlie, *supra* note 960, p. 451.

ist 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."[966] 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".[967] The nature of the obligation in question therefore determines whether or not a breach has occurred with regard to the state's legislation.

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.[968] 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.[969] Furthermore, norms reaching the level of *ius cogens* require states to adopt the necessary implementing legislation.[970] 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.

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966 G. Schwarzenberger, *International Law*, 3rd ed. (Stevens & Sons, London, 1957), p. 614.

967 Article 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. *See* G. Goodwin-Gill, 'State Responsibility and the "Good Faith" Obligation in International Law', in M. Fitsmaurice and D. Sarooshi (eds.), *Issues of State Responsibility before Judicial Institutions, The Clifford Chance Lectures*, vol. VII (Hart Publishing, Portland, 2004), p. 95, Sir G. Fitzmaurice, '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.

968 Articles 4 and 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.

969 Brownlie, *supra* note 960, p. 451.

970 Cassese, *supra* note 958, p. 219.

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.[971] 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 torture but also […] (ii) the maintenance in force or passage of laws which are contrary to the prohibition.[972]

> 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.[973]

Since rape may constitute 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.[974] 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".[975] James Crawford explains the focus on the state in the following manner:

971 *Prosecutor v. Furundzija, supra* note 28, para. 149.

972 *Ibid.*, para. 148.

973 *Ibid.*, para. 150.

974 Article 4 of the Draft Articles on Responsibility of States for Internationally Wrongful Acts, *supra* note 929.

975 *Ibid.*, chapter II Attribution of Conduct, para. 3.

> 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 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.[976]

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.[977] 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.[978] 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".[979]

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 com-

976 Crawford, *supra* note 939, p. 91.

977 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), Article 11, comment 4.

978 Draft Articles on Responsibility of States for Internationally Wrongful Acts, *supra* note 929, p. 53 (Article 11, comment 6).

979 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, supra* note 63.

mitted by private individuals.[980] The case is important in delineating the difference between conduct attributed to the state 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 to 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.[981] 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.[982] The Commentary mentions the example of a state that 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.[983] 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 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

980 *Case Concerning United States Diplomatic and Consular Staff in Tehran*, 24 May 1980, ICJ, ICJ Reports 1980.

981 *Ibid.*,, para. 58.

982 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.

983 Crawford, *supra* note 939, p. 92.

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.[984]

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.[985] 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, for example, 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".[986]

### 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 narrow focus on states, since it does not reflect today's international system.[987] Several authors assert that the

984 Bodansky and Crook, *supra* note 941, p. 783.

985 J. Cerone, 'Human Dignity in the Line of Fire: the Application of International Human Rights Law during Armed Conflict, Occupation, and Peace Operations', 39 *Vanderbilt Journal of Transnational Law* 1447 (November 2006), p. 1464.

986 *Ibid.*, p. 1468.

987 Matthew Craven *e.g.* argues that the Draft Articles are of limited importance for the human rights treaty regime. Craven, *supra* note 947, p. 107. Andrew Clapham *e.g.* finds the rules inappropriate. A. Clapham, 'The Drittwirkung of the Convention', in R. Macdonald *et al.* (eds.), *The European System for the Protection of Human Rights* (Martinus Nijhoff, Leiden, 1993), 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. E. Brown Weiss, 'Invoking State Responsibility in the 21st Century', 96 *American Journal of International Law* 798 (2002), 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 hu-

ILC Draft Articles are inappropriate for analysing the practice of human rights bodies because human rights serve a distinct purpose.[988] 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.[989] 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.[990] 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.[991] 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 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: "[I]f 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".[992] The law of state responsibility must therefore always be borne mind, but it is also necessary to enlarge the scope of obligations

man rights regime more directly within the framework of international law and resist an unfortunate trend of autonomous development. Chinkin, *supra* note 851, p. 395.

988 M. Evans, 'State Responsibility and the European Convention on Human Rights: Role and Realm', in M. Fitsmaurice and D. Sarooshi (eds.), *Issues of State Responsibility Before Judicial Institutions* (The Clifford Chance Lectures, Vol. VII, Hart Publishing, Portland, 2004), p. 144.

989 Clapham, *supra* note 987, p. 171.

990 Draft Articles on Responsibility of States for Internationally Wrongful Acts, *supra* note 929, p. 31.

991 Romany, *supra* note 951, p. 99.

992 J. Crawford, 'Revising the Draft Articles on State Responsibility', 10 *European Journal of International Law* 2 (1999), p. 440.

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.[993] 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".[994] The hazard of course lies in the use of the public/private distinction as a device for the state to deny responsibility for violations committed by private actors, for instance, 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: "[S]cholars […] 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."[995] The private/public distinction is often criticised because there is no reliable or constant basis for the distinction.[996] 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.[997]

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993 *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, *supra* note 300.

994 Clapham, *supra* note 300, pp. 94, 124.

995 P. Cane, 'Public Law and Private Law: A Study of the Analysis and Use of a Legal Concept', in J. Eekelaar and J. Bell (eds.), *Oxford Essays in Jurisprudence* (Oxford University Press, Oxford, 1987), p. 61.

996 Chinkin, *supra* note 851, p. 389.

997 *Ibid.*, p. 389.

It is generally recognised that international law is gradually moving away from a state-centric stance towards a moral, human rights approach.[998] This trend was explicitly observed by the ICTY in the *Tadic* case.[999] 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.[1000]

998 L. Hammer, *A Foucaldian Approach to International Law: Descriptive Thoughts for Normative Issues* (Ashgate, Aldershot, 2007), p. 115.

999 *Prosecutor* v. *Dusko Tadic aka "Dule"*, *supra* note 76, para. 97.

1000 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.* J. A. Hessbruegge, 'The Historical Development of the Doctrines of Attribution and Due Diligence in International Law', 36:265 *New York University Journal of International Law & Policy* (2004), p. 26, M. Nowak, 'New Challenges to the International Law of Human Rights', *Nordic Journal of Human Rights* (01/2003), p. 2, Clapham, *supra* note 300, p. 137, T. Buergenthal, 'The Normative and Institutional Evolution of International Human Rights', 19:4 *Human Rights Quarterly* (November 1997), p. 719, UN Doc. E/CN.4/2006/61, 20 January 2006, *supra* note 213, 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, J. Knox, 'Horizontal Human Rights Law', 102 *American Journal of International Law* 1 (January 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 Situa-

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, non-governmental organisations (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 characteristics of the state.[1001] 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 is that supranational organisations have gained immense power, coupled with the ability of abusing it *vis-à-vis* the individual.[1002] 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.[1003] However, certain scholars have warned that this can cause a diminution of public international law with consequent loss of its effectiveness.[1004] 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.

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tion 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, *supra* note 11, 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.

1001 Clapham, *supra* note 300, 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, *ibid*., p. 2.

1002 Clapham, *supra* note 300, p. 137. *See also* J. Bourke-Martignoni, 'The History and Development of the Due Diligence Standard in International Law and Its Role in the Protection of Women against Violence', in C. Benninger-Budel (ed.), *Due Diligence and its Application to Protect Women from Violence* (Martinus Nijhoff, Leiden, 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".

1003 Meron, *Human Rights and Humanitarian Norms as Customary Law*, *supra* note 951, p. 162.

1004 Copelon, *supra* note 851, p. 867.

### 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 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.[1005] Rape during conflict has, for instance, been viewed as private, local deviations rather than an international security issue.[1006] 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.[1007] Though the distinction appears to operate on a neutral basis, such scholars contend that the effect is gendered.[1008] 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.[1009] According to authors such as Hilary Charlesworth and Christine Chinkin, international human rights law has been formulated with the needs of men in mind.[1010] 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

1005 Charlesworth and Chinkin, *supra* note 33, p. 308, Benninger-Budel, *supra* note 32, p. 11, Askin, *supra* note 205, p. 217, Cook, *supra* note 924, Romany, *supra* note 951, Copelon, *supra* note 862, 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, *supra* note 247, p. 11.

1006 "Rape must never be minimized as part of cultural traditions, UN envoy [Margot Wallström] says", UN News, *supra* note 5.

1007 Steiner *et al.*, *supra* note 15, p. 213, Charlesworth, *supra* note 138, 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.

1008 Charlesworth, *supra* note 138, 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. *See* Cook, *supra* note 924, p. 94.

1009 Y. Ertürk, 'The Due Diligence Standard: What Does it Entail for Women's Rights?', in C. Benninger-Budel (ed.), *Due Diligence and its Application to Protect Women from Violence* (Martinus Nijhoff, Leiden, 2008), p. 32.

1010 Charlesworth *et al.*, *supra* note 139, 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, *supra* note 951, p. 99.

international human rights in general.[1011] 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."[1012] 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, such as 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.

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.[1013] 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.[1014]

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1011 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, *supra* note 1009, p. 32.

1012 MacKinnon, *supra* note 635, p. 184.

1013 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, *supra* note 842, p. 128.

1014 Charlesworth and Chinkin, *supra* note 33, p. 308.

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.[1015] 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.

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".[1016] 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".[1017] 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".[1018] 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 book.

1015 Buss, *supra* note 684, p. 371.

1016 M. Koskenniemi, 'Book Review: Reconceiving Reality: Women and International Law', 89 *American Journal of International Law* 227 (1995), p. 230.

1017 Article 1. *See also* the UN Declaration on the Elimination of Violence against Women.

1018 Article 1, Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa.

## 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 Pufendorf.[1019] 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.[1020] 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.[1021] This expansion of state obligations is a natural development alongside the shifting relationship between state machinery and citizen.[1022]

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.[1023] Whereas the general approach by states to the

1019 Hessbruegge, *supra* note 1000, p. 283, UN Doc. E/CN.4/2006/61, *supra* note 213, para. 19 and Bourke-Martignoni, *supra* note 1002, p. 48.

1020 UN Doc. E/CN.4/2006/61, *supra* note 213, para. 19. *See e.g. The Alabama Claims* (1871), published for the National Union of Conservative and Constitutional Association, The Central Press Company.

1021 Bourke-Martignoni, *supra* note 1002, p. 52.

1022 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: "[T]he 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, *supra* note 1000, p. 302.

1023 Declaration on the Elimination of Violence against Women, Article 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, Prosecu-

due diligence principle has primarily concerned responding to violence when it has occurred, a larger focus has now been given to preventative actions.[1024] The state must take such reasonable measures of prevention that a well-administered government could be expected to exercise under similar circumstances.[1025] The due diligence regime is thus focused on the *measures* and *means* taken rather than the result that must be reached.[1026] 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 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, for instance, 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.[1027] 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, for instance, by the regional human rights courts has deliberately been employed to broaden the scope of obligations.[1028] Positive obligations is a broader concept than due diligence in human rights, and entails a general duty on the part of states to undertake affirmative efforts.[1029] 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, for example, education of personnel in the justice system and the performance of adequate investigations to

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tors and Lawyers, Office of the High Commissioner for Human Rights in Cooperation with the International Bar Association, 2003, p. 773.

1024 Ertürk, *supra* note 1009, 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.

1025 D. Shelton, 'State Responsibility for Covert and Indirect Forms of Violence', in K. Mahoney and P. Mahoney (eds.) *Human Rights in the Twenty-First Century: A Global Challenge* (Martinus Nijhoff, Dordrecht, 1993), p. 272, UN Doc. E/CN.4/2006/61, *supra* note 213, which describes it in terms of prevention, protection, punishment and reparation.

1026 Holtmaat, *supra* note 143, p. 88.

1027 E. Brems, *Human Rights: Universality and Diversity* (Martinus Nijhoff, Leiden, 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.

1028 Evans, *supra* note 988, p. 140, Akandji-Kombe, *supra* note 930, p. 8.

1029 A. Mowbray, *The Development of Positive Obligations under the European Convention on Human Rights by the European Court of Human Rights* (Hart Publishing, Portland, 2004), p. 2.

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.[1030] 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, UN treaty bodies and UN special rapporteurs.[1031] 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.[1032] In such cases, the state functions as an accomplice to the human rights violation.[1033] 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.[1034] States are therefore 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 responsibilit[ies]", implying that non-state actors are held responsible by way of the state.[1035] 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

1030 B. Hofstötter, 'European Court of Human Rights: Positive Obligations in E. and others v. United Kingdom', 2 *International Journal of Constitutional Law* 525 (2004), p. 531.

1031 UN Doc. E/CN.4/1995/42, *supra* note 34, para. 103. *See* the following chapter.

1032 *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, *supra* note 34, 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.

1033 Romany, *supra* note 951, p. 99.

1034 UN Doc. E/CN.4/2006/61, *supra* note 213, para. 29.

1035 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. H. Steiner, 'International Protection of Human Rights', in M. Evans (ed.) *International Law*, 1st ed. (Oxford University Press, Oxford, 2003), p. 777, Hofstötter, *supra* note 1030, 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.

is considered separate from the law on state responsibility in the ILC Draft Articles, since due diligence obligations flow directly from treaties.[1036] 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.[1037] 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".[1038] The due diligence standard therefore constitutes 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".[1039] 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 "encourag-

1036 Draft Articles on Responsibility of States for Internationally Wrongful Acts, *supra* note 929, 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, *supra* note 951, p. 99.

1037 J. A. Hessbruegge, 'Human Rights Violations Arising from Conduct of Non-State Actors', 11 *Buffalo Human Rights Law Review* 21 (2005), p. 65.

1038 Draft Articles on Responsibility of States for Internationally Wrongful Acts, *supra* note 929, p. 34 (commentary to Article 2, para. 3).

1039 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.

es and enhances the danger of privately inflicted harm".[1040] Further, "the State's indifference or inaction provides a form of encouragement and/or *de facto* permission".[1041] 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 that "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".[1042] Further, due diligence requirements strengthen the effectiveness of rights guaranteed since, to the individual concerned, it makes little difference if the violence emanates from a state or private actor.[1043]

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 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

1040 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.

1041 *Ibid*., para. 18.

1042 *Loayza Tamayo Case*, 27 November 1998, Inter-American Court of Human Rights, Reparations Judgment, Series C No. 42, <www1.umn.edu/humanrts/iachr/C/42-ing.html>, visited on 9 November 2010, para. 85.

1043 Hofstötter, *supra* note 1030, p. 527.

*Velasquez Rodriguez* case of 1988.[1044] 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 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.[1045]

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.[1046]

On the issue of violations committed by non-state actors, the Court concluded that

> 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

1044 *Velasquez Rodriguez Case*, 29 July 1988, Inter-American Court of Human Rights, Series C No. 4, <www1.umn.edu/humanrts/iachr/b_11_12d.htm>, visited on 9 November 2010.

1045 *Ibid.*, para. 176.

1046 *Ibid.*, para. 165. Emphasis added.

> act itself, but because of the lack of due diligence to prevent the violation or to respond to it as required.[1047]

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 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".[1048]

The Court's reasoning in the *Velasquez Rodriguez* case was subsequently confirmed in the *Godinez Cruz* case, which also concerned the disappearance of a politically active person in Honduras.[1049] 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 […]".[1050] 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.[1051]

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.[1052] As for the motivation

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1047 *Ibid.*, para. 172. Emphasis added.

1048 *Ibid.*, para. 173.

1049 *Godínez Cruz Case*, 21 July 1989, Inter-American Court of Human Rights, Series C No. 8, <www1.umn.edu/humanrts/iachr/C/8-ing.html>, visited on 9 November 2010.

1050 *Ibid.*, para. 192.

1051 *Case of the "Mapiripan Massacre"*, 15 September 2005, Inter-American Court of Human Rights, Series C No. 134, <www.corteidh.or.cr/docs/casos/articulos/seriec_134_ing.pdf>, visited on 9 November 2010, para. 110.

1052 *Ibid.*, paras. 107 *et seq.*: "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.

of the private individual, it is not relevant in 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".[1053]

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 and influencing the overall interpretation and development of international human rights.[1054] 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.[1055]

### 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. The Convention on the Elimination of All Forms of Racial Discrimination (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*".[1056] The Convention on the Elimination of All Forms of Discrimination against Women (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 (UDHR) calls upon "all people and nations" to respect

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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."

1053 Report on the Situation of Human Rights in the Republic of Guatemala, 13 October 1981, Inter-American Commission on Human Rights, OAS doc. OEA/Ser.L/V/II.53, doc. 21, rev.2, chapter II, para. 10.

1054 Meron, *Human Rights and Humanitarian Norms as Customary Law*, *supra* note 951, p. 164.

1055 *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, <www1.umn.edu/humanrts/africa/comcases/155-96.html>, visited on 9 November 2010, 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: "[G]overnments 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*, *supra* note 1044, para. 59.

1056 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.

human rights and provide for "progressive measures, national and international, to secure their universal and effective recognition […]".[1057] The International Covenant on Civil and Political Rights (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 International Covenant on Economic, Social and Cultural Rights (ICESCR) imposes a duty on state parties individually and collectively to take steps to achieve the realisation of the rights provided for in the Covenant.[1058] 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.[1059] 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."[1060] The Committee further expanded on the legal obligations of Article 2 on state parties in its General Comment 31.[1061] 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".[1062] 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 domestic criminal or civil law.[1063] 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

1057 Universal Declaration of Human Rights, (preamble).

1058 Article 2 of International Covenant of Economic, Social and Cultural Rights (ICESCR), G.A. Res. 2200A(XXI), UN Doc. (3 January 1976), Akandji-Kombe, *supra* note 930, p. 5.

1059 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* E. Lutz, 'International Obligations to Respect and Ensure Human Rights', 19 *Whittier Law Review* 345 (1997-1998).

1060 General Comment No. 3, para.1.

1061 General Comment No. 31.

1062 *Ibid*., para.7.

1063 General Comment No. 31, para. 8.

diligence to prevent, punish, investigate or redress the harm caused by such acts by private persons or entities".[1064]

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.[1065] 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.[1066]

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".[1067] On the duties to *respect* and *ensure* rights, the Inter-American Commission states:

> [T]hese 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 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.[1068]

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

1064 *Ibid*., para. 8.

1065 Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, UN Doc. A/39/51, (1985).

1066 This will be discussed further in chapter 7.2.

1067 American Convention on Human Rights, 22 November 1969, O.A.S.T.S. 36, OEA7Ser.1./V/11.23 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. A. Ewing, 'Establishing State Responsibility for Private Acts of Violence against Women under the American Convention on Human Rights', 26 *Columbia Human Rights Law Review* 751 (1994-1995), p. 761.

1068 *Chumbivilcas* v. *Peru*, 1 March 1996, Inter-American Commission on Human Rights, Case 10.559, Report No. 1/96, <www1.umn.edu/humanrts/cases/1996/peru1-96.htm>, visited on 9 November 2010, section 3.

has also been held by the African Commission to contain duties for member states to protect persons within its jurisdiction.[1069]

The European Convention on Human Rights (ECHR) 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".[1070] 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, "[u]nder 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 the result of non-observance of that obligation in the enactment of domestic legislation, the responsibility of the State for that violation is engaged".[1071]

Substantial jurisprudence exists that recognises positive duties for states, also concerning acts between private individuals, with regard to several of the rights in

1069 Article 1 of the African Charter. *See also Commission Nationale des Droits de l'Homme et des Libertes* v. *Chad*, African Commission on Human and People's Rights, Comm. No. 74/92, 1995, <www1.umn.edu/humanrts/africa/comcases/74-92.html>, visited on 9 November 2010, paras. 19-23 (African Comm. Human & Peoples' Rights, 1995). *Mouvement Burkinabé des droits de L´Homme* v. *Burkina Faso*, Decision of 7 May 2001, African Commission on Human and People's Rights, Comm. No. 204/97, <www1.umn.edu/humanrts/africa/comcases/204-97.html>, visited on 9 November 2010. Here the Commission emphasised: "[I]f 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." *See* para. 42.

1070 *Marckx* v. *Belgium,* 13 June 1979, ECtHR, No. 6833/74, <cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=Marckx%20%7C%20v.%20%7C%20Belgium&sessionid=61867803&skin=hudoc-en>, visited on 9 November 2010, para.31.

1071 *Case of Young, James and Webster* v. *The United Kingdom*, 13 August 1981, ECtHR, No. 7601/76; 7806/77, <cmiskp.echr.coe.int/tkp197/view.asp?item=3&portal=hbkm&action=html&highlight=Case%20%7C%20of%20%7C%20Young%2C%20%7C%20James%20%7C%20Webster&sessionid=61867803&skin=hudoc-en>, visited on 9 November 2010, para. 49.

the Convention.[1072] 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:

> [T]he 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.[1073]

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".[1074] 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, investigate and punish acts of violence, whether those acts are perpetrated by the state or private persons, and provide protection to victims".[1075]

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.*

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1072 *See e.g.* case law of the ECtHR concerning Article 2: *Osman* v. *The United Kingdom*, 28 October 1998, ECtHR, No. 87/1997/871/1083, Reports of Judgments and Decisions 1998-VIII, <cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=Osman%20%7C%20v.%20%7C%20The%20%7C%20United%20%7C%20Kingdom&sessionid=61867803&skin=hudoc-en>, visited on 9 November 2010, Article 3: *M.C. v. Bulgaria, supra* note 240, Article 8: *X and Y* v. *The Netherlands, supra* note 963, *Case of 97 Members of the Gldani Congregation of Jehovah's Witnesses and Others* v. *Georgia*, 3 May 2007, ECtHR, No. 71156/01, <cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=Case%20%7C%20of%20%7C%2097%20%7C%20Members&sessionid=61867803&skin=hudoc-en>, visited on 9 November 2010. 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.

1073 *Airey* v. *Ireland*, 9 October 1979, ECtHR, No. 6289/73, <cmiskp.echr.coe.int/tkp197/view.asp?item=3&portal=hbkm&action=html&highlight=Airey%20%7C%20v.%20%7C%20Ireland&sessionid=61867803&skin=hudoc-en>, visited on 9 November 2010, para. 32.

1074 *Osman* v. *UK, supra* note 1072, para. 23.

1075 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.

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.[1076] 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.[1077]

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

1076 *Osman* v. *United Kingdom, supra* note 1072.

1077 *Ibid*., para. 115. Emphasis added. *See also Case of Mahmut Kaya* v. *Turkey*, 28 March 2000, ECtHR, No. 22535/93, <cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=Case%20%7C%20of%20%7C%20Mahmut%20%7C%20Kaya%20%7C%20v.%20%7C%20Turkey&sessionid=61867803&skin=hudoc-en>, visited on 9 November 2010, 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 extrajudicial 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.

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 […]".[1078]

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.[1079]

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 European and the Inter-American Human Rights Court.[1080] However, elements of this test have also been applied to other rights, for example, the prohibition of torture and inhuman and degrading treatment. In *E. and others* v. *The United Kingdom*, regarding sexual abuse in

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1078 *Osman* v. *United Kingdom*, *supra* note 1072, para. 116. *See also Opuz* v. *Turkey*, 9 June 2009, ECtHR, No. 33401/02, <cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=Opuz%20%7C%20v.%20%7C%20Turkey&sessionid=61867803&skin=hudoc-en>, visited on 9 November 2010. 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.

1079 *Case of the Massacre of Pueblo Bello*, 31 January 2006, Inter-American Court of Human Rights, Series C No. 140, <www.corteidh.or.cr/docs/casos/articulos/seriec_140_ing.pdf>, visited on 9 November 2010, para. 123.

1080 *Kilic* v. *Turkey*, 28 March 2000, ECtHR, No. 22482/93, <cmiskp.echr.coe.int/tkp197/view.asp?item=2&portal=hbkm&action=html&highlight=Kilic%20%7C%20v.%20%7C%20Turkey&sessionid=61867803&skin=hudoc-en>, visited on 9 November 2010, paras. 62-63, *Osman v. United Kingdom, supra* note 1072, paras. 115-116, *Renolde* v. *France*, 16 October 2008, ECtHR, No. 5608/05, <cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=Renolde%20%7C%20v.%20%7C%20France%2C&sessionid=61867803&skin=hudoc-en>, visited on 9 November 2010, para. 85, *Case of the Massacre of Pueblo Bello, supra* note 1079, para. 124.

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.[1081] 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."[1082] 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".[1083] 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.[1084]

### 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 and UN treaty bodies.[1085] 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.[1086]

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1081 *E. and others* v. *The United Kingdom*, 26 November 2002, ECtHR, No. 33218/96, <cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=E.%20%7C%20others%20%7C%20v.%20%7C%20The%20%7C%20United%20%7C%20Kingdom&sessionid=61867803&skin=hudoc-en>, visited on 9 November 2010. 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.

1082 *E. and others* v. *The United Kingdom*, para. 92.

1083 *Ibid*., para. 96.

1084 *See further* discussion in chapter 6.4.7.

1085 Meron, *Human Rights and Humanitarian Norms as Customary Law*, *supra* note 951, p. 164.

1086 S. Farrior, 'State Responsibility for Human Rights Abuses by Non-State Actors', 92 *American Society of International Law Proceedings* 299 (1998), p. 302. *See e.g.* the discussion on prevention in relation to the right to life.

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,[1087] non-discrimination,[1088] inhuman or degrading treatment, for instance pertaining to female genital mutilation (FGM) or sexual violence,[1089] rights of minorities and indigenous peoples[1090] and the right to privacy and family life,[1091] 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.[1092] 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, such as the prohibition of retroactive laws, the due process rights of the accused and the right to recognition as a person before the law.[1093] The UN Human Rights Committee in General Comment No. 31 also recognised that not all human rights contain horizontal obligations:

> [T]he 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.[1094]

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1087 *William Eduardo Delgado Páez* v. *Colombia*, Comm. 195/85, UN Doc. CCPR/C/39/D/195/1985, (1990), paras. 5-6.

1088 *Franz Nahlik* v. *Austria*, Comm. 608/1995, UN Doc. CCPR/C/57/608/1995, (1996), para. 8(2).

1089 *See M.C.* v. *Bulgaria*, *supra* note 240. FGM: UN Doc. CCPR/C.79/Add.85 (1997): Sudan, para. 10; UN Doc. CCPR/C/79/Add.82 (1997): Senegal, para. 12.

1090 *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*, 31 August 2001, Inter-American Court of Human Rights, Series C No. 79, <www1.umn.edu/humanrts/iachr/AwasTingnicase.html>, visited on 9 November 2010, *The Social and Economic Rights Action Center and the Center for Economic and Social Rights* v. *Nigeria*, *supra* note 1055.

1091 Cases of the ECtHR: *X and Y* v. *The Netherlands*, supra note 963, *López Ostra* v. *Spain* (Application No. 16798/90), Judgment of 9 December 1994, *Guerra* v. *Italy*, 19 February 1998, ECtHR, No. 116/1996/735/932, <cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=Guerra%20%7C%20v.%20%7C%20Italy&sessionid=61867803&skin=hudoc-en>, visited on 9 November 2010.

1092 Hessbruegge, *supra* note 1037, p. 75.

1093 *Ibid.*, p. 71.

1094 General Comment No. 31 on Article 2 of the Covenant. Emphasis added.

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.[1095] 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 inappropriate tool of analysis.[1096] 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.[1097] Whether a state has acted with the required level of due diligence within a particular context can therefore only be determined case by case.[1098] For instance, the European system of human rights allows for national varieties in implementation through the margin of appreciation regime, in order to ac-

1095 Clapham, *supra* note 987, p. 204.

1096 Hessbruegge, *supra* note 1037, 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.

1097 Steiner, *supra* note 1035, p. 777. *See also* Ertürk, *supra* note 1009, 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 […]".

1098 Bourke-Martignoni, *supra* note 1002, p. 57, E. Abi-Mershed, 'Due Diligence and the Fight against Gender-Based Violence in the Inter-American System', in C. Benninger-Budel

commodate 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.[1099] Hessbruegge warns that the scope of state responsibility to protect persons within their jurisdiction from non-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.[1100] Evans asserts that "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".[1101] 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.[1102] 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

(ed.), *Due Diligence and its Application to Protect Women from Violence* (Martinus Nijhoff, Leiden, 2008), p. 137.

1099 Clapham, *supra* note 987, p. 203.

1100 Hessbruegge, *supra* note 1037, p. 66.

1101 Evans, *supra* note 988, p. 159.

1102 *Ibid.*, pp. 466, 470.

appreciation of the dignity of man.[1103] These 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, Lesbian, Gay, Bisexual and Transgender (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.[1104] 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.[1105] As for violence against women, the doctrine obliges states to eliminate, reduce and mitigate such conduct.[1106] 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."[1107] 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, 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

1103 *See e.g.* R. Dworkin, *Taking Rights Seriously* (Harvard University Press, Cambridge, 1977), p. 172.

1104 Clapham, *supra* note 987, p. 201.

1105 Benninger-Budel, *supra* note 32, p. 1.

1106 Cook, *supra* note 842, p. 151.

1107 C. MacKinnon, 'On Torture: A Feminist Perspective on Human Rights', in *Human Rights in the Twenty-First Century: A Global Challenge* (Martinus Nijhoff, Dordrecht, 1993), p. 29.

freedoms on a basis of equality with men".[1108] 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".[1109] 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.[1110] Charlesworth and Chinkin find evidence of the growing *opinio iuris* in various restatements of the language of this Declaration.[1111]

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.[1112] Failure by the state to protect women against violence can be viewed as "state complicity and conspiracy with private actors of violence".[1113] 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 referred to by *e.g.* the ECtHR.[1114] 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,

1108 Article 3 of the UN Convention on the Elimination of all Forms of Discrimination against Women.

1109 *Ibid.*, Article 4 (c).

1110 Charlesworth and Chinkin, *supra* note 33, p. 73.

1111 *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.

1112 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).

1113 UN Doc. E/CN.4/2004/66, *supra* note 935, para. 57.

1114 *Opuz* v. *Turkey*, *supra* note 1078, para. 74.

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.[1115]

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".[1116] 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:

> [V]iolence 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.[1117]

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, administrative, social and economic measures, to ensure the prevention, punishment and eradication of all forms of violence against women".[1118]

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".[1119] 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".[1120]

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1115 General Recommendation No. 19, para. 24(t)(i).

1116 Article 7(b) of The Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women.

1117 The Situation of the Rights of Women in Ciudad Juarez, Mexico: The Right to be Free from Violence and Discrimination, 7 March 2003, Inter-American Commission on Human Rights, OEA/Ser.L/V/II.117, Doc. 44, 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.

1118 Article 4(2)(b) of the Protocol on the Rights of Women in Africa.

1119 Para. 124(b) of the 1995 Beijing Declaration.

1120 UN Doc. A/61/122/Add.1, *supra* note 2, para. 261.

Included in the responsibilities of states is the requirement to enact, implement and monitor legislation covering all forms of violence against women.[1121]

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.[1122] 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.[1123]

The 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 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".[1124] 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.[1125]

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1121 *Ibid.*, para. 263.

1122 UN Doc. E/CN.4/2006, 20 January 2006.

1123 The United Nations Commission on Human Rights in resolution 1994/45, adopted on 4 March 1994, para. 2. Emphasis added.

1124 UN Doc. E/CN.4/1995/42, *supra* note 34, 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. UN Doc. E/CN.4/1999/68, *supra* note 336, para. 25.

1125 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

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.[1126] Because of its evaluation of 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.[1127] 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.[1128] 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

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 and UN Doc. E/CN.4/1996/53, *supra* note 835, paras. 140-41.

1126 Holtmaat, *supra* note 143, p. 88.

1127 Abi-Mershed, *supra* note 1098, p. 137.

1128 UN Doc. E/CN.4/2006/61, *supra* note 213, para. 61.

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.[1129]

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. 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".[1130] 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.[1131] 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.[1132] Accordingly, an

1129 *Ibid.*, para. 15.

1130 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 commentary of Draft Articles on Responsibility of States for Internationally Wrongful Acts, *supra* note 929, 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 […]."

1131 *Velasquez Rodriguez Case*, *supra* note 1044, paras. 174-177.

1132 Meron, *Human Rights and Humanitarian Norms as Customary Law*, *supra* note 951, p. 185. An example is provided by the ILC, where a failure to enact legislation required by Ar-

obligation to prohibit 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, for instance, requires states to detail the "legislative, administrative, judicial and other measures they take to prevent and punish acts of torture" in periodic reviews.[1133] 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."[1134] As the UN Office of the High Commissioner for Human Rights (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.[1135] 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.[1136]

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.[1137] Certain

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ticle 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.

1133 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.

1134 *Velasquez Rodriguez Case*, *supra* note 1044, para. 175.

1135 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.

1136 *Ibid*., p. 780.

1137 *See e.g. William Eduardo Delgado Páez* v. *Colombia*, *supra* note 1087, para. 5.5, *Plattform "Ärzte für das Leben"* v. *Austria*, 21 June 1988, ECtHR, No. 10126/82, <cmiskp.echr.coe.int/tkp197/view.asp?item=2&portal=hbkm&action=html&highlight=Plattform&sessionid=6

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".[1138] 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.[1139] Even the lack of legislation *per se* 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.

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1867803&skin=hudoc-en>, visited on 9 November 2010, *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*, *supra* note 1072. 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, *supra* note 1037, p. 85. General Comment 3, The Nature of States Parties Obligations (Article 2, para. 1), 14/12/90, ICESCR, para. 1.

1138 *Villagrán Morales et al. Case (The Street Children case)*, 19 November 1999, Inter-American Court of Human Rights, Series C No. 63, <www.unhcr.org/refworld/docid/4b17bc442.html>, visited on 9 November 2010, paras. 145-146.

1139 *See e.g.* this argument in *Prosecutor* v. *Kunarac, Kovac and Vukovic*, *supra* note 497, para. 195.

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.[1140] 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:

> [T]he 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.[1141]

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".[1142] This is the case 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.[1143] 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

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1140 *Barrios Altos Case*, 14 May 2001, Inter-American Court of Human Rights, Series C No. 75, <www1.umn.edu/humanrts/iachr/C/75-ing.html>, visited on 9 November 2010, paras. 41-44, *Hilaire, Constantine and Benjamin et al. Case*, 21 June 2002, Inter-American Court of Human Rights, Series C No. 94, <www1.umn.edu/humanrts/iachr/C/94-ing.html>, visited on 9 November 2010, para. 212.

1141 Caballero Delgado and Santana Case, 29 January 1997, Inter-American Court of Human Rights, Reparations Judgment, Cancado dissent, Series C No. 31, <www1.umn.edu/humanrts/iachr/C/31-ing.html>, visited on 9 November 2010, para.5.

1142 Advisory Opinion OC-14/94, IACtHR, *supra* note 962, para. 58.

1143 *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.

person's human rights may call for the application of criminal law.[1144] 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.[1145] 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.[1146] What follows is an exploration of the duty to criminalise violence between private individuals.

### *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. [1147] Applicant

1144 S. Trechsel, 'Comparative Observations on Human Rights Law and Criminal Law', *Saint Louis – Warsaw Transatlantic Law Journal* (2000), p .6.

1145 *See below* chapter 6.4.6.

1146 C. Pitea, 'Rape as a Human Rights Violation and a Criminal Offence: The European Court's Judgment in M.C. v. Bulgaria', 3 *Journal of International Criminal Justice* (2005), pp. 455-456.

1147 *A* v. *The United Kingdom,* 23 November 1998, ECtHR, No. 25599/94, <cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=25599/94&sessionid=61867803&skin=hudoc-en>, visited on 9 November 2010.

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:

> [T]he 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 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.[1148]

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.[1149] 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.[1150] The applicant had been subjected to domestic violence at the hands

1148 *Ibid.*, paras. 22-24. Emphasis added. *See also Tyrer* v. *United Kingdom, supra* note 373, Judgment of 25 April 1978, *Costello-Roberts* v. *United Kingdom*, 24 March 1993, ECtHR, No. 13134/87, <cmiskp.echr.coe.int/tkp197/view.asp?item=2&portal=hbkm&action=html&highlight=Costello-Roberts%20%7C%20v.%20%7C%20United%20%7C%20Kingdom&sessionid=61867803&skin=hudoc-en>, visited on 9 November 2010.

1149 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.

1150 *Bevacqua and S.* v. *Bulgaria*, 12 June 2008, ECtHR, No. 71127/2001, <cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=Bevacqua%20%7C%20S.%20%7C%20v.%20%7C%20Bulgaria&sessionid=61867803&skin=hudoc-en>, visited on 9 November 2010.

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*".[1151] 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.[1152] The failure of the authorities to 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.[1153]

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 *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

1151 *Ibid.*, p. 65. Emphasis added.

1152 *Kontrova* v. *Slovakia*, 31 May 2007, ECtHR, No. 7510/2004, <cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=Kontrova%20%7C%20v.%20%7C%20Slovakia&sessionid=61867803&skin=hudoc-en>, visited on 9 November 2010.

1153 *Ibid.*, para. 49. Emphasis added. *See also Branko Tomasic* v. *Croatia*, 15 January 2009, ECtHR, No. 46598/06, <cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=Branko%20%7C%20Tomasic%20%7C%20v.%20%7C%20Croatia&sessionid=61867803&skin=hudoc-en>, visited on 9 November 2010. 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.

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".[1154] 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".[1155] 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.[1156] 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.[1157] 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".[1158] 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*.[1159] 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

1154 *Opuz* v. *Turkey*, *supra* note 1078, para. 159.

1155 *Ibid*., para. 169.

1156 The Court here relied on statistics and reports by local organisations and international NGOs such as Amnesty International.

1157 *Maria da Penha* v. *Brazil*, Case 12.051, Report No. 54/01, 16 April 2001, IACHR.

1158 *Ibid*., para. 56.

1159 *Jessica Gonzalez and others* v. *the United States*, 24 July 2007, Inter-American Commission on Human Rights, Admissibility Decision, Report 52/07, Petition 1490-05, <www.cidh.org/annualrep/2007eng/usa1490.05eng.htm>, visited on 9 November 2010.

of treating domestic violence as a low-priority crime, belonging to the private sphere, as a result of discriminatory stereotypes about the victims".[1160] 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.

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.[1161] 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.[1162]

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.[1163] 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."[1164] 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 es-

1160 *Ibid.*, para. 58.

1161 *Aydin* v. *Turkey, supra* note 492.

1162 *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.

1163 *C.R.* v. *United Kingdom*, *supra* note 387.

1164 *Ibid.*, para. 42. Article 7 aims to ensure that no one is subjected to arbitrary prosecution.

sence of which is respect for human dignity […]".[1165] 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*.[1166] 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:

> 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 […] 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.[1167]

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:

> [T]he 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.[1168]

However, in stressing the importance of an adequate criminal law in such cases, the Court continued:

1165 *Ibid.*, para. 42.

1166 *X and Y* v. *The Netherlands*, *supra* note 963.

1167 *Ibid.*, para. 23.

1168 *Ibid.*, para. 24.

> The Court finds that the protection afforded by the civil law in the case of wrong-doing 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.[1169]

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:

> It 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 […][1170]

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.[1171] 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 18th birthday of an applicant. Accordingly, they were prevented from 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

1169 *Ibid.*, para. 27.

1170 *X and Y* v. *The Netherlands*, Report of the Commission, adopted on 5 July 1983, <cmiskp.echr.coe.int/tkp197/portal.asp?sessionId=62844688&skin=hudoc-en&action=request>, visited on 10 November 2010, para. 55.

1171 *Case of Stubbings and Others* v. *The United Kingdom*, 22 October 1996, ECtHR, Nos. 22083/93; 22095/93, <cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=Stubbings%20%7C%20Others&sessionid=61867803&skin=hudoc-en>, visited on 9 November.

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.[1172]

However, concerning the lack of recourse to civil remedies the Court concluded that effective remedies existed through the penal code:

> [P]rotection 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 […][1173]

Furthermore:

> [I]n 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.[1174]

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, 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.[1175]

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.[1176] The applicant, a 14-year-old girl, claimed to have

1172 *Ibid*., para. 64.

1173 *Ibid*., para. 65.

1174 *Ibid*., para. 66.

1175 Ewing, *supra* note 1067, p. 773.

1176 *M.C.* v. *Bulgaria*, *supra* note 240.

been raped by two men, but upon filing a complaint to the police, the 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".[1177] 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.[1178] The Supreme Court had stated that "force" was not limited to direct violence, but could also consist in placing the victim in a situation where she saw no other option but to submit.[1179] 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.[1180]

1177 *Ibid.*, para. 83.

1178 *Ibid.*, para. 79.

1179 *Ibid.*, para. 84.

1180 *Ibid.*, paras. 64-65.

Rape was only possible between strangers – that is, not in cases such as the one in question where the applicant knew the alleged offenders.[1181] 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.[1182] 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."[1183]

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 crime of rape even in such jurisdictions.[1184] 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".[1185] 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.[1186] 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 in 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.[1187]

1181 *Ibid.*, para. 122.
1182 *Ibid.*, paras. 88-100.
1183 *Ibid.*, para. 163.
1184 *Ibid.*, para. 159.
1185 *Ibid.*, para. 165.
1186 *Ibid.*, para. 164.
1187 *Ibid.*, para. 161.

The Court further stated:

> What is decisive, however, is the meaning given to words such as 'force' of '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.[1188]

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.[1189] 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 that

> 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.[1190]

The Court also referred to Recommendation Rec (2002)5 of the Committee of Ministers, which obliges states to penalise all non-consensual sexual acts.[1191] 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 crimi-

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1188 *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).

1189 *See* Sweden, Prop. 04/05:45 Bilaga 9, p. 208. *See also* the support for this notion in Asp, *supra* note 432. 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.

1190 *M.C.* v. *Bulgaria*, *supra* note 240, para. 166.

1191 *Ibid*., para. 101.

nal laws must be drafted, interpreted and applied.[1192] 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 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.[1193] 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.[1194] 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 vic-

1192 Pitea, *supra* note 1146, 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* J. Conaghan, 'Extending the Reach of Human Rights to Encompass Victims of Rape: M.C. v. Bulgaria', *Feminist Legal Studies*, 13:145-157 (2005), p. 155.

1193 The Court stated that "the investigation and its conclusions must be centred on the issue of non-consent".

1194 B. Rudolf and A. Eriksson, 'Women's Rights Under International Human Rights Treaties: Issues of Rape, Domestic Slavery, Abortion, and Domestic Violence', 5 *International Journal of Constitutional Law* 507 (July 2007). The Court *e.g.* discussed the fact that women often do not physically resist. *See* para. 164.

tims 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 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.[1195]

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.[1196]

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.[1197] 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".[1198] Member states must also penalise any sexual acts committed against non-consenting persons, even where no signs of resistance are evident.[1199]

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 legislative or other measures" to ensure that the following conduct is criminalised:

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1195 *M.C.* v. *Bulgaria, supra* note 240, para. 154.

1196 *Ibid.*, para. 150.

1197 Rec(2002)5 of the Committee of Ministers of the Council of Europe on the protection of women against violence.

1198 *M.C.* v. *Bulgaria*, *supra* note 240, para. 34.

1199 *Ibid.*, para. 35.

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.[1200]

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.[1201] 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:

> Rape 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.[1202]

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

1200 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.

1201 *Case of the Miguel Castro-Castro Prison* v. *Peru*, *supra* note 411.

1202 *Ibid.*, para. 310.

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.[1203] 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.[1204] 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".[1205] 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 Pará), 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",[1206] 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.

#### 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.[1207] Most relevant for this book, 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.

1203 *Ibid.*, para. 312.

1204 *Ibid.*, para. 312.

1205 *Ibid.*, para. 379.

1206 *Ibid.*, para. 292.

1207 K. Starmer, 'Positive Obligations under the Convention', in J. Jowell and J. Cooper (eds.), *Understanding Human Rights Principles* (Hart Publishing, Portland, 2001), pp. 146-147.

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'[…]",[1208] quoting a Report on Criminalisation by the European Committee on Crime Problems, which outlines numerous factors that influence the effectiveness of general deterrence.[1209] 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".[1210] 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.[1211] Is this taken 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.[1212] The operationalisation of prevention was 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 ar-

1208 *M.C.* v. *Bulgaria*, *supra* note 240, Concurring Opinion, para. 2.

1209 European Committee on Crime Problems, Report on Decriminalisation, Strasbourg, Council of Europe, 1980.

1210 *M.C.* v. *Bulgaria*, *supra* note 240, Concurring Opinion, para. 3.

1211 Pitea, *supra* note 1146, p. 456, who argues that international law should be more flexible.

1212 *See Osman* v. *the United Kingdom*, *supra* note 1072.

gument which was dismissed by the Court.[1213] 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.[1214] 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."[1215]

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,[1216] 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.[1217] 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, for example, 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 book. 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

1213 *X and Y* v. *The Netherlands*, *supra* note 1170, para. 61.

1214 *E. and others* v. *The United Kingdom,* ECtHR, para. 99.

1215 *Ibid.*

1216 *See e.g. Guerra* v. *Italy*, *supra* note 1091 and *López Ostra* v. *Spain*, 9 December 1994, ECtHR, No. 16798/90, <cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=L%F3pez%20%7C%20Ostra%20%7C%20v.%20%7C%20Spain&sessionid=61867803&skin=hudoc-en>, visited on 9 November 2010.

1217 *Airey* v. *Ireland*, *supra* note 1073.

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 member states rather than the result of a progressive analysis by the Court. However, the dynamic interpretation of the convention also leads to an evolutional approach, thus treating the convention as a living document. As such, strides gained, for example, in 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, 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 *demands* 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,[1218] to amend penal codes containing inadequate punishment, *e.g.* in those jurisdictions that erase the criminal liability of rape suspects where the perpetrator marries the victim,[1219] or laws requiring the consent of the complainant before prosecuting.[1220] 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.[1221]

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.[1222] 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.[1223] The Committee has similarly urged states to amend legislation to explicitly define the crime of rape as "sexual intercourse without consent".[1224]

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*.[1225] 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 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

1218 UN Doc. A/57/38 (2002): Portugal (CEDAW), UN Doc. CAT/C/GTM/CO/4 (2006): Guatemala (CAT).

1219 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).

1220 UN Doc. CCPR/CO/80/COL (2004): Colombia (HRC).

1221 UN Doc. CCPR/C/79/Add. 54 (1995): Russian Federation, (HRC), para. 14,

1222 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.

1223 UN Doc. A/57/38 (2002): Hungary, (CEDAW), paras. 333-334.

1224 UN Doc A/57/38 (2002): Estonia, (CEDAW), para. 98, UN Doc. A/55/38 (2000): Lithuania, para. 151.

1225 *Ms. A.T.* v. *Hungary*, Communication No.2/2003, 26 January 2005, CEDAW.

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".[1226] 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.[1227] 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 […]";[1228] 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 […]".[1229]

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 rape that rest on the use of force and not on the absence of consent.[1230] 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

1226 *Ibid*., para.9.3.

1227 *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.

1228 *Sahide Goekce* v. *Austria*, *supra* note 1227, para. 12.3. (a).

1229 *Ibid*., para. 12.3. (b).

1230 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.

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.[1231] 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.[1232] 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.[1233] 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 international law leads to a normative link between general rules on state responsibility and international human rights law.[1234]

However, legal doctrine indicates that even a single breach of an international human rights duty is sufficient to constitute an internationally wrongful act.[1235] 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, for example, the passage of incompatible legislation may constitute such a breach.[1236] Andrew Clapham states that this proposition also can be applied to the due diligence standard, such as in single cases of private killings or private racial discrimination, if evidence indicates that the state failed to curtail, prevent or punish such action.[1237] Rebecca Cook contends that both individual events and accumulated statistics can serve as evidence of

1231 Cook, *supra* note 842, p. 150.

1232 Romany, *supra* note 951, p. 100.

1233 *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.

1234 Romany, *supra* note 951, p. 102.

1235 M. Kamminga, *Inter-State Accountability for Violations of Human Rights* (Erasmus University, Amsterdam, 1990), p. 170.

1236 Draft Articles on Responsibility of States for Internationally Wrongful Acts, *supra* note 929, p. 57 (Article 12, para. 12).

1237 Clapham, *supra* note 300, p. 106.

a state breach of obligations. State complicity is thus more *obvious* when the violence in question is of a pervasive or persistent character.[1238] 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.[1239] 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:

> [W]hile 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.[1240]

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.[1241] 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.

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1238 Cook, *supra* note 842, p. 151.

1239 Steiner, *supra* note 1035, 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 […]."

1240 *Velasquez Rodriguez* case, *supra* note 1044, para. 175.

1241 *Ibid.*, paras. 123-126. *See also* the ECtHR, *e.g.* Case of *Khamila Isayeva* v. *Russia*, (Application No. 6846/02), 15 November 2007, <cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=russia%20%7C%206846/02&sessionid=62844688&skin=hudoc-en>, visited on 10 November 2010, paras. 100 *et seq.*

The Inter-American Court in the subsequent *Godinez 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.[1242] 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 the human rights affected by that practice."[1243] 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.[1244] This can be adduced from the case of *Fairen Garbi & Solis Corrales*,[1245] 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.[1246] 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

1242 *Godínez Cruz Case*, *supra* note 1049, para. 136.

1243 *Ibid*., 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 Columbian military personnel, it was held likely that the military did bear responsibility for the acts. *Joaquín David Herrera Rubio et al.* v. *Colombia*, *supra* note 1137.

1244 Ewing, *supra* note 1067, p. 789.

1245 *Fairen Garbi & Solis Corrales*, 15 March 1989, Inter-American Court of Human Rights, Series C No. 6, <www.corteidh.or.cr/docs/casos/articulos/seriec_06_ing.pdf>, visited on 9 November 2010.

1246 *Maria da Penha* v. *Brazil*, Case 12.051, Report No. 54/01, IACHR, 16 April 2001.

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".[1247] It made clear that "tolerance by the State organs is not limited to this case; rather, it is a pattern".[1248] 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".

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".[1249] It emphasised the fact that this was a situation of widespread violations of women's rights, stating: "[W]e 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."[1250]

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.[1251] 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 interconnected to amount to a pattern or system.[1252] 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.[1253] This has led certain authors to conclude that the threshold of

1247 *Ibid.*, para. 56.

1248 *Ibid.*, para. 55.

1249 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".

1250 CEDAW/C/2005/OP.8/MEXICO, para. 261.

1251 *Ms. A.T* v. *Hungary*, *supra* note 1225, paras. 9.3 and 9.4.

1252 *Ireland* v. *The United Kingdom*, 18 January 1978, ECtHR, No. 5310/71, <cmiskp.echr.coe.int/tkp197/view.asp?item=4&portal=hbkm&action=html&highlight=Ireland%20%7C%20v.%20%7C%20The%20%7C%20United%20%7C%20Kingdom&sessionid=61867803&skin=hudoc-en>, visited on 9 November 2010, para 159.

1253 *E. and others* v. *The United Kingdom, supra* note 1081, para. 100.

finding a violation of a positive obligation in the European context has been set high by requiring a pattern of systematic negligence.[1254]

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.[1255] As such, it seems that the state incurs responsibility for rape between non-state actors in situations where there exists a substantial risk of it 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 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.[1256] However, as Ewing makes clear, it may be difficult in many states to compile statistics on violence against women.[1257] 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 prevent, punish and eradicate violence against women and then formulating and introducing any needed changes.[1258]

1254 Hofstötter, *supra* note 1030, p. 528.

1255 *Case of Mahmut Kaya* v. *Turkey, supra* note 1077, *Z. and others* v. *The United Kingdom*, *Osman* v. *United Kingdom*, *supra* note 1072 and *E. and others* v. *The United Kingdom*, *supra* note 1081.

1256 Quénivet, *supra* note 135, p. 65.

1257 Ewing, *supra* note 1067, p. 790.

1258 Access to Justice for Women Victims of Violence in the Americas, 20 January 2007, Inter-American Commission on Human Rights, OAE/Ser.L/V/II, doc. 68, para. 42.

Firm guidelines exist on how to correctly gather national statistics on incidents of violence against women, including methods, frequency and public accessibility.[1259] 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 it 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.[1260] 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."[1261] In addition, "[a]ccurate 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."[1262] 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".[1263] The Inter-American Commission of Women of the Organization of American States (OAS) has stated: "The 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."[1264] 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

1259 *Ibid.*, para. 44.

1260 Para. 24(c) of Recommendation No. 19 and Article 4(k) of the Declaration on the Elimination of Discrimination against Women.

1261 UN Doc. A/61/122/Add.1, *supra* note 2, para. 209.

1262 *Ibid.*, para. 274. Emphasis added.

1263 Access to Justice for Women Victims of Violence in the Americas, *supra* note 1258, para. 190.

1264 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.

considered effective. That could be the case, for example, when practice has shown its ineffectiveness […]"[1265] 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 reporting it.[1266]

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,

1265 Judicial Guarantees in States of Emergency, 6 October 1987, Inter-American Court of Human Rights, Advisory Opinion OC-9/87, <www1.umn.edu/humanrts/iachr/b_11_4i.htm>, visited on 9 November 2010, para. 24.

1266 WHO World Report on Violence and Health, (2002) and UN Doc. E/CN.4/Sub.2/1998/13, *supra* note 10. 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 Victimisation in International Perspective, Key Findings from the 2004-2005 ICVS and EU ICS, p. 78. Similarly, an 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. *See* 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. *See* 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.

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,[1267] 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 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 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 accord-

1267 Ewing, *supra* note 1067, p. 776. *See also* reports in previous footnote.

ance with a treaty.[1268] 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*.[1269] 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, for example, to prevent and punish human rights violations, the formulation of the rights are often 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.[1270] 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."[1271] 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 of 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.[1272] 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

1268 Article 27 of the Vienna Convention on the Law of Treaties.

1269 Steiner *et al.*, *supra* note 15, p. 1096.

1270 D. Shelton, 'The Boundaries of Human Rights Jurisdiction in Europe', 13 *Duke Journal of International and Comparative Law* (Winter 2003), pp. 129-130.

1271 R. Macdonald, 'The Margin of Appreciation', in R. Macdonald *et al.* (eds.), *The European System for Protection of Human Rights* (Martinus Nijhoff, Dordrecht (1993), p. 84. *See t*he discussion below on the margin of appreciation.

1272 Brems, *supra* note 1027, pp. 363-364.

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 standard.[1273] 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.[1274] 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, that similar cases are treated in like manner.[1275] 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, since the Court obliges states to reform their criminal laws to converge on the core element of non-consent. However, the Court seemed to allow the states discretion on how to formulate such legislation.

1273 *Ibid.*, pp. 367-397. *See also* Y. Shany, 'Toward a General Margin of Appreciation Doctrine in International Law?', 16 *European Journal of International Law* 907 (November 2005), p. 927.

1274 Shelton, *supra* note 1270, p. 134.

1275 Shany, *supra* note 1273, p. 912.

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".[1276] 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.[1277] 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 International Criminal Court (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 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

1276 Preamble, European Convention on Human Rights.

1277 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 Y. Arai-Takahashi, *The Margin of Appreciation Doctrine and the Principle of Proportionality in the Jurisprudence of the ECHR* (Intersentia, Antwerp, 2002), p. 4.

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, for example, 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, for example, of 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, par-

ticularly sexual and verbal violence".[1278] Additionally, under the provisions of Article 4 on the right to life, integrity and security of the person, states must take appropriate and effective 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.[1279] The Protocol has been greeted as a particularly progressive treaty in focusing on the autonomy of women in relation to bodily integrity and reproductive capabilities and its significance is believed to extend well beyond Africa.[1280] 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.[1281] The rights and obligations in the Convention are therefore also applicable to sexual violence. Remarkably, the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) fails to mention violence against women as a concern and does not discuss the sexual autonomy or reproductive capabilities of women. The United Nations (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.[1282]

The Beijing Platform for Action, the final act from the World Conference on Women in 1995, has declared: "[T]he 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".[1283] 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.[1284] 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.

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1278 Article 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.

1279 Article 11, Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa.

1280 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.

1281 Article 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.

1282 Article 1 of the UN Declaration on the Elimination of Violence against Women.

1283 Beijing Platform for Action, Fourth World Conference on Women, UN Doc. A/CONF.177/20, 15 September, 1995, para. 96.

1284 Eriksson, *supra* note 33, p. 329.

The statement in the Platform for Action was a new development on sexual autonomy within the international human rights discourse. It affirmed that 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.[1285]

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.[1286] 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.[1287] 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.[1288]

"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 and freedom from discrimination in relation to sexual orientation.[1289] Rather than centring on the *content* of women's choices, the concept entails the woman's ability to maintain

1285 However, reservations were made to several articles.

1286 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.

1287 Y-O. Jansen, 'The Right to Freely Have Sex? Beyond Biology: Reproductive Rights and Sexual Self-Determination', 40 *Akron Law Review* 311 (2007), p. 313.

1288 L. Freedman, 'Censorship and Manipulation of Reproductive Health Information', in S. Coliver (ed.), *The Right to Know: Human Rights and Access to Reproductive Health Information* (University of Pennsylvania Press, Philadelphia, 1995), p. 5.

1289 S. Fried and I. Landsberg-Lewis, 'Sexual Rights: From Concept to Strategy', in K. Askin & D. Koenig (eds.), *Women and International Human Rights Law*, vol. 3 (Transnational Publishers, Ardsley, NY, 2001), p. 93.

control over her physical integrity and reproductive capabilities and to not engage in sexual activities without consent.[1290] 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.[1291] 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.[1292]

By viewing sexuality and sexual violence as an 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.[1293] 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, for instance, the prevention of HIV, progress in reproductive technology, and the rights and freedoms of sexual minorities.[1294]

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 flows from the case law on sodomy laws in the European Court of Human Rights.[1295] 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 discussed and the scope of state obligations analysed.

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1290 *Ibid*., p. 116, M. Scheinin, 'Sexual Rights as Human Rights- Protected under Existing Human Rights Treaties?', 67:17 *Nordic Journal of International Law* (1998), p. 18.

1291 S. Fried, 'Controlling Women's Sexuality: The Case for Due Diligence', in C. Benninger-Budel (ed.), *Due Diligence and its Application to Protect Women from Violence (*Martinus Nijhoff, Leiden, 2008), p. 260.

1292 S. Lai *et al*., 'Female Sexual Autonomy and Human Rights', 8 *Harvard Human Rights Journal* 201 (1995), p. 227.

1293 O. Phillips, 'A Brief Introduction to the Relationship Between Sexuality and Rights', 33 *Georgia Journal of International & Comparative Law* 451 (Winter 2005), p. 454.

1294 M. Childs, 'Review Article, Sexual Autonomy and Law', 64 *The Modern Law Review* 309 (2001), p. 309.

1295 *See e.g. Dudgeon* v. *The United Kingdom*, 22 October 1981, ECtHR, No. 7525/76, <cmiskp.echr.coe.int/tkp197/view.asp?item=3&portal=hbkm&action=html&highlight=Dudgeon%20%7C%20v.%20%7C%20The%20%7C%20United%20%7C%20Kingdom&sessionid=61867803&skin=hudoc-en>, visited on 9 November 2010.

## 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 its 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.[1296] 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 intimidation, since it can be inflicted without leaving visible physical scars, it causes severe trauma and can lead to additional consequences such as impregnation or venereal disease.[1297] 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.[1298] 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.[1299] The UN

1296 Steiner *et al., supra* note 15, p. 225.

1297 For example as a method of interrogation. *See* H. Pearce, 'An Examination of the International Understanding of Political Rape and the Significance of Labelling it Torture', *International Journal of Refugee Law* 14(4):534 (2002), p. 539.

1298 General Comment No. 2, Implementation of Article 2 by States Parties, UNCAT, UN Doc. CAT/C/GC/2, 24 January, 2008, para. 1.

1299 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. Gen-

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.[1300]

The crime of torture has been defined in three human rights instruments, although a prohibition is contained in all major human rights treaties.[1301] 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.[1302] The UN Convention against Torture is widely accepted to be the primary international source for the definition of torture.[1303] 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.[1304]

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

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eral Comment No. 2, Implementation of Article 2 by States Parties, paras. 1-5. *See also Barcelona Traction Case*, *supra* note 97.

1300 UN Doc. E/CN.4/1986/15, *supra* note 1299, pp. 1-2.

1301 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.

1302 Article 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.

1303 *See e.g. Prosecutor* v. *Delalic et al.*, *supra* note 334, para. 258, *Prosecutor* v. *Furundzija*, *supra* note 28, paras. 160-161.

1304 Article 1 of UN Convention against Torture.

are further obliged to ensure that acts of torture are offences under their criminal laws.[1305]

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. 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:

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 International Criminal Tribunal for the former Yugoslavia (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.[1306] A European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment also exists but contains no definition of torture.[1307] Instead, the scope of the prohibition

1305 *Ibid*., Article 4.

1306 *The Prosecutor* v. *Delalic et al*, *supra* note 334, para. 459.

1307 The Convention is enforced through the Committte 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.

of torture in the European context has primarily been interpreted by the European Court of Human Rights (ECtHR).

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 (UNCAT). Even though it is clear that torture concerns acts of a "particular intensity and cruelty"[1308] 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.[1309] A general unwillingness also exists in differentiating between torture and inhuman and degrading treatment, since the threshold often is unclear.[1310] Furthermore, ill-treatment is often an accessory to torture and the two concepts are therefore intertwined.[1311] However, ill-treatment differs in the severity of pain experienced and does not require proof of one of the listed proscribed purposes.[1312] The UN General Assembly has stated that torture is "an aggravated and deliberate form of cruel, inhuman and degrading treatment or punishment",[1313] which is similarly argued by the European Court of Human Rights.[1314] In *Ireland* v. *the United Kingdom*, the ECtHR stated that the distinction "derives principally from a difference in the intensity of the suffering inflicted".[1315] 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.[1316] The effect of this distinction is that certain state obligations apply solely to torture, such as the obligation in the UN Convention

1308 *Ireland* v. *United Kingdom*, *supra* note 1252, para. 167.

1309 UN Doc. E/CN.4/1986/15, *supra* note 1299, para. 35, *Soering* v. *The United Kingdom*, 7 July 1989, ECtHR, No. 14038/88, <cmiskp.echr.coe.int/tkp197/view.asp?item=2&portal=hbkm&action=html&highlight=Soering%20%7C%20v.%20%7C%20The%20%7C%20United%20%7C%20Kingdom&sessionid=61867803&skin=hudoc-en>, visited on 9 November 2010, para. 100.

1310 M. Nowak, *UN Covenant on Civil and Political Rights, CCPR Commentary*, 2nd revised ed. (N. P. Engel Publisher, Khel am Rhein, 2005), p. 160. CCPR General Comment No. 2, para. 3, CCPR General Comment 20, para. 3.

1311 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.

1312 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., ECtHR.

1313 GA Resn. 3452 (XXX), 9/12/75, Article 1(2).

1314 *Ireland* v. *United Kingdom*, *supra* note 1252, para. 167.

1315 *Ibid.*, para. 167.

1316 *Selmouni* v. *France*, *supra* note 373, para. 101.

against Torture to criminalise torture, the prohibition of non-refoulement and extradition obligations.[1317] Furthermore, torture alone incurs obligations to apply the principle of universal jurisdiction and is recognised as *ius cogens*.[1318] Similar 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*.[1319] 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.[1320] In fact, further criteria with which to distinguish torture from inhuman or degrading treatment is the powerlessness of the victim.[1321] 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.[1322] 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".[1323] 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.[1324] 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".[1325]

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 inher-

1317 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.

1318 UN Doc. E/CN.4/2006/6, *supra* note 1312, 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, *supra* note 862, p. 241, fn. 48.

1319 UN Doc. E/CN.4/2006/6, *supra* note 1312, paras. 39-40.

1320 *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, *supra* note 771, p. 176.

1321 *Ibid.*, para. 39.

1322 UN Doc. E/CN.4/2006/6, *supra* note 1312, para. 39.

1323 UN Doc. A/HRC/7/3, *supra* note 1311, para 28.

1324 *Ibid.*, para 28.

1325 *Ibid.*, para. 45.

ently 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 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".[1326] 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.[1327]

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, for instance, 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: "Whereas detention contexts are classic situations of powerlessness, it can also arise outside of detention or direct State control."[1328] 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 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

1326 UN Doc. A/HRC/7/3, *supra* note 1311, para. 29.

1327 Copelon, *supra* note 862, p. 242, footnote 52. Copelon argues that it would lead to such questions as why the woman did not 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.

1328 UN Doc. A/HRC/7/3, *supra* note 1311, para. 68.

of the State, in conjunction with the State, under its direction or control, or otherwise under color of law".[1329]

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".[1330] 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.[1331] 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.[1332] 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.[1333] 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: "[T]he 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 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."[1334] Koojimans emphasises: "States shall provide appropriate protection under law against such treatments, even when the perpetrators are 'private' persons rather than 'public officials'."[1335] The UN Committee against Torture has also adopted a wide approach, evident in its general comment on the implementation of Article 2 in it stating: "Since 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

1329 General Comment No. 2, para. 15.

1330 UN Doc. E/CN.4/1986/15, *supra* note 1299, para. 38.

1331 Oosterhoff *et al.*, *supra* note 889, p. 69.

1332 UN Doc. E/CN.4/1986/15, *supra* note 1299.

1333 UN Doc. A/HRC/7/3, *supra* note 1311, p. 7.

1334 UN Doc. E/CN.4/1986/15, *supra* note 1299, para. 38.

1335 *Ibid.*, para. 49.

the Convention with impunity, the State's indifference or inaction provides a form of encouragement and/or de facto permission."[1336]

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.[1337] The due diligence principle has been applied to gender-based violence such as rape and domestic violence.[1338]

The UN Human Rights Committee has further commented on the applicability of the prohibition on torture in the International Covenant on Civil and Political Rights (ICCPR) on acts perpetrated by private individuals in stating: "[I]t 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."[1339] In its General Comment No. 20, the Human Rights Committee (HRC) again confirms the positive duties of states by obliging them to ensure the person's protection against acts of torture, stating:

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1336 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 Somalian 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.

1337 General Comment No. 2, para. 18.

1338 *Ibid.*, para. 18.

1339 General Comment 7, UN Human Rights Committtee, 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* C. Safferling, *Towards an International Criminal Procedure* (Oxford University Press, Oxford, 2001), p. 128.

> 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.[1340]

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".[1341] 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.[1342] Several subsequent reports have also clearly established the possibility of rape used as torture.[1343] Country reports by the UN Special Rapporteur have confirmed instances where rape has been employed as a form of torture.[1344] The UN Human Rights Committee in commenting on the ICCPR also considers restrictive national laws and

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1340 General Comment 20, UN Human Rights Committtee, Article 7, para. 2.

1341 UN Doc. A/HRC/7/3, *supra* note 1311, p. 6.

1342 UN Doc. E/CN.4/1986/15, *supra* note 1299, 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.

1343 UN Doc. E/CN.4/1992/SR.21, para. 35, 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, 12 January 1995, para. 19, UN Doc. A/HRC/7/3, *supra* note 1311, para. 26

1344 UN Doc. E/CN.4/1995/34, 12 January 1995, *e.g.* paras. 51, 170 and 244 (Bangladesh, Ecuador, El Salvador), Report of the Special Rapporteur on Torture and Cruel, Inhuman or Degrading Treatment or Punishment, Visit by the Special Rapporteur to Pakistan, Nigel Rodley, UN Doc. E/CN.4/1997/7/Add.2, 15 October 1996, paras. 14, 16 and 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

practices prohibiting rape a concern with regard to the prohibition of torture or inhuman and degrading treatment.[1345] 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.[1346] 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.[1347] 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.[1348] 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.[1349] 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.[1350]

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.[1351] As is often stressed in the jurisprudence of the *ad hoc* tribunals, rape can be employed as

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Detention, Report of the Special Rapporteur, Theo van Boven, UN Doc. E/CN.4/2003/68/Add.2, 3 February 2003.

1345 General Comment 28, Equality of Rights Between Men and Women (Article 3), UN Doc. CCPR/C/21/Rev.1/Add.10 (2000), HRC, Article 7.

1346 General Comment 28, Equality of Rights Between Men and Women (Article 3), para. 11.

1347 UN Doc. A/HRC/7/3, *supra* note 1311.

1348 UN Doc. A/RES/63/166, 19 February 2009, para. 9.

1349 *Ibid*., para. 35, referring to a case in the Mexican justice system where an act of oral sex was charged as a "libidinous act". *Ana Maria Velasco contra Doroteo Blas Marcelo*, 79/2006, Juzgado Primero Penal de Tenango de Valle, Estado de Mexico, <centroprodh.org.mx/english/images/stories/documentos/boletinatencosentencia.pdf>, visited on 10 November 2010.

1350 UN Doc. A/HRC/7/3, *supra* note 1311, paras. 62-63.

1351 Report of the Special Rapporteur, Mr. P. Kooijmans, Pursuant to Commission on Human Rights Resolution 1992/32, Question of the Human Rights of all Persons Subjected to any Form of Detention or Imprisonment, in Particular: Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, UN Doc. E/CN.4/1993/26, 15 December 1992, para. 580.

a means of humiliating and destroying family and community cohesion.[1352] 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".[1353] 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."[1354] The stigma attached to rape may lead to reluctance on the victim's part to seek redress.[1355] Thus when rape is applied as a method of torture, impunity for the perpetrator appears disproportionately higher than for other methods of torture.[1356]

The types of rape reaching the level of torture can be divided into those of the public versus the private sphere;[1357] the former alone traditionally viewed as included in the scope of the torture definition. This essentially comprises violence against women in custody, including rape 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 violations occurring during arrest and in the initial periods of detention.[1358] 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: "[R]ape 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."[1359]

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.[1360] In fact, Rapporteur Kooijmans has noted that "[s]ince it was clear

1352 UN Doc. A/HRC/7/3, *supra* note 1311, para. 36.

1353 Askin, *supra* note 205, p. 265.

1354 UN Doc. E/CN.1/1993/26, *supra* note 1351, para. 580.

1355 UN Doc. E/CN.4/1995/34, *supra* note 1343, para. 19.

1356 *Ibid*., para. 19.

1357 UN Doc. A/HRC/7/3, *supra* note 1311, para. 34.

1358 Nowak, *supra* note 1310, p. 179.

1359 *Aydin* v. *Turkey*, *supra* note 492.

1360 UN Doc. E/CN.4/1992/SR.21, para. 35, UN Doc. E/CN.4/1995/34, *supra* note 1343, 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

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".[1361] The concluding observations and general comments from the UNCAT also indicate that rape under certain circumstances may amount to torture.[1362] 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.[1363] In such 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.[1364] 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.[1365] In *V.L.* v. *Switzerland*, the Committee against Torture stated: "The 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 difficult to attribute the act to the state.[1366]

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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."

1361 UN Doc. E/CN.4/1992/SR.21, para. 35.

1362 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.

1363 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

1364 *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.

1365 *G.R.B.* v. *Sweden*, Comm. No. 83/1997, UN Doc CAT/C/20/D/83/1997, (1998), (CAT).

1366 *V.L.* v. *Switzerland*, UN Doc. CAT/C/37/D/262/2005, (CAT), para. 8.10.

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.[1367] 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.[1368] In a recent report, the UN Special 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.[1369] 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.[1370]

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."[1371] Sexual abuse and rape have also been characterised as gender-based acts in other reports.[1372] UNCAT, for example, 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.[1373] Rape is arguably an example of the perpetuation

1367 Askin, *supra* note 11, 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.

1368 Copelon, *supra* note 862, p. 252. The state or public official must therefore not share the purpose of the private actor.

1369 UN Doc. A/HRC/7/3, *supra* note 1311, p. 7.

1370 General Comment No. 2, paras. 20-22.

1371 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.

1372 UN Doc. E/CN.4/1995/34, *supra* note 1343, para. 16, UN Doc. A/55/290, 11 August 2000, para. 5.

1373 *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

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, for example, in armed conflict.[1374]

#### 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.[1375] 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 cer-

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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.

1374 General Comment No. 2, para. 22. It reads: "Men 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."

1375 *Cyprus* v. *Turkey*, Report of the Commission, 10 July 1976, ECtHR, Nos. 6780/74 and 6950/75,<www.cyprus-conflict.org/materials/echr/index.html>, visited on 9 November 2010, paras. 373-374.

> tain cases] members of the same family were repeatedly raped, some in front of 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.[1376]

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.[1377] 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: "Rape 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."[1378] 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.[1379] 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.[1380] 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 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

1376 *Ibid.*, para. 358.

1377 *Aydin* v. *Turkey*, *supra* note 492.

1378 *Ibid.*, para. 83.

1379 *Ibid.*, para. 98.

1380 *Ibid.*, para. 83.

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.[1381] The Court has, however, received criticism for its narrow scope of interpretation in *Aydin*.[1382] As Ivana Radadic points out, the assessment of the severity of the treatment is frequently evaluated in connection with the responsibility of the state, such as in the *Aydin* case where rape committed in detention by a state actor was regarded as particularly grave and abhorrent.[1383] 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 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.[1384] 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 cor-

1381 *Aydin* v. *Turkey*, *supra* note 492, p. 364.

1382 I. Radacic, 'Rape Cases in the Jurisprudence of the European Court of Human Rights: Defining Rape and Determining the Scope of the State's Obligations', No. 3 *European Human Rights Law Review* (2008), p. 363.

1383 *Ibid.*, pp. 363-364.

1384 *Raquel Martí de Mejia* v. *Peru*, 1 March 1996, Inter-American Commission on Human Rights, Case 10.970, Report No. 5/96, <www1.umn.edu/humanrts/cases/1996/peru5-96.htm>, visited on 9 November 2010.

roborative 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.[1385] 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."[1386] 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 1977 Additional Protocols, the Statute of the ICTY, as well as statements by the International Committee of the Red Cross (ICRC).[1387] 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.[1388]

1385 *Ibid.*, section B 1a, quoting *e.g.* the UN Special Rapporteur on Torture, Amnesty International and Human Rights Watch.

1386 *Ibid.*, para. 251.

1387 *Ibid.*, 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).

1388 *Ibid.*, Analysis 3a.

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.[1389] 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.[1390] In the case of *Ana, Beatriz, and Celia González Pérez*, the Inter-American Commission analysed violence administered to three sisters, including rape, by Mexican armed forces.[1391] 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

1389 *Ibid*.,V (B), 3 a.

1390 The Commission in a report on the human rights situation in Haiti particularly emphasised: "[R]ape 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. *See also El Salvador*, 1 February 1994, Inter-American Commission on Human Rights, Case 10.772, Report No. 6/94, <www1.umn.edu/humanrts/cases/6%5E94elsa.pdf>, visited on 9 November 2010 . 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.

1391 *Ana, Beatriz and Celia Gonzalez Perez*, *supra* note 347.

law.[1392] 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.[1393] 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 Mauritanians detained and charged with intent to overthrow the government by issuing a manifesto on discrimination against their ethnic group.[1394] The conditions in detention facilities, including rape of female members of the group, were considered to amount to torture and 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.[1395] 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

1392 *Ibid.*, paras. 43-53.

1393 *Case of the Miguel Castro-Castro Prison* v. *Peru*, *supra* note 411.

1394 *Malawi African Association and Others* v. *Mauritania*, African Commission on Human and Peoples' Rights, Comm. Nos. 54/91, 61/91, 98/93, 164/97 à 196/97 and 210/98, 2000, <www1.umn.edu/humanrts/africa/comcases/54-91.html>, visited on 9 November 2010.

1395 *The Prosecutor* v. *Delalic et al*, *supra* note 334.

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.[1396] 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".[1397] The requirement of proving pain and suffering in connection to the rape was later modified by the Tribunal in the *Kunarac* case, where the pain element was presumed once the rape had been substantiated.[1398] 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".[1399] 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".[1400]

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:

> [T]he 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.[1401]

In a persuasive manner, the Tribunal argued: "[T]he 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."[1402] The Tribunal observed that the particular setting of international humanitarian law and international criminal law might well

1396 *Ibid*., para. 495.

1397 *Ibid*., para. 942.

1398 *Prosecutor* v. *Kunarac, Kovac and Vukovic*, *supra* note 497, para. 151.

1399 *Prosecutor* v. *Kunarac, Kovac and Vukovic*, *supra* note 409, para. 495.

1400 *Prosecutor* v. *Delalic et al*., *supra* note 334, para. 258, *Prosecutor* v. *Furundzija*, *supra* note 28, paras. 160-161.

1401 *Prosecutor* v. *Kunarac, Kovac and Vukovic*, *supra* note 409, paras. 496-497.

1402 *Ibid*., para. 495. Emphasis added.

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".[1403] 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 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.[1404]

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."[1405] This refers to the Statute of the ICTY, which affirms individual criminal responsibility

1403 *Ibid.*, para. 468.

1404 *Prosecutor* v. *Kunarac, Kovac and Vukovic*, *supra* note 409, para. 470.

1405 *Ibid.*, para. 493.

regardless of the official status of the perpetrator.[1406] The ICTY in the *Kunarac* case also quoted the legal reasoning of the *Flick* judgment at Nuremberg in which the Tribunal held: "It 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."[1407]

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.[1408]

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.[1409] 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 law in relation to the criminal responsibility of an individual for torture *outside* of the framework of the UN Torture Convention".[1410]

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:

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1406 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."

1407 *United States* v. *Friedrich Flick et al*, 1947, referred to in *Prosecutor* v. *Kunarac, Kovac and Vukovic*, *supra* note 409, paras. 488-95.

1408 *Prosecutor* v. *Kunarac, Kovac and Vukovic*, *supra* note 409, para. 483.

1409 *Ibid*., para. 485.

1410 *Prosecutor* v. *Kunarac, Kovac and Vukovic*, *supra* note 497, para. 148. Emphasis added.

> 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.[1411]

The Elements of Crimes of the International Criminal Court (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.[1412] Torture as a crime against humanity does, however, require that the victim be "in the custody or under the control of the perpetrator".[1413] 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 Elements of Crimes. 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.

#### 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:

> [T]here 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

1411 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.

1412 *See below* chapter 9.3.2. For critique of the removal of the state nexus in international criminal law, *see* Burchard, *supra* note 771, who argues that it diminishes the stigma of torture as an international offence.

1413 Article 7(2)(e) of the Elements of Crimes, ICC.

> that she was treated with tranquilizers, demonstrate most emphatically the severe pain and suffering that she endured.[1414]

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".[1415] The *ad hoc* tribunals have followed this understanding of torture in cases subsequent to the *Kunarac* decision.[1416] 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: "Some 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.[1417] 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.[1418] The Prosecution 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 […]".[1419] 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

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1414 *Prosecutor* v. *Delalic et al.*, *supra* note 334, para. 964.

1415 *Prosecutor* v. *Kunarac*, *supra* note 497, para. 150.

1416 *Prosecutor* v. *Miroslav Kvocka*, *supra* note 30, para. 141, *The Prosecutor* v. *Laurent Semanza*, *supra* note 663, para. 343.

1417 *Prosecutor* v. *Radoslav Brdanin*, 1 September 2004, ICTY, Case No. IY-99-36-T, <www.icty.org/x/cases/brdanin/tjug/en/brd-tj040901e.pdf>, visited on 10 November 2010, para. 485.

1418 *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.

1419 *Ibid.*, 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.

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 International Criminal Tribunal for Rwanda (ICTR) stated: "[L]ike 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.[1420] 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:

> [A]ll 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 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.[1421]

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: "[I]f 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."[1422] 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

1420 Discussed more in chapter 9.2.1.1. *See also Prosecutor* v. *Furundzija*, *supra* note 28, 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.

1421 *Prosecutor* v. *Kunarac, Kovac and Vukovic*, *supra* note 409, para. 816. Emphasis added.

1422 *Prosecutor* v. *Kunarac, Kovac and Vukovic, supra* note 497, para. 155.

> way which, in the normal course of events, would cause severe pain or suffering, whether physical or mental, to his victims.[1423]

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: "[T]he rationale behind this distinction is that the prohibition on torture is not concerned with private conduct, which is ordinarily sanctioned under national law."[1424] The approach that the prohibited purpose did not have to be "the predominating or sole purpose" has been followed in subsequent cases, such as *Kvocka* and *Semanza*.[1425]

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",[1426] indicating that it is not of relevance what drove the perpetrator, such as 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.[1427] Evaluating motive in the form of intent could then diminish the protection against, for example, 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.[1428] 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. [1429] 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".[1430] 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,

1423 *Ibid*., para. 153.

1424 *Prosecutor* v. *Delalic et al*., *supra* note 334, para. 471.

1425 *Prosecutor* v. *Miroslav Kvocka*, *supra* note 30, para. 153, *The Prosecutor* v. *Laurent Semanza*, *supra* note 663, para. 343.

1426 Viseur Sellers and Okuizumi, *supra* note 595, p. 61.

1427 Quénivet, *supra* note 135, p. 72

1428 *Prosecutor v. Delalic et al., supra* note 334, para. 941.

1429 *Ibid*., para. 941.

1430 *Ibid*., para. 941.

it should also apply to rape committed in peacetime because no distinction can be drawn from the standpoint of discrimination.[1431]

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 *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.[1432] The Tribunal held that the complainants were selected as rape victims and the "sole reason for this treatment […] was their Muslim ethnicity".[1433] 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.[1434] 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: "It 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 of-

1431 The question of rape as a form of gender discrimination will be further discussed in chapter 7.4.

1432 *Prosecutor* v. *Kunarac, Kovac and Vukovic*, *supra* note 409, para. 557. *See* criticism of this in Dixon, *supra* note 345, p. 700.

1433 *Prosecutor* v. *Kunarac, Kovac and Vukovic*, *supra* note 409, para. 577. *See also* para. 816: "[T]he 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."

1434 *The Prosecutor* v. *Laurent Semanza*, *supra* note 663, 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."

ficial, could be considered as occurring for a purpose that does not, in some way, involve punishment, coercion, discrimination or intimidation. In the view of this Trial Chamber this is inherent in situations of armed conflict."[1435] It further stated: "Only 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."[1436] 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 motives to all instances of rape.

Torture in the Elements of Crimes 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".[1437] 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".[1438] 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.[1439] 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 argue that, for example, not all rape offences constitute torture.[1440] 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

1435 *Prosecutor* v. *Delalic et al., supra* note 334, para. 495.

1436 *Ibid., para. 471, quoting* H. J. Burgess and H. Danelius, *A Handbook on the Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment* (Martinus Nijhoff, Dordrecht, 1988), p. 119.

1437 *See* Article 7(1)(f) on crimes against humanity and 8(2)(c)(i) on war crimes as torture in the Elements of Crimes.

1438 Article 7(1)(f), The Elements of Crimes.

1439 M. Politi, 'Elements of Crimes', in A. Cassese *et al.* (eds.), *The Rome Statute of the International Criminal Court: A Commentary. Volume II* (Oxford University Press, Oxford, 2002), p. 470.

1440 *See e.g.* Burchard, *supra* note 771, p. 176.

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, such as torture.[1441] 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.[1442] 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/international humanitarian 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.[1443] 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 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 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.[1444] 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.

1441 UN Doc. E/CN.4/Sub.2/2004/12, *supra* note 529.

1442 General Comment No. 2, CAT, para. 15.

1443 UN Doc. A/HRC/7/3, *supra* note 1311.

1444 Burchard, *supra* note 771, p. 175.

## 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.[1445] 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.[1446] 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.[1447] 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.[1448] Accordingly, state officials have generally neither wished to become "voyeurs of activity behind the bedroom door, nor meddlers in 'normal sexual relations'".[1449]

The competing interests of the right to privacy were evident, for instance, 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.[1450] 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, for instance, during divorce proceedings.[1451]

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

1445 Article 12, UDHR, Article 17, ICCPR, Article 8 ECHR, Article 11 American Convention. Not the African Charter on Human Rights.

1446 Nowak, *supra* note 1310, pp. 388-389.

1447 C. Brants, 'The State and the Nation's Bedrooms: The Fundamental Right of Sexual Autonomy', in P. Alldrige and C. Brants (eds.), *Personal Autonomy, the Private Sphere and Criminal Law* (Hart Publishing, Portland, 2001), p. 120.

1448 K. Raes, 'Legal Moralism or Paternalism? Tolerance or Indifference? Egalitarian Justice and the Ethics of Equal Concern', in P. Alldridge and C. Brants (eds.), *Personal Autonomy, the Private Sphere and Criminal Law* (Hart Publishing, Portland, 2001), p. 26. The European legal culture thus places a greater emphasis on inter-dependence than independence.

1449 Rhode, *supra* note 25, p. 250.

1450 Prop. 1962:10 Förslag till Brottsbalk.

1451 Motion 1962:650.

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.[1452] 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.[1453] 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.[1454] 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.

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.[1455] 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.[1456]

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 European Convention on Human Rights (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".[1457] The lack of a possibility to prosecute

1452 Brants, *supra* note 1447, p. 117. CCPR General Comment No. 16, Article 17, para.1.

1453 *See e.g.* the language in Article 12, UDHR, Article 17 ICCPR, Article 8(2) ECHR, Article 11(2) American Convention.

1454 P. Alldridge and C. Brants, 'Introduction', in P. Alldrige and C. Brants (eds.), *Personal Autonomy, the Private Sphere and Criminal Law* (Hart Publishing, Portland, 2001), p. 6.

1455 *See e.g. Dudgeon* v. *United Kingdom*, *supra* note 1295, *Toonen* v. *Australia*, Comm. No. 488/1992, UN Doc CCPR/C/50/D/488/1992, (1994), HRC.

1456 *See e.g.* Schulhofer, *supra* note 215.

1457 *X and Y* v. *The Netherlands*, *supra* note 963, 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.

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 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.[1458]

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.[1459]

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".[1460] 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

1458 *X and Y* v. *The Netherlands*, Series B: Pleadings, Oral Arguments and Documents , at 75. *See* in Clapham, *supra* note 300, p. 221.

1459 *X and Y* v. *The Netherlands*, Series B, at 51.

1460 *X and Y* v. *The Netherlands*, *supra* note 963, para. 23.

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 criminal law provisions.[1461] 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'".[1462] 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.[1463] 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:

> [T]he 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 on the other, the Commission concludes […] that Article 3 has not been violated in the present case.[1464]

1461 *M.C.* v. *Bulgaria*, *supra* note 240, para. 150.

1462 *Mejia Egocheaga* v. *Peru*, *supra* note 1384, Analysis 3a.

1463 General Comment No. 28, UN.Doc.CCPR/C/21/2Rev.1/Add.10 (2000), HRC, para. 20.

1464 *X and Y* v. *The Netherlands*, *supra* note 1170, p. 29.

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)."[1465] 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.[1466] 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, for example, 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.

## 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 advertantly 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, for example, 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 knowl-

1465 Clapham, *supra* note 300, p. 199.

1466 *Ibid.*, p. 196.

edge 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.[1467] The nature of discrimination is understood as an offence against human dignity, which often targets the most vulnerable classes of people in society.[1468] However, there is no universal definition of non-discrimination though certain commonalities in the interpretation of various regulations have developed. The right to equality is first and foremost to be found in the Universal Declaration of Human Rights, which proclaims: "All human beings are born free and equal in dignity and rights."[1469] The principle is additionally seen in a number of human rights instruments, including the ICCPR, International Covenant on Economic, Social and Cultural Rights (ICESCR), Convention on the Elimination of All Forms of Racial Discrimination (CERD), CEDAW and various regional human rights treaties.[1470]

The concepts of equality and non-discrimination are entwined, in that discrimination frequently is perceived to be the negative aspect of the right to equality.[1471] They are usually held to be indivisible terms, non-discrimination serving as a complement to equality by prohibiting unjust inequalities.[1472] Several treaties contain provisions

1467 W. Vandenhoule, *Non-Discrimination and Equality in the View of the UN Human Rights Treaty Bodies* (Intersentia, Antwerpen, Oxford, 2005), p. 1.

1468 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.

1469 Article 1, UDHR.

1470 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.

1471 O. M. Arnardóttir, *Equality and Non-Discrimination under the European Convention on Human Rights* (Martinus Nijhoff, The Hague, 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, *supra* note 348, p. 31.

1472 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".

on both equality and non-discrimination, for instance, the ICCPR.[1473] Meanwhile, the UN Human Rights Committee in General Comment No. 18 on non-discrimination approaches both principles under the heading of non-discrimination, declaring: "[N]on-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."[1474] Other treaties contain one regulation that applies to both equality and non-discrimination. The American Convention on Human Rights is one example of this.[1475] According to the Committee on Economic, Social and Cultural Rights (CESCR), the concepts are "integrally related and mutually reinforcing".[1476] In the Explanatory Report to Protocol 12 of the ECHR, on 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.[1477]

Equality and non-discrimination will therefore be approached as two aspects of a single matter.

### *7.4.2 Purpose or Effect of Discrimination*

Because there is no universal definition of discrimination, the core components of the main treaty regulations and interpretations thereof will be discussed. A disparity can be detected in convention regulations and literature in the understanding of the concept of equality, particularly with regard to gender, and which standard of review to apply.

In general, according to the classic liberal approach to non-discrimination, sex equality is equated with equal treatment, in so far as the recognition of differences between men and women is unacceptable.[1478] Non-discrimination in its traditional form thus entails the prohibition of a distinction that rests on gender and should guarantee equal opportunities. It thereby disregards the fact that men and women may have different starting points. A broader concept of non-discrimination involves an examination of standards and practices that appear neutral but may affect women as a class in

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*See* UN Doc. Supplement No. 38 (A/57/38), CEDAW Committee, 27th Session, (Belgium), para. 146.

1473 *See* Articles 2, 3 and 26 of the ICCPR.

1474 CCPR General Comment No. 18, Non-discrimination UN Doc. HRI/GEN/1/Rev.1, para.1.

1475 Article 24 of the American Convention on Human Rights.

1476 General Comment No. 16: The Equal Right of Men and Women, UN Doc. E/C.12/2005/4, para. 3.

1477 Protocol No. 12 to the Convention for the Protection of Human Rights and Fundamental Freedoms, Explanatory Report, ETS No. 177, para. 15.

1478 Edwards, *supra* note 348, p. 10.

negative ways.[1479] The law is frequently constructed by the most privileged within society.[1480] 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. As Catherine MacKinnon claims, the "difference" may actually stem from an underlying power imbalance and is therefore "created" rather than being possessed of an innate quality.[1481] Rather, according to theories on power imbalance, current sexual inequality arises from social structures that have created differences in gender roles based upon sex. As touched upon earlier, 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.[1482] Equality in this manner "is not freedom to be treated without regard to sex but freedom from systematic subordination because of sex".[1483]

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*.[1484] Systemic inequality is deemed to occur as a result of "dominant societal values", which has often reflected a male, heterosexual perspective.[1485] The Committee finds structural discrimination as originating from "traditional attitudes by which women are regarded as subordinate to men or as having stereotyped roles".[1486] Discrimination is viewed as being interconnected in various areas such as in labour, family law and violence against women. Laws criminalising rape may arguably maintain such a systemic discrimination, which means that a body of law, or a system, is built on gender-biased foundations.

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

1479 Access to Justice for Women Victims of Violence in the Americas, *supra* note 1258, paras. 73-75.

1480 *Ibid.*, para. 97.

1481 MacKinnon, *supra* note 214, p. 218.

1482 S. Wright, 'Human Rights and Women's Rights', in K. Mahoney and P. Mahoney (eds.), *Human Rights in the Twenty-First Century: A Global Challenge* (Martinus Nijhoff Publishers, Dordrecht, 1993), p. 80.

1483 Charlesworth *et al.*, *supra* note 139, p. 632.

1484 Holtmaat, *supra* note 143, p. 78.

1485 Vandenhoule, *supra* note 1467, p. 36.

1486 General Recommendation, No. 19, Violence against Women, (1992), para. 11.

> 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 that

> 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.[1487]

Discrimination may consequently take various forms: direct discrimination or an adverse effect, that is, indirect discrimination, since the provisions mention measures that have either the *purpose or effect* of discrimination.[1488] Direct discrimination occurs when a party adopts a rule or practice that singles out a group for discriminatory treatment. An adverse effect, on the other hand, is relevant to situations where discrimination occurs 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.[1489] 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 inadvertantly 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.[1490]

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1487 Article 1, African Protocol on Women.

1488 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* C. Fraser, 'Creating Access to Justice through Judicial Education: Correcting the Blindness', *First South Asian Regional Judicial Colloquium New Delhi* (1-3 November 2002), Wright, *supra* note 1482, p. 79. Wouter Vandenhoule denotes these forms of discrimination as *de jure* or *de facto* discrimination, *see* Vandenhoule *supra* note 1467, 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.

1489 *See e.g.* Vandenhoule, *supra* note 1467, p. 35.

1490 General Recommendation No. 25, on Article 4, para. 1, On temporary measures, UN Doc. HRI/GEN/1/Rev.7, (2004), CEDAW note 1.

This is particularly pertinent in situations where laws on the prohibition of rape have a gender-neutral wording but do in fact affect people 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:

> 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. [1491]

The regulation has also been given a similar interpretation as the CEDAW provision.[1492] Intent is not required for an act or law to be discriminatory.[1493] Indirect discrimination occurs when a rule or a decision exclusively or disproportionately affects persons of a specific category in a detrimental manner.[1494] 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".[1495] Such differentiations must be on the footing of reasonable and objective criteria. For example, the Committee in *Althammer* v. *Austria* on 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.[1496]

The regional human rights courts and bodies have developed their own methodology through case law in determining the actuality of discrimination. The Inter-American

1491 CCPR General Comment No. 18: Non-Discrimination, para. 7.

1492 *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.

1493 *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: "[T]he 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."

1494 *Althammer et al.* v. *Austria*, Comm. No. 998/2001, UN. Doc. CCPR/C/78/D/998/2001, (2003), HRC. para. 10.2.

1495 CCPR General Comment No. 18, para. 8.

1496 *Althammer et al.* v. *Austria*, *supra* note 1494, para. 10.2.

Commission has stated that "identifying discriminatory treatment requires a showing of a difference in treatment between persons in a sufficiently analogous or comparable situation".[1497] However, a variation in treatment may be appropriate where the distinction is based upon "reasonable and objective criteria".[1498] If it concerns unequal treatment rooted in gender, the differentiation must be "compelling or of great import or weight".[1499] The European Court of Human Rights has also developed a specific methodology in attending to claims of discrimination under Article 14 of the European Convention on Human Rights, which also takes indirect discrimination into consideration.[1500] In *Hugh Jordan* v. *The United Kingdom*, the Court ruled: "Where a general policy or measure has disproportionately prejudicial effects on a particular group, it

1497 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, 13 April 1999, Inter-American Commission on Human Rights OEA/Ser.L/V/II.106, Chapter VI, III (B). *See also* Proposed Amendments to the Naturalization Provisions of the Constitution of Costa Rica, 19 January 1984, Inter-American Court of Human Rights, Advisory Opinion, OC-4/84, <www1.umn.edu/humanrts/iachr/b_11_4d.htm>, visited on 9 November 2010, 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".

1498 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, 13 April 1999, Inter-American Commission on Human Rights OEA/Ser.L/V/II.106, Chapter VI, III (B).

1499 Access to Justice for Women Victims of Violence in the Americas, *supra* note 1258, para. 85. For example, in the case of *Maria Eugenia Morales de Sierra*, the Inter-American Commission held that the difference in treatment based upon sex is highly suspect and the state must accordingly provide very weighty reasons to justify them. *See Maria Eugenia Morales de Sierra Case*, 19 January 2001, Inter-American Commission on Human Rights, Case 11. 625, Report No. 4/01, <www.cidh.org/women/Guatemala11.625eng.htm>, visited on 9 November 2010.

1500 The methodology as established in the *Belgian Linguistics* case is the following: First the Court decides upon whether or not 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. Finally, 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 employed 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*, 23 July 1968, ECtHR, Nos. 1474/62, 1677/62, 1691/62, 1769/63, 1994/63, 2126/64, <cmiskp.echr.coe.int/tkp197/view.asp?item=2&portal=hbkm&action=html&highlight=Case%20%7C%20Relating%20%7C%20to%20%7C%20Certain%20%7C%20Aspects%20%7C%20of%20%7C%20the%20%7C%20Laws%20%7C%20on%20%7C%20Use%20%7C%20Languages%20%7C%20in%20%7C%20Education%20%7C%20

is not excluded that this may be considered as discriminatory notwithstanding that it is not specifically aimed or directed at that group."[1501] On gender discrimination, the European Court has stated: "[T]he 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 have to be advanced before a difference of treatment on the ground of sex could be regarded as compatible with the Convention."[1502]

In *Opuz* v. *Turkey* of 2009, the Court assessed 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".[1503] It consequently referred to CEDAW, the Belém do Pará Convention, the case law of the Inter-American Commission, and UN resolutions.[1504] In this case the Court did not find the legislation inadequate, but rather that the general attitude of local authorities was found wanting, including the ways women were treated at police stations when reporting domestic violence, as well as judicial passivity in providing effective protection to victims.[1505] It found the "unresponsiveness of the judicial system and impunity enjoyed by the aggressors", though unintentional, mainly affected women and therefore amounted to discrimination.[1506]

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 any law prohibiting rape both on the basis of the language employed 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?

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Belgium%20%7C%20v.&sessionid=61867803&skin=hudoc-en>, visited on 9 November 2010.

1501 *Hugh Jordan* v. *The United Kingdom*, 4 May 2001, ECtHR, No. 24746/94, <cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=Hugh%20%7C%20Jordan%20%7C%20v.%20%7C%20The%20%7C%20United%20%7C%20Kingdom&sessionid=61867803&skin=hudoc-en>, visited on 9 November 2010, para. 154.

1502 *Abdulaziz, Cabales and Balkandali* v. *The United Kingdom*, ECHR, 28 May 1985, Nos. 9214/80, 9573/81, 9474/81, <cmiskp.echr.coe.int/tkp197/view.asp?item=3&portal=hbkm&action=html&highlight=Abdulaziz%2C%20%7C%20Cabales%20%7C%20Balkandali&sessionid=61867803&skin=hudoc-en>, visited on 9 November 2010, para. 78.

1503 *Opuz* v. *Turkey*, *supra* note 1078, para. 184.

1504 *Ibid*., paras. 186-190.

1505 *Ibid*., para. 192.

1506 *Ibid*., para. 200.

### 7.4.3 State Obligations

General human rights obligations to respect and protect naturally also pertains to the principle of non-discrimination. Respect inevitably results in states necessarily refraining from enacting discriminatory laws and engaging in biased practices.[1507] States must not only cease pursuing discriminatory policies but also meet their obligations to protect citizens from such partiality, whether by public agents or non-state actors.[1508] Specific duties for states to eliminate sex discrimination are listed in Article 2 of CEDAW, which declares 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 for all women.[1509] Recommendation No. 19 even mentions IHL in its affirming "the right to equal protection according to humanitarian norms in times of international or internal armed conflict".[1510]

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.[1511] The Protocol to the African Charter on Women's Rights provides for states, among other measures, to "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".[1512] Included in Article 26 of the ICCPR is the principle of equal protection under the law, which entails both positive and negative aspects. Legislatures must desist both from enacting laws that contain a discriminatory element and to explicitly prohibit discrimination through the adoption of specific laws.[1513] Clear compul-

1507 General Recommendation No. 23, (1997), CEDAW, paras. 41 and 47.

1508 *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*, 8 September 2005, Inter-American Court of Human Rights, Series C No. 130, <www1.umn.edu/humanrts/iachr/C/130-ing.html>, visited on 9 November 2010, *Maria da Penha* v. *Brazil*, Case 12.051, Report No. 54/01, 16 April, 2001.

1509 General Recommendation No. 19, para. 24(b).

1510 *Ibid.*, Article 7(c).

1511 Article 7(g) of Inter-American Women's Convention.

1512 Article 2 b) of Protocol to the African Charter on Women.

1513 Nowak, *supra* note 1310, p. 607.

sions therefore exist for states to adopt legislation that is non-discriminatory through its wording and effect.

During the drafting of the non-discrimination regulation of the ICCPR, it was frequently emphasised that discrimination in private relations was a matter of legitimate, personal decision-making, which was protected against state interference as a right to privacy.[1514] The UN Human Rights Committee has recorded that while the obligations do not have a direct horizontal effect, the positive duties require that states must protect citizens against infractions by private parties in relation to the non-discrimination principle.[1515] 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".[1516] 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 such as the freedom of movement in order to reduce the risk of being raped.[1517] The Declaration on the Elimination of Violence against Women for example expresses the opinion that "opportunities for women to achieve legal, social, political and economic equality in society are limited, inter alia, by continuing and endemic violence".[1518] Violence leads to fear or a general disincentive to become involved in public matters and therefore restricts the autonomy of women beyond that of physical self-determination.[1519] The advantage of formulating violence against 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 crimi-

1514 *Ibid.*, p. 632. *See* further discussion on this in Vandenhoule, *supra* note 1467, p. 18, M. Scheinin, '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.

1515 CCPR General Comment No. 31, (2004), para. 8.

1516 MacKinnon, *supra* note 514, 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." *See* p. 1302.

1517 Stellings, *supra* note 915, p. 188.

1518 Preamble of the Declaration on the Elimination of Violence against Women.

1519 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.

nal acts but part of a "systemic and political problem", requiring a structural solution. It thereby minimises the public/private problem.[1520]

That inequality existing in the enjoyment of rights by women is "deeply embedded in tradition, history and culture" has been attested by various bodies of the UN.[1521] 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".[1522] Sexual violence as a measure of this imparity has been wholly accepted. Though men are also subject to certain acts deemed to be typically gender-based, such as rape, it is generally held that violence against women is a specific category rooted in discrimination.[1523] Since principally women are subjected to sexual violence, rape clearly contains a gender component. 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.[1524]

The UN Special Rapporteur has also emphasised that the violation of a woman's sexuality, such as that which occurs in rape, is a "manifestation of the way in which masculine power and domination over women's bodies is established".[1525] As such, violence forms "part of a historical process and is not natural or born of biological determin-

1520 Edwards, *supra* note 348, pp. 50-51.

1521 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 to CEDAW. In the past decade, sociocultural factors as explanations of sexual violence have 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.

1522 *Maria da Penha Fernandes* v. *Brazil*, IACHR, para. 58. *See also A.T.* v. *Hungary*, *supra* note 1225, which found that the state's lack in enacting effective legal and social services demonstrated the persistence of traditional gender stereotypes.

1523 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* O. Jones, 'Sex, Culture and the Biology of Rape: Toward Explanation and Prevention', 87:827 *California Law Review* (1999), p. 921. *See also* UN Doc. A/HRC/7/3, *supra* note 1311, 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.

1524 UN Doc. E/CN.4/1995/42, *supra* note 34, para. 48.

1525 UN Doc. E/CN.4/2004/66, *supra* note 935, para. 35.

ism. The system of male dominance has historical roots and manifestations change over time."[1526] The causes, nature and consequences of violence against women therefore differ in comparison with men, as well as the systemic nature of the abuse.

The acknowledgement of gender-based violence as a human rights transgression 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 effect 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 merely as an afterthought to economic and social issues.[1527] Recognition was instead first provided by the Economic and Social Council in resolution 1990/15 in reviewing the strategies of Nairobi, stating: "Violence against women in the family and society is pervasive and cuts across lines of income, class and culture and must be matched by urgent and effective steps to eliminate its incidence. Violence against women derives from their unequal status in society."[1528] In 1991 the Economic and Social Council adopted resolution 1991/18 entitled "Violence against Women in all its Forms". It 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 attend to these issues.[1529] That document later became the Declaration on the Elimination of Violence against Women.

As noted, violence against women is neither specifically referred to in the definition of discrimination in CEDAW, nor mentioned elsewhere in the Convention. However, the CEDAW Committee has in subsequent documents interpreted discrimination to encompass gender-based violence. General Recommendation No. 19, adopted in 1992 by the Committee and subsequently referred to in its views, attests that gender-based violence is a form of discrimination "that seriously inhibits women's ability to enjoy rights and freedoms on a basis of equality with men".[1530] 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".[1531] 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 was further acknowledged that gender-based violence is a form of discrimination in that it restricts the ability of women to enjoy their rights and freedoms on equal terms with men.[1532] It was argued that sexual violence represents a form of sex discrimination, based upon the highly gendered nature of the crime, and that sexual

1526 *Ibid.*, para. 49.

1527 UN Doc. E/CN.4/1995/42, *supra* note 34, para. 21.

1528 Annex to Resolution 1990/15 of 24 May 1990, ECOSOC, para. 23.

1529 Resolution 1991/18, Violence against Women in all its Forms, 30 May 1991, ECOSOC.

1530 General Recommendation No. 19, CEDAW, para. 1.

1531 *Ibid.*, para. 6.

1532 UN Doc. A/RES/48/104, 23 February 1994, General Assembly Resolution 48/104.

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 conveyed in the preamble to the Declaration, which states:

> [V]iolence 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.[1533]

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.[1534]

Article 2 further specifies that violence inflicted on 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 directed at women was also recorded in *Ms. A.T* v. *Hungary* reviewed by the CEDAW Committee, in which it stated that domestic violence affects women in a disproportionate manner.[1535]

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".[1536] It is further acknowledged as a form of discrimination.[1537] 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".[1538] The Inter-American Commission has on several occasions analysed cases of violence against women within the meaning of gender discrimination and affirmed the problematic nature of international law and the attendant difficulties in creating a public versus private sphere.[1539]

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1533 Emphasis added.

1534 Article 1 of UN Declaration on Elimination of Violence against Women.

1535 *Ms. A.T* v. *Hungary*, *supra* note 1225. *See more* in chapter 6.4.6.

1536 Preamble of the Inter-American Women's Convention.

1537 *Ibid.*, Article 6a.

1538 *Ibid.*, Article 1.

1539 *See e.g. Maria Eugenia Morales de Sierra Case*, *supra* note 1499 and *Maria Da Penha Fernandes*. It concluded 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

The UN Human Rights Committee also 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 on the subject of rape.[1540] The Council of Europe has additionally acknowledged the discriminatory effect of violence against women, stating in a recommendation to member states: "[V]iolence 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."[1541]

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".[1542] The fact that this form of violence is universal and pervades all cultures signifies its roots in patriarchy.[1543] Accordingly: "violence against women is both a means by which women's subordination is perpetuated and a consequence of their subordination".[1544] That violence against women in general represents a form of discrimination is thus no longer controversial within the UN and regional human rights systems.[1545]

A parallel can also be drawn to the approach that rape represents a form of torture, as discussed in a previous chapter. In order to fulfil the definition of torture, the act in question 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 concerned can be shown to be gender-specific, *e.g.* aimed at perpetuating male domination over women, of which rape is provided as an example.[1546] The ICTY, though as of yet in solely one case, has also held that rape

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Rights, OAE/Ser.L/V/IL, Doc. 68, 20 January 2007, Access to Justice for Women Victims of Violence in the Americas, *supra* note 1258, para. 60.

1540 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 the woman's right to give free and full consent to marriage.

1541 Rec(2002)5 of the Committe of Ministers on the Protection of Women Against Violence, adopted on 30 April 2002, Council of Europe.

1542 UN Doc. A/61/122/Add.1, *supra* note 2, para. 23.

1543 *Ibid.*, para. 69.

1544 *Ibid.*, para. 72. The UN Commisssion on Human Rights has affirmed the discriminatory aspect of gender-based violence in Resolution 2003/45, stating: "[A]ll 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.

1545 General Recommendation No. 19, CEDAW. *See also* In-depth study on all forms of violence against women, UN Doc. A/61/122/Add.1, *supra* note 2, para. 22, Declaration on the Elimination of Violence against Women, General Assembly, UN Doc. A/RES/48/104.

1546 UN Doc. A/HRC/7/3, *supra* note 1311, para. 30.

*per se* meets the purpose requirement of discrimination as it primarily and intentionally targets women. The Trial Chamber in the *Celebici* case referred to CEDAW and attested that rape may constitute discrimination since it is violence directed against a woman, because such person is a woman.[1547] It also noted that rape in detention camps often was committed for the "purpose of seeking to intimidate not only the victim but also other inmates, by creating an atmosphere of fear and powerlessness".[1548] The Trial Chamber in *Kunarac* also affirmed that the rape in question was committed on the basis of ethnicity and gender.[1549] 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 contends: "[I]n 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."[1550] This presupposes that sexual violence is perpetrated as a measure to subordinate women, be it in peacetime or in armed conflict.

The jurisprudence of the ECtHR on 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.[1551] In the few cases heard by the Court pertaining to state obligations to prohibit rape, the Court has failed to discuss either its endemic nature of rape or the particular vulnerability of women. Though the Court progressively analysed the nature of rape in *M.C.* v. *Bulgaria* in defining the offence, the discriminatory aspect of sexual violence was not raised. While feminist legal scholars for decades have phrased the crime of rape in terms of discrimination, national and regional courts have been reluctant to adopt that 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. The obstacles to eradicate sexual violence then become more difficult for the state to overcome.[1552] It fails to understand its systemic nature and remedies will consequently be fragmented and addressed only for the individual victim rather than being treated as a wider issue.[1553] Brande Stellings, for example, takes the view that failure to accept rape as a crime of sex and gender "overlooks the way it both represents and maintains a system of subordination".[1554] In addition, the significance of accepting gender violence *per se* as

1547 *Prosecutor v. Delalic et al., supra* note 334, para. 493.

1548 *Ibid*., para. 941.

1549 *Prosecutor* v. *Kunarac, Kovac and Vukovic*, *supra* note 409, paras. 654 and 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*, *supra* note 497, para. 154.

1550 UN Doc. E/CN.4/Sub.2/1998/13, *supra* note 10, para. 55.

1551 Radacic, *supra* note 1382, pp. 365 and 375.

1552 *Ibid*., p. 375.

1553 Copelon, *supra* note 851, p. 869, Stellings, *supra* note 915, p. 188.

1554 Stellings, *supra* note 915, p. 188.

a form of gender discrimination is that it does not require evidence that the state treats violence against women differently from that against men.

The categorisation of rape as a result of inequality on the basis of sex is not uncontroversial since male victims also exist – a somewhat ignored category of victims. 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 the literature seems to be relegated solely to the female victim. Is male rape then to be 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 one group is treated as inferior and not accorded equal rights. It is unlikely that this can be attributed to men as a category, though the practice of sexual violence against men in former Yugoslavia perhaps could contain such as aspect. However, even though victims of rape primarily are women and a discriminatory aspect therefore mainly applies to women, many jurisdictions define rape in a non-neutral manner, without acknowledging the male position. 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, for instance, rape.[1555] 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.

### *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 judged to be a principal aspect in protecting basic rights and freedoms and a precondition for states to fully comply with obligations to act with due diligence regarding violence against women.[1556] Gender discrimination can obstruct access to justice for women in that all persons should be equal before the law and the justice system.[1557] The traditional concept of access to justice served to provide the person with access to courts and prompt redress and where necessary with legal representation.[1558] Though the concept has fundamentally sought

1555 Edwards, *supra* note 348, p. 56.

1556 Access to Justice for Women Victims of Violence in the Americas, *supra* note 1258, Executive Summary, para.4.

1557 *See* Articles 2, 14 and 26 of the ICCPR, CCPR General Comment No. 18 on non-discrimination, paras. 1-3.

1558 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*

to eradicate such impediments as poverty and language limitations that may block access to the legal system, the doctrine has arguably focused too much on access *to* justice rather than on the *quality* of the justice itself.[1559] Hence the concept includes not only the possibility of pursuing a claim in court, but the right of a hearing in "accordance with substantive standards of fairness and justice".[1560] It thus reflects basic norms of the rule of law.[1561] A broader idea of access to justice also recognises the existence of 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, for instance, the UN Special Rapporteur on Violence against Women.[1562] This includes prejudices on the part of the judiciary as well as law-making and law-enforcement institutions.[1563] Obstructions in the law might incorporate stereotypes or prejudices against women in both substantive and procedural laws.[1564] Gender bias has in fact been identified as one of the most significant hindrances to women seeking access to justice.[1565] 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".[1566] Problems identified in relation to the processing of complaints on violence against women include the lack of training of public officials in the proper interpretation and application of the law, overburdened law-enforcement agencies, scepticism towards female victims and a lack of information for victims on how to gain redress.[1567] The

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and *de facto* equality, *i.e.* not solely the formal existence of judicial remedies but a requirement that the remedies are effective.

1559 A. Currie, *Riding the Third Wave: Rethinking Criminal Legal Aid Within an Access to Justice Framework*, Ottawa: Department of Justice, (2000).

1560 F. Francioni, 'The Rights of Access to Justice under Customary International Law', in F. Francioni (ed.), *Access to Justice as a Human Right* (Oxford University Press, Oxford, 2007), p. 1.

1561 It can, in part, be inferred from standards on the right to a fair trial. *See* Article 8 UDHR, Articles 2 and 14 ICCPR, Articles 6 and 13 ECHR, Article 25 IACHR, Article 7 African Charter. It is contructed as a procedural guarantee.

1562 UN Doc. E/CN.4/2004/66, *supra* note 935, para. 57

1563 *Ibid.*, para. 57.

1564 K. Mahoney, *Access to Justice and Gender*, First South Asian Regional Judicial Colloquium on Access to Justice, New Delhi (1-3 November 2002), p. 3.

1565 UN Doc. E/CN.4/2004/66, *supra* note 935, para. 57. *See also* Mahoney, *supra* note 1564, p. 16.

1566 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.

1567 Access to Justice for Women Victims of Violence in the Americas, *supra* note 1258, Executive Summary, paras. 8, 12-16.

result is that most cases of this kind of violence are never punished.[1568] An important parallel can be drawn with *Opuz* v. *Turkey*, which affirmed the systematic nature of domestic violence. The ECtHR recognised the great 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, for example through relying on stereotypical gender roles, whether in the definition of a crime or in the procedural law, can also represent discrimination. It is understood that stereotypes of the parts of men and women play in the family or in society in general, which are reaffirmed in the law, uphold the inequalities found in all societies.[1569] It creates impediments in access to justice, whether in the definition of rape or through procedural laws. Restrictive definitions and evidentiary rules may prevent the effective enforcement of rape statutes and the protection of women. The eradication of these roles is therefore part of the duty of banning systemic gender discrimination. The responsibility of the state must accordingly be to conduct an analysis to accurately assess why and under what circumstances specific forms of gender-based violence are committed. This must be reflected in the law on such crimes as rape. CEDAW explicitly calls on states to eradicate practices based upon prejudices and stereotypes of women.[1570] It has for instance 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".[1571]

Impediments to the access to justice in the form of discriminatory laws are 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 to be understood simply in terms of entry to judicial and legal services *e.g.* through legal aid, but also in ascertaining that "law enforcement organs at all levels are equipped to effectively interpret and enforce gender equality rights"[1572] and in requiring a "reform of existing discriminatory laws and practices in order to promote

1568 *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.

1569 Article 5(a) CEDAW, UN Doc. E/CN.4/1996/53, *supra* note 835, para. 27.

1570 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.

1571 Concluding Comments of CEDAW on Ireland, UN Docs. A/54/38, 25/06/99, paras. 193-194.

1572 Article 8(d) of Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa.

and protect the rights of women".[1573] The Inter-American Commission in a 2007 report 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.[1574]

Deficiencies in legislation combined with failure in properly applying the provisions are mentioned as obstacles to gaining access to justice.[1575] The types of regulations described as most frequently creating 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 that persistently occur in the judicial systems regarding rape include unreasonable evidentiary requirements; rejection of a complainant's uncorroborated testimony; allowing the woman's past sexual history as evidence; focusing on the victim's resistance, and emphasising the overt use of force.[1576] The UN Human Rights Committee in a General Comment has noted that certain practices that could breach the right of access to justice and the 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.[1577] An assumption of fault by law-enforcement officers and judges, for example, 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

1573 *Ibid*., Article 8(f).

1574 Access to Justice for Women Victims of Violence in the Americas, *supra* note 1258, 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 argued that laws which extinguish the rapist's criminal responsibility if he married the victim, or where this served as a mitigating factor, undermined 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.* in Iraq. *See* CCPR General Comment No. 28, para. 24.

1575 Access to Justice for Women Victims of Violence in the Americas, *supra* note 1258, Executive Summary, para. 217.

1576 UN Doc. E/CN.4/1997/47, *supra* note 203, para. 28.

1577 CCPR General Comment No. 28, para. 18. *See also* S/2009/362, *supra* note 12, 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.

the victim also constitute evident obstacles to justice.[1578] Another issue of relevance, both to the principle of non-discrimination and access to justice, are those penal codes where a woman can be prosecuted for offences arising from the original complaint if unable to secure a conviction. This for instance occurs where a woman can be charged with adultery if she fails to prove that she was raped.[1579] Given the nature of rape as that of 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.

However, going 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.[1580] Examples 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 […]".[1581] Marital rape exemptions and the selective failure to prosecute rape of prostitutes are likewise discriminatory practices.[1582] 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.[1583]

The outcome of restrictive definitions of crimes and procedural rules is that violence against women in many cases is not formally investigated, prosecuted or punished, resulting in systematic impunity. The consequence is that female victims become disinclined to turn to the judicial system because they lack confidence in it. Widespread impunity in turn perpetuates the cycle of violence against women.[1584]

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1578 *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).

1579 *See e.g.* Saudi Arabia, Dubai, Somalia. Male victims may also be charged with sodomy for male-male rape in *e.g.* Dubai.

1580 Access to Justice for Women Victims of Violence in the Americas, *supra* note 1258, para. 221.

1581 *Ibid.*, para. 221.

1582 Edwards, *supra* note 348, p. 52.

1583 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.

1584 Access to Justice for Women Victims of Violence in the Americas, *supra* note 1258, Executive Summary, para. 6.

### 7.4.5.3 Gender-Bias in Language

What then are the indications that a measure or practice is discriminatory – for example through a gender-bias? Determining whether or not a law has a discriminatory effect is difficult. One way is to review the language of the definition and its implications. Rikki Holtmaat argues that in order to evaluate whether a law in fact rests on gender stereotypes, it might well be necessary to conduct in-depth studies on the basic assumptions of gender and its functions in legislation.[1585] 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 founded on the belief that women are untrustworthy and that men must be protected against false charges of rape. Such gender-bias may manifest itself in doctrines requiring "fresh" complaints, corroboration of witnesses or torn clothing, not placing value on the harm of the crime as experienced by women and applying other stereotypes as norms.[1586] 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 such law must be conducted. Note must be taken of the possibility that despite neutral appearances, provisions may still be gendered. Non-neutral legislation for example occurs when the harm of rape is established from a male perspective.[1587] 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 should consider the social context of sex inequality when defining and adjudicating sexual assault. Such a consideration would increase women's access to justice, since it places the role of sexual assault in the context of inequality of the sexes.[1588] For example, in the renowned *R.* v. *Ewanchuck* case, the Supreme Court of Canada re-evaluated the application of consent to sexual activity and determined it on the basis of a subjective test. The view of the Court was that the accused could not presume consent from the fact of complainant's silence or ambiguous conduct. If the aggrieved expressed non-consent, the defendant had an obligation to take additional "reasonable steps" to make certain of acquiescence.[1589] That interpretation of consent arguably adopts an equality approach. The traditional attitude would presume consent to the point of a woman's resistance, or find a basis for consent implied in the victim's manner of dress, past sexual conduct, or non-resistance. According to the Court, an equality-based approach instead examines whether or not steps were taken to assure consent, since a woman does not comport herself in a state of constant consent until saying "no". Even an apparently gender-neutral definition of rape that is consent-based can therefore have a discriminatory effect if it is not analysed in a gender-conscious manner.

1585 Holtmaat, *supra* note 143, p. 77.

1586 Fraser, *supra* note 1488, p. 5.

1587 Mahoney, *supra* note 1564, p. 16, Berglund, *supra* note 249, pp. 15-16.

1588 Mahoney, *supra* note 1564, p. 16

1589 *R.* v. *Ewanchuk*, *supra* note 447, para. 98-99.

Laws may also contain a gender discriminatory component when the *actus reus* is defined in such a technical manner so as to exclude male victims. Neutrality of the rape definition is therefore not achieved solely by ensuring that perpetrator and victim are described as either him or her. The definition must be enlarged to include penetration not only of the vagina but also the 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.[1590] Does a gender-neutral approach discriminate 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? Should male rape be cast as another crime, for example, non-consensual buggery, as previously in the United Kingdom? What is the initial reason for preoccupation with the female victim of rape? Historically, women were particularly protected in the manner of property. Women have also been predominantly the victims of rape. Beyond this, vaginal rape has been viewed as a more serious violation. For instance, in 1984 the Criminal Law Revision Committee of the United Kingdom argued in favour of retaining the definition of rape with its focus on penile-vaginal intercourse, since it was considered to be "unique and grave", partly because of the risk of pregnancy.[1591] The Model Penal Code of the United States similarly retained a gender-specific definition of rape on these grounds:

> [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.[1592]

Feminist legal scholars have also claimed that the recognition of male victimisation undermines sexual violence as a consequence of patriarchy and ignores the gendered reality.[1593] Neutrality would consequently lead to a non-neutral *status quo* and discourage the analysis of the law in gender-specific terms.[1594] More relevantly, certain critics point to the danger of ignoring the gender-specific ways in which victims react to sexual violence, which must be reflected in a definition. Joan McGregor 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

1590 Novotny, *supra* note 820, p. 748.

1591 Criminal Law Revision Committee, Sexual Offences, 15th report, United Kingdom, at para. 2.3, (1984).

1592 Model Penal Code and Commentaries, § 213.1 cmt at p. 338, (1980).

1593 Novotny, *supra* note 820, p. 748, MacKinnon, *supra* note 491, pp. 20 and 262.

1594 MacKinnon, *supra* note 491, p. 20, 262, C. Boyle, 'Sexual Assault and the Feminist Judge', 1 *Canadian Journal of Women & The Law* 93 (1985), p. 104.

women to the resistance requirement therefore disadvantages them."[1595] In this regard, there are 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 demands 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 on equal terms. Gender can still be central to an understanding of the nature of sexual violence. It supports the comprehension that rape is a matter of power and subordination and that the group of people mostly affected is women, while also recognising the male victim. The need for gender-neutrality in this formal manner has been acknowledged by the *ad hoc* tribunals and the ICC. In varying ways they have sought to include both female and male victims and perpetrators.

#### 7.4.5.4 Statistics as Evidence

Beyond the appraisal of language as to whether it is discriminatory, statistics may also aid in proving the discriminatory effect of criminal laws on rape. Anthony Ewing asserts that if detention and conviction rates in a particular state for crimes of violence against women were to be found significantly lower than that for crimes of violence against men, then this in itself is an indication of unequal protection of the law.[1596] 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.[1597]

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.[1598] In *D. H. and Others* v. *the Czech Republic*, albeit a case concerning ethnic discrimination, the Court stated: "[W]hen 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."[1599] In *Hoogendijk* v. *The Netherlands*, in respect of a labour disability insurance scheme, the Court in

1595 McGregor, *supra* note 192, p. 37.

1596 Ewing, *supra* note 1067, p. 779.

1597 Access to Justice for Women Victims of Violence in the Americas, *supra* note 1258, para. 91.

1598 *Opuz* v. *Turkey*, *supra* note 1078, para. 183.

1599 *D.H. and Others* v. *The Czech Republic*, 13 November 2007, ECtHR, No. 57325/00), <cmiskp.echr.coe.int/tkp197/view.asp?item=2&portal=hbkm&action=html&highlight=D.H.%20

like manner 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."[1600] In fact, the UN Human Rights Committee in a concluding observation noted that the disproportion between reported rapes and prosecutions in Iceland was a cause for concern from the viewpoint of gender equality and discrimination, implying that the *effect* of the law and practice was discriminatory.[1601]

As such, a regulation or practice that on the face of it is not discriminatory may in reality affect women in more negative ways, which may reveal itself in statistics. Sexual violence *per se* is discriminatory in its existence because 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 conceivable that restrictive criminal 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 have recourse to universal conventions and documents in their reasonings, as well as the adoption by other bodies of such arguments.

The European and the Inter-American systems have each expressly adopted certain flexibility in relation to the interpretation of their 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

%7C%20Others%20%7C%20v.%20%7C%20the%20%7C%20Czech%20%7C%20Republic&sessionid=61867803&skin=hudoc-en>, visited on 9 November 2010.

1600 *Hoogendijk* v. *The Netherlands*, 6 January 2005, ECtHR, No. 58461/00, Admissibility Decision, <cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=Hoogendijk%20%7C%20v.%20%7C%20The%20%7C%20Netherlands&sessionid=61867803&skin=hudoc-en>, visited on 9 November 2010.

1601 UN Doc. CCPR/CO/83/ISL, para. 11 (Iceland).

of present-day conditions". The Inter-American Court has also emphasised the importance of the evolution of the Declaration and American Convention on Human Rights.[1602] The Court has stated that the evolutional interpretation is consistent with the general rules of the 1969 Vienna Convention on the Law of Treaties, stating: "Both 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."[1603]

The regional human rights bodies frequently allude to the Universal Declaration of Human Rights (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 develop, also universal standards. In the case of *M.C.* v. *Bulgaria*, the Court took note of General Recommendation No. 19 of the United Nations Committee on the Elimination of Discrimination against Women.[1604] In addition, the case law of the *ad hoc* tribunals and the Rome Statute was analysed. In *Opuz* v. *Turkey*, CEDAW, General Recommendation No. 19 as well as case law from the Inter-American human rights system are discussed.[1605]

Article 29 of the American Convention on Human Rights 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.[1606] In

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1602 *Tyrer* v. *the United Kingdom*, *supra* note 373, 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, 14 July 1989, Inter-American Court of Human Rights, Advisory Opinion OC-10/89, <www1.umn.edu/humanrts/iachr/b_11_4j.htm>, visited on 9 November 2010, paras. 37-38.

1603 The Right to Information on Consular Assistance in the Framework of the Guarantees of the Due Process of Law, 1 October 1999, Inter-American Court of Human Rights, Advisory Opinion OC-16/99, <www1.umn.edu/humanrts/iachr/A/OC-16ingles-sinfirmas.html>, visited on 9 November, para. 114.

1604 *M.C.* v. *Bulgaria*, *supra* note 240, para. 108.

1605 *See also Nachova and Others* v. *Bulgaria*, 6 July 2005, ECtHR, Nos. 43577/98 and 43579/98, <cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=Nachova%20%7C%20Others%20%7C%20v.%20%7C%20Bulgaria&sessionid=61867803&skin=hudoc-en>, visited on 9 November 2010. 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*, *supra* note 1309.

1606 *See e.g.* Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism, 13 November 1985, Inter-American Court of Human Rights, Advisory Opinion, OC-5/85, <www1.umn.edu/humanrts/iachr/b_11_4e.htm>, visited on 9 November

*Mejia* v. *Peru* it directed attention to humanitarian law instruments and the statute of the ICTY. In *The Miguel Castro-Castro Prison* v. *Peru* case it pointed to the European Court's reasoning. In the decision of *Ana, Beatriz, and Celia González Pérez* the Commission discussed the case law of the European Court of Human Rights together with statements of 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.[1607] The African Commission has frequently touched upon the case law of the European and Inter-American Human Rights systems.[1608]

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 a bearing that goes beyond the state alone in the specific case at hand, or in respect of other member states in the system. This comparative exercise is natural since similar issues are often raised in the various systems that lend themselves to legal comparisons in a particular analysis. Dinah Shelton has observed that this cross-referencing and cross-fertilisation between the regional human rights systems can help develop a consistent international human rights law.[1609] 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 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.[1610]

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

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2010, p. 14, *Caballero Delgado and Santana Case* (Preliminary Objections), *supra* note 1141, para. 60, *Gangaram Panday* v. *Suriname*, 21 January 1994, Inter-American Court of Human Rights, Series C No. 16, <www.unhcr.org/refworld/category,LEGAL,,,SUR,3ae6b6c28,0.html, visited on 9 November 2010, para. 39.

1607 Article 60 of the African Charter.

1608 *See e.g. Curtis Francis Doebbler* v. *Sudan*, African Commission on Human and Peoples' Rights, Communication No. 236/2000, Sixteenth Activity Report 2002-2003, Annex VII, <www1.umn.edu/humanrts/africa/comcases/236-2000.html>, visited on 9 November 2010 and *The Social and Economic Rights Action Center and the Center for Economic and Social Rights* v. *Nigeria*, *supra* note 1055.

1609 Shelton, *supra* note 936, p. 148.

1610 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.

creates greater protection for the individual. However, the particular context of the region, be it religion and/or culture, may impose on such direct comparisons.

Much of the discussion on state 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. It is noteworthy that the judgments of the ECtHR have effect both at the national level and among the members of the Council of Europe. As articulated by Article 46 of the European Convention, judgments are binding on 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 effecting this change. The Council of Europe's Committee of Ministers supervises the adoption of individual steps taken by the state, such as payment of awards, but also on general measures in way of legislative or other changes directed at preventing similar infringements. The national law criminalising rape was for example amended subsequent to the decision of *X and Y* v. *The Netherlands*, allowing for the possibility of a mentally disabled victim to lodge a complaint through a legal representative.[1611]

However, judgments also have effect beyond the state alone that has been found to have breached the Convention. In order not to prompt complaints by individuals on similar matters, an implicit obligation exists also for other states to 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, that is, that case law reflects the current state of interpretation of state obligations in respect of the treaty. In a Recommendation in 2004 by the Committee of Ministers of the Council of Europe, it is emphasised that while the Convention only requires states to abide by judgments in cases to which they are parties, they 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".[1612] 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".[1613] 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. In like manner,

1611 *See* General measures adopted to prevent new violations of the European Convention on Human Rights, revised May 2006, p. 186. *See also* the CoE website for updates: <www.coe.int>.

1612 Recommendation Rec(2004)5, Committee of Ministers, Council of Europe, adopted on 12 May 2004.

1613 *Ibid*., paras. 5 and 7.

the Inter-American Court monitors compliance with its decisions and informs the Organization of American States General Assembly of any failures.[1614]

What is the effect of the ECtHR's legal reasoning on other international and regional courts, tribunals, treaty bodies or on human rights law in general? It has been noted in a study on the impact of international law at domestic level that many countries not a party to the European Convention cited case law from the Court as frequently as they did the jurisprudence from UN treaty bodies. This is judged to be a result of the great volume of interpretive cases from the Court combined with the fact that the various views of the UN treaty bodies may be more difficult to apply domestically. This is because the general comments are often too general and their decisions and views in individual cases contain limited legal reasoning.[1615] Antonio Cassese has observed that since the European Court of Human Rights frequently elucidates principles common to all 48 member states of the Council of Europe, it signifies general principles common to a large number of states with varying legal systems, both common and civil law. As such, it represents an "interesting sample of legal systems from the comparative law viewpoint" in opposition to, for example, the Inter-American human rights system where most states belong to the civil law system.[1616] It can therefore furnish a valuable indication when seeking to affirm general principles common to most legal systems. It must, however, be stressed that just as the member states represent a diversity of religious and moral considerations, as well as legal systems, the case law nevertheless still represents a European approach to human rights law which may be distinct from other areas.

As will be examined, both the ICTY and the ICTR have frequently made reference to the jurisprudence and argumentation of the ECtHR, particularly concerning issues pertinent to this topic – that is, 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.[1617] With regard to rape, it has been raised as a means to demonstrate a customary norm as to its

1614 D. Rodriguez-Pinzon, 'Basic Facts of the Individual Complaint Proecdure of the Inter-American Human Rights System', in. G. Alfredsson *et al.* (eds.), *International Human Rights Monitoring Mechanisms*, 2nd ed. (Martinus Nijhoff Publishers, Leiden, 2009), p. 623.

1615 Report of the Seventh Conference, New Delhi, (2002), The International Law Association, p. 544.

1616 Cassese, *supra* note 110, 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.

1617 *Prosecutor* v. *Furundzija*, *supra* note 28, para. 160, *Prosecutor* v. *Kunarac, Kovac and Vukovic*, *supra* note 409, para. 478.

general prohibition.[1618] 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 *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 international judges to make the provisions concrete.[1619]

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 making use of such reference. As viewed in the ensuing discussion on, for example, the definition of torture, the differences between international criminal law and human rights law that at times exist must also be kept in mind. Clearly, as the substance of international criminal law develops and concepts are defined, the need to make reference to human rights courts may well diminish in the future with mention merely being made to such matters as customary law or general principles.

The impact of the UN supervisory bodies' concluding observations and views is mixed. Albeit the importance of such views is generally held to be substantial in interpreting the normative framework of a particular treaty, the effect on national courts and the development of human rights jurisprudence has not been as substantial as the case law of regional human rights courts.[1620] First and foremost, the decisions 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 at the domestic level, a heightened recognition of the decisions and general comments has been noted. National courts have begun to refer to such documents on an increasing number of occasions, including those of states untouched by

1618 *Prosecutor* v. *Furundzija*, *supra* note 28, paras. 163 and 170.

1619 Cassese, *supra* note 110, pp. 26 and 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.

1620 Steiner, *supra* note 60, 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. *See also* Report of the Seventh Conference, New Delhi, (2002), The International Law Association, p. 514.

the views expressed.[1621] 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 Vienna Convention on the Law of Treaties (VCLT), *i.e.* as interpretation of the scope of obligations for states parties.[1622] 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 reviews 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 for derogation under any circumstances. The rules can only be modified by a subsequent norm of similar character in international law.[1623] The literal translation of *ius cogens* is "compelling law" and the norms have been described as the "pinnacle" of international law.[1624] What distinguishes such rules is their indelibility and their consequent supersession of any treaty or custom to the contrary. They can be said to contain a certain constitutional element in interna-

1621 Steiner, *supra* note 60, pp. 524, 540 and 544.

1622 Scheinin, *supra* note 59, p. 52.

1623 Article 53 of the Vienna Convention on the Law of Treaties of 1969. *See also* Shaw, *supra* note 52, p. 117.

1624 L. Hannikainen, *Peremptory Norms (Jus Cogens) in International Law, Historical Development, Criteria, Present Status* (Finnish Lawyers' Publishing Company, Helsinki, 1988), p. 4. Hannikainen describes peremptory norms as protecting overriding interests and values of the international community of states. M. Byers, 'Conceptualising the Relationship between Jus Cogens and Erga Omnes Rules', 66 *Nordic Journal of International Law* 211 (1997), p. 222, Adams, *supra* note 24, 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* 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 Koskenniemi, UN Doc. A/CN.4/L.682, 2006, para. 361, as well as having been influenced by natural law principles. I. Brownlie, *Principles of Public International Law* (Oxford University Press, Oxford, 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. *See e.g.* C. Bassiouni, 'International Crimes: Jus Cogens and Obligatio Erga Omnes', 59 *Law & Contemporary Problems* 63 (Autumn 1996), p. 68.

tional law as states are circumscribed in the subject-matter of their legislative powers, acts and transactions.[1625]

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 similar character.[1626] The International Law Commission (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 the jurisprudence of national and international courts.[1627] It is emphasised in the work of the ILC that unlike domestic legal systems with constitutions at their cores, international law is horizontal and does not contain a general order of precedence between rules.[1628] However, it is made plain that this does not preclude the fact that an order of precedence can be applied in a particular case to resolve a conflict, where *ius cogens* and *erga omnes* obligations can be considered to be such an "informal hierarchy".[1629] In distinguishing *ius cogens* norms from other rules, UN Special Rapporteur Fitzmaurice of the International Law Commission 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 agree 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.[1630]

While the concept of peremptory norms has met with scepticism, it is recognised in international practice and in the jurisprudence of both national and international courts and in legal doctrine.[1631] Despite the general acceptance of the existence of *ius cogens*

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1625 Broomhall, *supra* note 352, p. 42. *See also* M. Byers, 'Conceptualising the Relationship between Jus Cogens and Erga Omnes Rules', 66 *Nordic Journal of International Law* 211 (1997), p. 212, A. Orakhelashvili, *Peremptory Norms in International Law* (Oxford University Press, Oxford, 2006), p. 10.

1626 The terms "peremptory norms" and *ius cogens* norms are used interchangeably.

1627 Draft Articles on Responsibility of States for Internationally Wrongful Acts, *supra* note 929, 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.

1628 UN Doc. A/CN.4/L.682, *supra* note 1624, para. 324.

1629 *Ibid.*, paras. 325 and 327.

1630 Yearbook of the International Law Commission, 1958, vol. II, UN Doc. A/CN.4/SER.A/1958/Add.1, p. 40.

1631 UN Doc. A/CN.4/L.682, *supra* note 1624, 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.

norms in such fora, approaches to the principle are notorious for lacking in uniformity, in relation to the formation of the norms and their content. Ferdinandusse holds that it is unclear how a norm is elevated to or demoted from an *ius cogens* status, what consequences arise and which norms fit into the category.[1632] No procedure for identifying 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 and rests on *opinio iuris*, *ius cogens* norms find their basis and expression in maintaining an international *ordre public*.[1633] According to Malcolm Shaw, rules of an *ius cogens* character are simply created initially through the establishment of the particular proposition as a rule of general international law and then in its collective acceptance as a peremptory norm by the international law community of states as a whole.[1634] Universal acceptance of the rule as *ius cogens* therefore has to exist, which means that the rules have to be based upon custom or treaties.[1635] Considerations to be taken into account include whether or not the norm exists in a wide number of legal instruments, whether states have implemented proscriptions in national law and the extent to which national and international prosecutions have occurred.[1636] Several scholars emphasise the non-derogable nature of human rights which are considered to be peremptory, pointing to a common core of rights listed as non-derogable in major human rights treaties.[1637] This has, however, been criticised for concentrating too much on the intention of the parties to a treaty rather than on the nature of the norms.[1638] 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.[1639]

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1632 Ferdinandusse, *supra* note 88, p. 163.

1633 Yearbook of the International Law Commission, 1976, vol. II, UN Doc. A/CN.4/SER.A/1953/Add.1, p. 155

1634 Shaw, *supra* note 52, 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, *supra* note 1624, p. 68.

1635 Disagreement exists over the fact whether it is sufficient that a large majority of states support the norm. *See* the discussion in Hannikainen, *supra* note 1624, pp. 208-209, Shaw, *supra* note 52, p. 118.

1636 Bassiouni, *supra* note 1624, p. 70.

1637 T. Van Boven, 'Distinguishing Criteria of Human Rights', in K. Vasak and P. Alston (eds.), *The International Dimensions of Human Rights*, Vol. 1 (Greenwood Press, Westport, 1982), p. 43. *See however* T. Meron, 'On a Hierarchy of International Human Rights', 80 *American Journal of International Law* 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.

1638 Orakhelashvili, *supra* note 1625, p. 58.

1639 UN Doc. A/CN.4/L.682, *supra* note 1624, para. 376.

What then is the consequence of acknowledging a particular norm as *ius cogens*? Does it entail a particular obligation for the state beyond the absolute prohibition to engage in conduct that transgresses the norm? This is somewhat ambiguous. The ILC Draft Articles on State Responsibility oblige states to cooperate to bring to an end, through lawful means, serious contraventions of peremptory norms and to not recognise as lawful any situation created by a serious breach, nor render aid or assistance in maintaining such a position.[1640] 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 that 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.[1641]

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".[1642] Hannikainen also proposes that the function of such norms is to limit the right to conclude agreements.[1643] 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.[1644] Reservations against such norms will, however, be deemed inadmissible.[1645] Furthermore, regardless of national authorisation by legislative or judicial bodies that violate the norm, individuals are also bound by the principle.[1646]

Importantly, *ius cogens* norms require the enactment of domestic penal provisions prohibiting the conduct.[1647] It is unclear whether an *ius cogens* norm additionally entails an obligation on the part of states to prosecute and punish perpetrators of such violations. The ICTY in the *Furundzija* case made the important point that a consequence of holding a norm as *ius cogens* is that it grants the international community possibilities for applying the principle of *aut dedere, aut judicare*, indicating that every

1640 Article 41 of Draft Articles on Responsibility of States for Internationally Wrongful Acts, *supra* note 929. *See also* Hannikainen, *supra* note 1624, p. 313, Ferdinandusse, *supra* note 88, p. 182.

1641 *Prosecutor* v. *Furundzija*, *supra* note 28, para. 153.

1642 *Ibid*., para. 155.

1643 Hannikainen, *supra* note 1624, p. 1.

1644 Ferdinandusse, *supra* note 88, p. 171.

1645 Cassese, *supra* note 958, p. 207. Additional consequences include an impact on state immunities, treaties of extradition etc. *See also* VLCT Article 53.

1646 *Prosecutor* v. *Furundzija*, *supra* note 28, para. 155.

1647 Cassese, *supra* note 958, p. 219.

state is "entitled to investigate, prosecute and punish or extradite individuals […] who are present in a territory under its jurisdiction".[1648] Broad support among scholars also exists for the proposition that *ius cogens* norms give rise to an obligation on the part of states to either punish or extradite, which in turn can lead to support for the application of universal jurisdiction.[1649] Bassiouni even supports "the proposition that an independent theory of universal jurisdiction exists with respect to *ius cogens* international crimes".[1650] [1651] On the domestic level, Lord Wilkinson of the British House of Lords

1648 *Prosecutor* v. *Furundzija*, *supra* note 28, 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. 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, *supra* note 1625, pp. 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* Advisory Opinion OC-14/94, IACtHR, *supra* note 962. 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 trials, which established the concept of individual criminal responsibility in international law, emphasised that crimes are committed by 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.

1649 De Than and Shorts, *supra* note 45, p. 10, Ferdinandusse, *supra* note 88, p. 183, Adams, *supra* note 24, p. 386, K. Parker, 'Jus Cogens: Compelling the Law of Human Rights', 12 *Hastings International & Comparative Law Review* 411 (1989), p. 455, C. Bassiouni, 'Universal Jurisdiction for International Crimes: Historical Perspectives and Contemporary Practice', 42 *Virginia Journal of International Law* 81 (2001), p. 104.

1650 Bassiouni, *supra* note 1649, p. 104. Certain states also ascribe effects such as a duty to prosecute. Ferdinandusse, *supra* note 88, p. 185.

1651 Ferdinandusse, *supra* note 88, p. 185.

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 committed".[1652] The classification of a norm as *ius cogens* would then create consequences far beyond its constitutional aspects in circumventing the ability of states to consent to norms. It might also open the way for universal prosecutions.

*Ius cogens* norms are usually understood to have developed mainly through customary international law.[1653] However, since they are considered to be superior to "regular" customary norms, it appears that legal exceptions in the form of persistent objectors are precluded.[1654] 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, persistent objectors are rare since those norms that are considered *ius cogens* are also clearly accepted as customary international law and thus have incurred few objections.[1655]

The designation of 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

1652 *Regina* v. *Bow Street Metropolitan Stipendiary Magistrate, ex parte Pinochet Ugarte (No. 3)*, 24 March 1999, House of Lords, 119 ILR, <www.parliament.the-stationery-office.co.uk/pa/ld199899/ldjudgmt/jd990324/pino1.htm>, visited on 10 November 2010, p. 136. Lord Wilkinson. Proponents exist for the understanding that *ius cogens* norms simultaneously constitute obligations *erga omnes*. De Than and Shorts, *supra* note 45, 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*, 21 November 2001, ECtHR, No. 35763/97, <cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=Al-Adsani%20%7C%20v.%20%7C%20The%20%7C%20United%20%7C%20Kingdom&sessionid=61867803&skin=hudoc-en>, visited on 9 November 2010. 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.

1653 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".

1654 Byers, *supra* note 1624, p. 217.

1655 D. Shelton, 'International Law and "Relative Normativity"', in M. Evans (ed.), *International Law*, 1st ed. (Oxford University Press, Oxford, 2003), p. 158.

> and the individuals over whom they wield authority that the prohibition of torture is an absolute value form which nobody must deviate.[1656]

The concept of *ius cogens* has been invoked restrictively in practice by international judicial bodies and in declarations and treaties by the UN.[1657] The International Court of Justice (ICJ) has made reference to it but in rather elusive language.[1658] It has also been mentioned in the case law of the ICTY.[1659] The European Court of Justice (ECJ) has held that *ius cogens* norms place limits on the principle that UN Security Council resolutions have binding effect.[1660] The principle has even been described as "intellectually indefensible – at best useless and at worst harmful in the practical conduct of international relations".[1661] Though the existence of peremptory norms is viewed with scepticism by many scholars because of their rather abstract nature and unclear functions,[1662] they are gaining more acceptance in doctrine and in practice by international and domestic adjudicatory bodies. Antonio Cassese is of the opinion that the norms should not be underrated in the "guiding and channelling" of the conduct of states. It forbids states behaving in certain ways and induces them to fashion their conduct consistently in accordance with the norms. In this way *ius cogens* can be seen as to be working as a "world public order".[1663]

In fact, states quite frequently refer to a norm as *ius cogens* in their national legal systems, which in itself may be of relevance, even though often no specific effect

1656 *Prosecutor* v. *Furundzija*, *supra* note 28, para. 154.

1657 *Ibid*., p. 209.

1658 *See e.g. Case Concerning United States Diplomatic and Consular Staff in Tehran*, *supra* note 980, para. 41, *Case Concerning Military and Paramilitary Activities in and Against Nicaragua (Nicaragua* v. *The United States)*, *supra* note 63, paras. 190-191.

1659 *Prosecutor* v. *Furundzija*, *supra* note 28, para. 154, *Prosecutor* v. *Kupreskic*, *supra* note 97, para. 520, stating: "[M]ost 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."

1660 *Ahmed Ali Yusuf and Al Barakaat International Foundation* v. *Council of Europe and Commission of the European Communities*, 21 September 2005, ECJ, Case No. T-306/01, <eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62001A0306:EN:HTML>, visited on 9 November 2010, paras. 277 and 280, *Kadi* v. *Council of the European Union and Commission of the European Communities*, 3 September 2008, ECJ, Case No. T-315-01, <eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62001A0315:EN:HTM>, visited on 9 November 2010, para. 226.

1661 M. Weisburd, 'The Emptiness of the Concept of Jus Cogens, as Illustrated by the War in Bosnia-Herzegovina', 17 *Michigan Journal of International Law* 1 (1995-1996), p. 1.

1662 *Ibid*. *See also* A. D'Amato, 'It's a Bird, It's a Plane, It's Ius Cogens', 6:1 *Connecticut Journal of International Law* (Fall 1990).

1663 Cassese, *supra* note 958, 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.*W. Nagan and L. Atkins, 'The International Law of Torture: From Universal Proscription to Effective Application and Enforcement', 14 *Harvard Human Rights Journal* 87 (2001), p. 88.

is ascribed. Certain national legal systems have held that identifying a norm as *ius cogens* may give it national validity regardless of domestic regulations, or accord such norms superiority over national rules on matters such as immunity and prescription.[1664] However, such a prominent role for *ius cogens* rules has been rejected by most states, though it may be acknowledged that these norms have a privileged position in general.[1665] 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 instance, the House of Lords in *Pinochet III* argued that while the crime of torture was of a *ius cogens* nature, that status did not cure the fact of a lack of domestic implementing legislation, noting that *ius cogens* was "not a rule of jurisdiction".[1666] 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*".[1667] It is often emphasised that these norms prevent threats relating to the security, peace or essential values of society as a whole and are of particular importance for all nations to seek to redress.[1668] The norms consequently safeguard the interests of the international community rather than those of particular states.[1669] The International Law Commission has proposed that *ius cogens* norms consist of the prohibitions 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.[1670] Ian Brownlie additionally points to the principle of racial non-discrimination, crimes against humanity and the principle of self-determination as

1664 *See e.g.* Federal Constitution of the Swiss Confederation, 18 April 1999, Article 194(2). *Discussion in* E. de Wet, 'The Prohibition of Torture as an International Norm of Jus Cogens and its Implications for National and Customary Law', 15 *European Journal of International Law* 97 (February 2004).

1665 Ferdinandusse, *supra* note 88, pp. 164-165. *See* the US Court of Appeals, 9th Circuit, *US* v. *Matta-Ballesteros*, 1 December 1995, 71 F.3d 754, note 5, <caselaw.lp.findlaw.com/scripts/getcase.pl?navby=search&case=/data2/circs/9th/9150336.html>, visited on 9 November 2010. 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).

1666 *R.* v. *Bow Street Metropolitan Stipendiary Magistrate & Others, ex parte Pinochet Ugarte*, *supra* note 1652, p. 175.

1667 A. Watts, *The International Law Commission, 1949-1998, Volume 2: The Treaties* (Oxford University Press, Oxford, 1999), p. 741.

1668 De Than and Shorts, *supra* note 45, p. 10.

1669 Orakhelashvili, *supra* note 1625, p. 272.

1670 Draft Articles on Responsibility of States for Internationally Wrongful Acts, *supra* note 929, Commentary on Article 40, pp. 112-113.

*ius cogens*.[1671] 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.[1672] Lauri Hannikainen notes five categories that have acquired 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.[1673] The Inter-American Court on Human Rights has further held that the right to life is part of the *ius cogens* regime,[1674] 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".[1675] The prohibition against torture has also evolved into an *ius cogens* status.[1676] This was confirmed in the *Furundzija* case heard by the ICTY and in case law of the European Court of Human Rights.[1677]

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 – evident in such things as the anti-slave trade movement and piracy. With the development of international criminal law and the jurisprudence of the international tribunals, it is argued that the list of international crimes, including genocide, war

1671 Brownlie, *supra* note 960, (2008), p. 511. *See further* discussions on the content of *ius cogens* in A. Tahvanainen, 'Hierarchy of Norms in International and Human Rights Law', 24:3 *Nordisk Tidskrift for Menneskerettigheter* (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, *supra* note 1624, p. 219, mentions the use of force, genocide, slavery, torture and apartheid. *See further e.g.* Adams, *supra* note 24.

1672 Bassiouni, *supra* note 1649, 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 and Shorts, *supra* note 45, p. 10.

1673 Hannikainen, *supra* note 1624, p. 317.

1674 *Victims of the Tugboat "13 de Marzo"* v. *Cuba*, 16 October 1996, Inter-American Commission on Human Rights, Case 11.436, Report No. 47/96, <www.cidh.org/annualrep/96eng/cuba11436.htm>, visited on 9 November 2010, para. 79.

1675 Juridical Condition and Rights of the Undocumented Migrants, 17 September 2003, Inter-American Court of Human Rights, Advisory Opinion OC-18/03, <www1.umn.edu/humanrts/iachr/series_A_OC-18.html>, visited on 9 November, para. 101.

1676 UN Doc. E/CN.4/Sub.2/1998/13, *supra* note 10, para. 53, Viseur Sellers, *supra* note 148, p.293, General Comment No. 2, UNCAT, para. 1, de Wet, *supra* note 1664, A. Clapham, 'The Jus Cogens Prohibition of Torture and the Importance of Sovereign State Immunity', in M. Kohen (ed.), *Promoting Justice, Human Rights and Conflict Resolution Through International Law* (Martinus Nijhoff Publishers, Leiden, 2007).

1677 *Prosecutor* v. *Furundzija*, *supra* note 28, paras. 147-155. *Al-Adsani*, *supra* note 1652, para. 61, stating that the Court accepts "that the prohibition of torture has achieved the status of a peremptory norm in international law […]".

crimes and crimes against humanity, has reached the status of *ius cogens*.[1678] 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.[1679] Women may receive equal protection with respect to the harms that are recognised, but the harms from which they 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 to be an act of torture by regional human rights courts and may be prosecuted as such. In the setting of international criminal law, rape 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 an *ius cogens* norm has been raised, given the significant position that it holds in the body of human rights law.[1680] Ian Brownlie proposes the notion that, in fact, gender discrimination belongs to "the least controversial" examples of *ius cogens*.[1681]

Patricia Viseur Sellers maintains that the prohibition of rape in this sense is engaged in legal "piggybacking" as it enters by way of other crimes into the family of *ius cogens*.[1682] There is increasing evidence to show that the crime has attained the level of *ius cogens,* apart from the fact that it can form a constituent part of most accepted *ius cogens* norms. The jurisprudence of the ICTY and the ICTR coupled with the Rome Statute, UN resolutions, the enlarged attention paid to gender violence in international treaties together with the recent recognition of gender crimes in regional human rights courts all provide compelling evidence that offences of sexual violence are now considered to be among the most serious of international crimes.[1683] These are not merely indications of its development into a customary norm confirmed, for instance, by the ICRC Study on Customary Law, but that it extends far beyond this. It is now intrinsic to the universal legal conscience. This development supports the assertion that at least

1678 Askin, *supra* note 11, p. 293.

1679 H. Charlesworth and C. Chinkin, 'The Gender of Ius Cogens', 15 *Human Rights Quarterly* 63 (1993), p. 70.

1680 Eriksson, *supra* note 33, p. 139, Brownlie, *supra* note 1624, p. 513, Hannikainen, *supra* note 1624, p. 477.

1681 Brownlie, *supra* note 1624, p. 513.

1682 Viseur Sellers, *supra* note 148, p. 296.

1683 J. R. McHenry III, 'The Prosecution of Rape Under International Law: Justice That is Long Overdue', *Vanderbuilt Journal of Transnational Law* (October 2002), p. 20. *See further* Viseur Sellers, *supra* note 148, Sungi, *supra* note 154, Askin, *supra* note 11, p. 294, D. Mitchell, 'The Prohibition of Rape in International Humanitarian Law as a Norm of Jus Cogens: Clarifying the Doctrine', 15 *Duke Journal of Comparative & International Law* 219 (2005).

the crime of rape, as opposed to all forms of sexual violence, has risen to the level of *ius cogens*.[1684]

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 without question they are created on the basis of international consensus. States are as a consequence bound by the principles regardless of express consent.[1685] States must as a consequence enact domestic criminal laws prohibiting rape. Acknowledgment of the prohibition of rape or the non-discrimination principle as *ius cogens* is important for the purpose of binding states despite treaty obligations and objections, but also with regard to the possibility of resolving conflicts between rights. Gender discrimination as a higher norm in the hierarchy of international law would thus prevail over 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 significant from a moral standpoint by elevating it up as one of the most fundamental of prohibitions in international law. That in turn might well increase levels of reporting and investigations at the domestic level.

In conclusion, substantial support exists to assert 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 offence as an *ius cogens* norm are unclear, apart from the rules set out 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 the 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 topic for consideration is whether, when a norm is deemed to be 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.[1686] 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.

1684 Askin, *supra* note 11, p. 294.

1685 UN Doc. E/CN.4/2003/75, *supra* note 859, para. 67.

1686 Draft Articles on Responsibility of States for Internationally Wrongful Acts, *supra* note 929, Commentary on Article 40, p. 113.

However, little indication exists yet that states will be obliged to adopt a particular definition of 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 of regional human rights courts and soft law documents, one is able to draw the conclusion that despite the general wording of norms in such documents, and the scarcity of case law on the matter, the flexibility of states is becoming increasingly circumscribed in respect of 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 by way of a dynamic and evolutive method of interpretation, classifying rape as a form of torture, an invasion of the right to privacy and a manifestation of gender discrimination. Viewing rape as a form of torture has the added benefit of denoting the prohibition as an *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 at the personal 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 a great deal of support for the notion that the prohibition of rape has developed on the customary level as a human rights violation, the *opinio iuris* being 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 that condemn 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,[1687] all relevant to the acknowledgement of the prohibition of rape during times of armed conflict. The provisions of IHL are rarely interpreted in international or regional tribunals and courts as no such mechanisms were envisaged in the 1949 Geneva Conventions.[1688] Those Conventions presume instead national implementation and development. This chapter will thus primarily review regulations rather than case law on the prohibition on sexual violence. Whereas international humanitarian law (IHL) has few enforcement procedures, it has, however, been interpreted in the context of international criminal law, a body of law founded on both international human rights law and IHL. The focus will therefore be in the next chapter, detailing jurisprudence concerning rape from the *ad hoc* tribunals of the International Criminal Tribunal for the former Yugoslavia (ICTY) and International Criminal Tribunal for Rwanda (ICTR) and the regulations of the permanent International Criminal Court. The international criminal law tribunals frequently refer to the 1949 Geneva Conventions. It must, however, be remembered that while international criminal law shares common roots with international humanitarian law, particularly on war crimes, it has been noted that care must be taken before transposing IHL standards directly on to international criminal law, since the latter body of law has distinct principles of interpretation.[1689] IHL and 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

1687 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.

1688 Wagner, *supra* note 42, p. 356.

1689 Cryer, *supra* note 92, p. 11.

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 constantly evolving through the mechanism of soft law documents, which have the flexibility to be progressive and to draw inspiration from societal changes in ways that treaty law is rarely able to do.[1690] Efforts have, however, been made to advance and clarify the scope of IHL, also in relation to violence against women, for example, through the International Committee of the Red Cross (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 designed to regulate the protection of persons in armed conflicts who are not, or are no longer, participating in the hostilities.[1691] It also restricts the means and methods of such conflict.[1692] Domestic military codes regulating conflict, based upon anticipated reciprocal treatment by the opponent, preceded the present conventions regulating humanitarian law.[1693] International humanitarian law currently consists of a wide range of international treaties, of which the most important instruments are the four 1949 Geneva Conventions for the protection of victims of war, together with the two Additional Protocols.[1694] The Geneva Conventions have gained universal ratification and most of its provisions, if not all, are regarded as customary international law.[1695] This will be

1690 Gardam and Jarvis, *supra* note 335, p. 175.

1691 C. Greenwood, 'Definition of the Term "Humanitarian Law"', in D. Fleck (ed.) *The Handbook of International Humanitarian Law*, 2nd ed. (Oxford University Press, Oxford, 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.

1692 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 or 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.

1693 M. Newton, 'Comparative Complementarity: Domestic Jurisdiction Consistent with the Rome Statute of the International Criminal Court', 167 *Military Law Review* 20 (2001), p. 33.

1694 I shall only discuss Additional Protocol I and II. A third protocol was promulgated in 2005 on the additional emblem of the ICRC.

1695 C. Greenwood, 'Historical Development and Legal Basis', in D. Fleck (ed.) *The Handbook of International Humanitarian Law*, 2nd ed. (Oxford University Press, Oxford, 2008), 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, <www.icrc.org/IHL.nsf/(SPF)/party_main_treaties/$File/IHL_and_other_related_Treaties.pdf> visited on 10 December 2009 .

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.[1696]

Necessity and proportionality are important principles in IHL, meaning that a belligerent party may only apply the degree of force necessary to defeat the enemy and for the achievement of its objectives.[1697] 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.[1698] The rules thus seek to strike a balance between military imperative and humanity.[1699] Military necessity is consequently circumvented by moral and legal considerations.[1700] IHL applies to both international and non-international armed conflicts, however, bringing to the fore different instruments depending on the particular conflict.[1701] The enforcement of IHL relies on the domestic justice systems of individual states because no specific international adjudicatory bodies exist for this purpose. However, international bodies, such as the ICTY and ICTR, have also served to enforce certain provisions of IHL.[1702] Though international humanitarian law, similar to that of 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.[1703]

1696 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, 55th session, Supplement no. 10, (A/56/10), p. 284, *The Prosecutor* v. *Zoran Kupreskic and others*, *supra* note 97, para. 520, *Legality of the Threat of Use of Nuclear Weapons*, 8 July 1996, ICJ, Advisory Opinion, ICJ Reports 1996, para. 79.

1697 L. Green, *The Contemporary Law of Armed Conflict* (Manchester University Press, Manchester, 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, *supra* note 46, p. 59.

1698 *See* Articles 48-55, Additional Protocol I. *See also* discussion by Greenwood, *supra* note 1695, pp. 35-37.

1699 *See e.g.* G. Best, *War & Law Since 1945* (Oxford University Press, Oxford, 1994), p. 115, Green, *supra* note 1697, p. 348, A. P. V. Rogers, *Law on the Battlefield* (Manchester University Press, Manchester, 2004), p. 3, D. Jinks, 'Protective Parity and the Laws of War', 79 *Notre Dame Law Review* 1493 (2004), p. 1494.

1700 Green, *supra* note 1697, p. 348.

1701 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.

1702 Werle and Jessberger, *supra* note 50, p. 279.

1703 D. Fleck (ed.), *The Handbook of International Humanitarian Law*, 2nd ed. (Oxford University Press, Oxford, 2008), p. xiii.

## 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.[1704] The protection of women in war is also to be found in several early texts, such as the Belli Treatise of 1563, which held that the crime of rape during wartime was punishable by death.[1705] Hugo Grotius, in the 1600s, argued that sexual violence committed both during peace and wartime must be punished.[1706] Specific regulations on the protection of women were also included in bilateral and multilateral treaties from the 16th century onwards, such as the Treaty of Amity and Commerce between the United States and Prussia in 1785, which declared: "If war should arise between the two contracting parties…all women and children […] shall not be molested in their persons."[1707]

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.[1708] Rape was considered to be one of the most serious offences and Article 44 set down: "All wanton violence committed against persons in the invaded country, all destruction of property not commanded by the authorized officer, all robbery, all pillage or sacking, even after taking place by main force, *all rape,* wounding, maiming, or killing of such inhabitants, are prohibited under the penalty of death, or such other severe punishment as may seem adequate for the gravity of the offence."[1709] As Patricia Viseur Sellers observes, the regulations spoke of a rise in the notion of personhood, evident in 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 […]"[1710]

Several other domestic documents also contained regulations on the protection of female honour. The Oxford Manual, devised by the Institute of International Law in 1880 to serve as a model for domestic laws, affirmed: "Human life, female honour, religious beliefs, and forms of worship must be respected. Interference with family life is

1704 Askin, *supra* note 11, p. 299.

1705 Pierion Belli, de re militari et belli tractatus (Herbert Nutting Trans., 1949), (1563). *See* Askin, *supra* note 205, p. 26.

1706 Askin, *supra* note 11, p. 299.

1707 Treaty on Amity and Commerce, July 9-Sept. 10, 1785, US – Prussia, Article 23.

1708 L. Doswald-Beck and S. Vité, 'International Humanitarian Law and Human Rights Law', No. 293 *International Review of the Red Cross* (March-April 1993), pp. 94-119.

1709 Emphasis added.

1710 P. Viseur Sellers, 'The Cultural Value of Sexual Violence', 93 *American Society of International Law Procedure* 312 (1999), p. 317.

to be avoided."[1711] The 1874 Declaration of Brussels, aiming to codify international laws of war, also sought to protect the woman's right to honour: "[T]he honour and rights of the family […] should be respected."[1712]

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.[1713] 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 means of conquest and domination.[1714] Similarly, during the Second World War, sexual violence was used as a weapon of war, evidence of which was brought to international attention during the Nuremberg trials. The war, in which millions were 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, persons were held to be morally responsible at the international level, piercing the veil of state sovereignty and, in a way assuming the role of the domestic justice system in prosecuting such individuals. The new concept of international individual criminal responsibility was motivated by the need to eradicate impunity in relation to the most serious crimes, since large-scale atrocities rarely are punished domestically owing to the common involvement of the state machinery. Accordingly, "individuals have international duties which transcend the national obligations of obedience imposed by the individual State".[1715]

The International Military tribunals at Nuremberg (IMT) and of the Far East (IMTFE) prosecuted 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 wide-

1711 Bassiouni, *supra* note 255, p. 347.

1712 *Ibid.*, p. 347.

1713 Article 46 of 1907 Hague Convention.

1714 N. Erb, 'Gender-Based Crimes under the Draft Statute for the Permanent International Criminal Court', 29 *Columbia Human Rights Law Review* 401 (1998), p. 401.

1715 Trial of the German Major War Criminals: Proceedings of the International Military Tribunal Sitting at Nuremburg (IMT Docs.), vol. 1, p. 223.

ly documented occurrences of rape during the war.[1716] Though rape allegations were brought before the court through testimony, these were handled in a reluctant manner, for instance, by the French prosecutor at the trials who refused to describe sexual offences in detail.[1717] The court proceeding transcripts are filled with evidence of various forms of sexual violence, including sexual mutilation such as cutting off the breasts of victims.[1718] Women were raped in front of neighbours and relatives.[1719] Brothels were also established.[1720]

Subsequent Nuremberg trials were held for 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 various judgments.[1721] The transcripts of the Tokyo trials also contained extensive testimonies of sexual violence.[1722] The rape of Nanking is described thus:

> 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

1716 Askin, *supra* note 11, p. 301. According to Mary Ann Tetreault, the Allies were inhibited in fully prosecuting these crimes partly due to the mass rapes committed by Russian troops in Berlin. *See* Tetreault, *supra* note 723, p. 198.

1717 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".

1718 *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.").

1719 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").

1720 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.").

1721 Article II(1)(C).

1722 *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, *supra* note 205, p. 62.

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.[1723]

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 Toyoda, Matsui and Hiroto for their actions in Nanking included charges of rape and sexual assault.[1724] 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".[1725] Rape and other forms of sexual violence were, however, classified as "inhumane treatment", "ill-treatment" and "a failure to respect family honour and rights".[1726] Several generals in addition to the Foreign Minister were held accountable for various crimes that included rape.[1727] Matters of non-consent or force were not raised during those hearings, nor were the *actus reus* elements. The definition of rape was thus not an issue.

The enforced prostitution of the so-called comfort women was largely ignored and remained unrecognised until the establishment of the Women's International War Crimes Tribunal by NGOs in Tokyo in 2000.[1728] The lack of codification of rape as an international crime and the disregard of witness testimonies detailing sexual violence clearly demonstrated the standpoint that rape was not considered to be 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 of the international community over the extensive degree of persecution of civilians, the original Geneva Conventions were judged to be inadequate. The Conventions were accordingly reformulated in 1949, creating the Fourth Convention protecting civilians in times of war. The Conventions were supplemented by two Additional Protocols in 1977. The Conventions and the Additional Protocols now constitute the foundation of international humanitarian law. Many provisions of the four conventions now form part of customary international law and are therefore binding on all states, regardless of whether or not they are a party to the treaties, as

1723 IMTFE Docs, vol. 20, p. 49, 604.

1724 IMTFE Docs, Hiroto and Toyoda: p. 49, 788-792, Matsui: p. 49, 814.

1725 *United States* v. *Soemu Toyoda*, Official Transcript of Record of Trial, p. 5006, cited in Cleiren, *supra* note 880, p. 481.

1726 IMTFE docs. *See* discussion in Bensouda, *supra* note 11, p. 403.

1727 Ellis, *supra* note 12, p. 226.

1728 The Women's International War Crimes Tribunal on Japan's Military Sexual Slavery, held in Tokyo 8-12 December 2000. Judgment was passed on 4 December 2001, which found all ten defendants guilty.

made evident in the ICRC Study on Customary Law.[1729] In the *Nuclear Weapons* case, the International Court of Justice (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".[1730] All states have ratified the conventions but the additional protocols have not gained an equal amount of ratifications.[1731] The promulgation of customary norms is thus of exceptional importance.

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".[1732] IHL has constructed a regime of "protected persons", including the sick and wounded, medical personnel, civilians, and prisoners of war.[1733] Because equality is a fundamental principle of IHL, women benefit from the general protections of the Geneva Conventions in the same way as men, whether as civilians, combatants or those no longer a part of hostilities.[1734] Approximately 40 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.[1735] The rules protect certain categories, such as pregnant women, mothers of young children, and women in detention. They also contain general prohibitions on sexual violence. Only one article in the Fourth Geneva Convention explicitly prohibits rape. Further provisions on the matter exist in the Additional Protocols. No definition of the crime, however, is provided. Article 27 of the Fourth 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".[1736] The Commentary to the Article further accentuates:

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1729 *The ICRC Study on Customary International Humanitarian Law*, *supra* note 21, p. 606, Askin, *supra* note 11, p. 290.

1730 *Legality of the Treat or Use of Nuclear Weapons*, *supra* note 1696, p. 257, para. 79.

1731 *See* <www.icrc.org>.

1732 Preliminary Remarks to the Geneva Conventions, International Red Cross, 12 August 1949.

1733 Geneva Convention I concerns the wounded and sick, Geneva Convention II wounded, sick and those shipwrecked at sea, Geneva Convention III prisoners of war, Geneva Convention IV civilians. Protected persons are defined in the following manner in Article 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."

1734 *See e.g.* Article 12 First Geneva Convention, Article 12 Second Geneva Convention, Article 16 Third Geneva Convention, Article 27 Fourth Geneva Convention, Article 74 Protocol I, Article 4 Protocol II.

1735 F. Krill, 'The Protection of Women in International Humanitarian Law', 249 *International Review of the Red Cross* 337 (August 1995), p. 363.

1736 Convention (IV) Relative to the Protection of Civilian Persons in Time of War. Geneva, 12 August 1949.

> 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.[1737]

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".[1738] The language of the Fourth Convention has thus been modernised through the additional protocols in the removal of the focus on the honour of the woman to the protection of dignity. It must, however, be noted that the additional protocols do not enjoy universal ratification and the provision of the Fourth Geneva Convention is still of particular relevance.

The Commentary of the International Committee of the Red Cross (ICRC) to the provisions in the Conventions heavily criticises the widespread sexual assault directed against women during the Second World War, and its subsequent lack of prosecution. It categorically denounces sexual violence in these 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."[1739] The Commentary also notes the protection of women against being "forced into immorality by violence" and "family rights" in connection with sexual violence.[1740]

The fact that the harm of sexual violence in this sense is described as the dishonour of women has received substantial criticism for constituting an outdated understanding of rape.[1741] Though it recognises rape as a violation of the honour of a *woman*,

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1737 Commentary on the Fourth Geneva Convention, Article 27.

1738 Article 75(b) Protocol I, Article 4(2)(e) Protocol II.

1739 Geneva Convention IV relative to the Protection of Civilian Persons in Time of War, Commentary, Article 27, p. 206.

1740 *Ibid*., p. 206.

1741 J. Gardam, 'Women, Human Rights and International Humanitarian Law', 324 *International Review of the Red Cross* 421-432 (1998), C. Niarchos, 'Women, War and Rape: Challenges Facing the International Tribunal for the Former Yugoslavia', 17 *Human Rights Quarterly* 671-676 (1995), C. McDougall, '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, Leiden, 2006), p. 343. Certain feminist scholars maintain 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 dif-

as opposed to domestic codes dwelling on the honour of her husband or family, it arguably fails to recognise the brutality of sexual violence and applies a value-laden term that implies that the harm is itself a violation of property. It similarly concerns itself mainly with the social value attached to women's chastity and that virginity and chastity, by implication, are preconditions for recognising the deed as an offence.[1742] 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.[1743]

The provision on grave breaches in the four Geneva Conventions and Additional Protocol I is of special importance, since the list of violations carries with it particularly far-reaching state obligations. The breaches are defined thus:

> 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.[1744]

All state parties must enact laws that provide for individual criminal responsibility,[1745] actively search for perpetrators and exercise jurisdiction over such persons, alternatively hand them over to other states that will exercise such jurisdiction.[1746] The grave

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ferent way, a general category of rules that is not inclusive of the reality for women cannot respond to their situation." *See* Gardam and Jarvis, *supra* note 335, 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. H. Durham, 'International Humanitarian Law and the Protection of Women', in H. Durham and T. Gurd (eds.), *Listening to the Silences: Women and War* (Martinus Nijhoff Publishers, Leiden, 2005), p. 97.

1742 Lindsey, *supra* note 609, p. 32, Kalosieh, *supra* note 410, p. 122, Dixon, *supra* note 345, 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, *supra* note 336, para. 4.

1743 Geneva Convention IV relative to the Protection of Civilian Persons in Time of War, Commentary, Article 27, p. 202. One should bear in mind that the language in the Conventions reflects their creation in 1949.

1744 Article 147 Geneva Convention IV.

1745 Article 49 Geneva Convention I, Article 50 Geneva Convention II, Article 129 Geneva Convention III, Article 146 Geneva Convention IV.

1746 Article 50 Geneva Convention I, Article 51 Geneva Convention II, Article 130 Geneva Convention III, Atricle 147 Geneva Convetion IV, Articles 11 and 85 Additional Protocol 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

breaches system is thus connected to the principle of *aut dedere aut judicare*, which applies irrespective of where the crime in question 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.[1747] It is therefore generally held that this provides a basis for universal jurisdiction.[1748]

The list of grave breaches contains no reference to gender-based violations, which has singularly aggrieved women's rights experts. Rhonda Copelon suggests that "this failure to recognize rape as violence is critical to the traditionally lesser or ambiguous status of rape in humanitarian law".[1749] However, though rape is not explicitly mentioned, it has been concluded that sexual violence does in fact fall within the regulation by way of interpretation.[1750] The language in the grave breaches provisions is intentionally broad and there is a general agreement that the article should be interpreted liberally.[1751] Sexual crimes may be covered by provisions such as those prohibiting "torture",[1752] "inhuman treatment",[1753] "wilfully causing great suffering"[1754] and "serious injury to body or health".[1755] The ICRC in a 1992 *aide-mémoire* stated that "the act of

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* T. Meron, 'International Criminalization of Internal Atrocities', 89 *American Journal of International Law* (1995), p. 555.

1747 UN Doc. E/CN.4/Sub.2/1998/13, *supra* note 10, para. 86.

1748 Green, *supra* note 1697, p. 45. *See also* C. Lopes and N. Quénivet, 'Individuals as Subjects of International Humanitarian Law and Human Rights Law', in R. Arnold and N. Quénivet (eds.), *International Humanitarian Law and Human Rights Law: Towards a New Merger in International Law* (Martinus Nijhoff, Leiden, 2008), p. 228.

1749 R. Copelon, 'Surfacing Gender: Re-Engraving Crimes Against Women in Humanitarian Law', 5 *Hastings Women's Law Journal* 243 (1994), p. 249. The failure lies in solely recognising rape as a violation of the woman's honour. *See also* Durham, *supra* note 1741, p. 98, Gardam and Jarvis, *supra* note 335.

1750 *The ICRC Study on Customary International Humanitarian Law*, *supra* note 21, pp. 323 *et seq*, Charlesworth and Chinkin, *supra* note 33, p. 316, Askin, *supra* note 11, p. 311.

1751 Askin, *supra* note 11, p. 310.

1752 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. D. Fleck and R. Wolfrum, *supra* note 942, p. 695.

1753 Inhuman treatment is understood as any treatment that 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.

1754 The "wilful imposition of suffering" corresponds with the prohibition on torture and inhuman or degrading treatment and refers to both physical and psychological suffering. D. Fleck and R. Wolfrum, *supra* note 942, p. 696. However, it is understood that it includes acts that do not meet all the conditions set down for the characterisation of torture.

1755 *The ICRC Study on Customary International Humanitarian Law*, *supra* note 21, pp. 323 *et seq*., Askin, *supra* note 11, p. 310, Bassiouni, *supra* note 255, p. 353.

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" included rape.[1756] 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, moreover, has 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 justice and punish those responsible".[1757] The fact that rape is considered to be a grave violation only by 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.[1758]

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.[1759] The jurisprudence of the *ad hoc* tribunals affirms that rape is prohibited by Common Article 3.[1760] The protections listed in Common Article 3 pertain to all parties to a conflict and is part of international customary law.[1761]

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 being due to an inadequacy of the rules, but rather to "a lack of willingness to respect them, to a lack of means to enforce them and to uncertainty as to their application in some

1756 International Committee of the Red Cross, Aide-Mémoire, para. 2, 3 December 1992.

1757 ICRC, Statement before the Commission for Rights of Women, European Parliament, Brussels, 18 February 1993. *See also* ICRC update on the Aide-Mémoire on rape committed during the armed conflict in ex-Yugoslavia, of 3 December 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".

1758 Bennoune, *supra* note 719, p. 388.

1759 *The ICRC Study on Customary International Humanitarian Law*, *supra* note 21, p. 324. Bassiouni, *supra* note 255. *See however* Additional Protocol II, which also offers protection in non-international conflicts.

1760 *See e.g. Prosecutor* v. *Miroslav Kvocka*, *supra* note 30, footnote 409, p. 63. It also noted that rape is a crime against Article 27 Fourth Geneva Convention, Article 76(1) Additional Protocol I, and Article 4(2)(e) Additional Protocol II.

1761 UN Doc. E/CN.4/1998/87, *supra* note 11, para. 74. *See also Prosecutor* v. *Tadic*, *supra* note 584, 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."

circumstances".[1762] Disregard for the rules was discussed at a conference in 1993 for the purpose of evaluating 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 need to be conducted. This is further discussed below.[1763] Similar arguments have been proposed regarding the protection of women's particular needs in armed conflicts – that is, that the legal regime of IHL is adequate but requires stricter enforcement.[1764] For example, the ICRC has 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".[1765] This has been criticised by certain feminist authors who argue that the body of IHL is in itself fundamentally flawed.[1766]

Despite the lack of a definition of the crime, the condemnation of rape is of particular importance with regard to the four Geneva Conventions, considering the status of customary international law and the universal jurisdiction of the crimes deemed to be grave breaches. The question has been raised whether the regulations of the 1949 Geneva Conventions are superfluous to the protection of women when set against the rise of international criminal law and the International Criminal Court (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 upon IHL regulations. Additionally, the ICC is founded on the principle of complementarity and thereby relies on the primary jurisdictions of states. 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.

## 8.6 The ICRC Study on Customary International Humanitarian Law

In 2005 the International Committee of the Red Cross published a comprehensive study detailing current established customary international humanitarian law.[1767] The

1762 *The ICRC Study on Customary International Humanitarian Law*, *supra* note 21, Introduction. Sassòli notes that a credibility gap exists between the law and reality. *See* Sassòli, *supra* note 46, p. 67.

1763 *See* Henckaerts, *supra* note 42, p. 176.

1764 J. Gardam, 'Women and Armed Conflict: The Response of International Humanitarian Law', in H. Durham and T. Gurd (eds.), *Listening to the Silences: Women and War* (Martinus Nijhoff Publishers, Leiden, 2005), pp. 114-116. Certain enforcement mechanisms, such as the protecting powers and the International Humanitarian Fact-Finding Commission tend not 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, *supra* note 46, pp. 54-55.

1765 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.

1766 Gardam, *supra* note 1764, p. 118.

1767 Henckaerts and Doswald-Beck, *supra* note 21, (2005).

fundamental protections listed in the study are drawn from the traditional sources of customary law, which are state practice and *opinio iuris*.[1768] International human rights law is at times included to "support, strengthen and clarify analogous principles of international humanitarian law".[1769] It should, however, be noted that this study has met with substantial criticism for its methodology and, at times, the thin basis from which it has drawn conclusions as to customary law.[1770]

The significance of rules being classified as customary is naturally that states are, apart from persistent objectors, bound by the regulations regardless of whether or not they have ratified treaties on the matter. While the four Geneva Conventions have been universally ratified, the same is not true of the Additional Protocols. Furthermore, international humanitarian treaty law does not regulate in sufficient detail the most common forms of armed conflict today – those that are non-international in character. Custom is therefore purported to provide more specificity and substance to treaty regulations.[1771] Evincing customary international law is further considered important to the work of courts and those international organisations that are frequently called upon to elaborate on the content of such, for example, the *ad hoc* tribunals.[1772] In fact, the study has already had an impact on both international and national courts and tribunals.[1773]

Most importantly, rape and other forms of sexual violence are prohibited as norms of customary international law.[1774] In 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

1768 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.* Widespread ratification of treaties was also 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 them. *See* Henckaerts, *supra* note 42, pp. 179-184. Concerning the collection of national practice, countries were selected on the basis of geographic representation as well as experience of armed conflict. *See* I. Scobbie, 'The Approach to Customary International Law in the Study', in E. Wilmshurst and S. C. Breau (eds.), *Perspectives on the ICRC Study on Customary International Humanitarian Law* (Cambridge University Press, Cambridge, 2007), p. 185.

1769 Henckaerts, *supra* note 42, p. 196.

1770 The use of some of the materials has been criticised. *See* Cryer, *supra* note 107, p. 25.

1771 Henckaerts, *supra* note 42, p. 178.

1772 Introduction, *The ICRC Study on Customary International Humanitarian Law*, *supra* note 21.

1773 Cryer, *supra* note 107, p. 240, M. MacLaren and F. Schwendimann, 'An Exercise in the Development of International Law: The New ICRC Study on Customary International Humanitarian Law', 6:9 *German Law Journal* (2005), p. 1231.

1774 *The ICRC Study on Customary International Humanitarian Law*, *supra* note 21, Rule 93, p. 323.

and cruel treatment, together with "outrages upon personal dignity".[1775] The study also finds support in the explicit mention of rape in Additional Protocols I and II and in 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 the national legislation of many countries, classifying rape as a war crime, as well as the widespread condemnation of sexual violence by states and international organisations. Condemnation is also evident in national military manuals. The discussion of state practice with regard to sexual violence has, however, been seen as lacking in certain respects, such as in the failure to mention the international outcry over the use of comfort women during the Second World War.[1776] The study records that, with regard to human rights law, rape has mainly been prohibited under regulations on torture or cruel, inhuman and degrading treatment.

As for the definition of rape, the ICRC quotes those developed by the ICTY and ICTR in the *Furundzija, Kunarac and Akayesu* cases.[1777] 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 advanced further. It does, however, emphasise that the crime is non-discriminatory in its application in that both men and women are potential victims. This is also evident in the definition in the Elements of Crimes of the 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 the subject of criticism.[1778]

Also of interest is the prohibition on torture and cruel, inhuman and degrading treatment, which is emphasised as being 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.[1779] It notes the ICTY's understanding that the definition of torture does not contain the same elements under IHL as those under international human rights law, most importantly on the lack of requiring a state nexus. Similarly, it points to the lack of a "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 pre-requisite. The study is thus important in confirming the customary status of the prohibition of rape, but does not further develop proposals as to the customary elements of its definition.

1775 *Ibid.*, p. 323.

1776 S. Breau, 'Protected Persons and Objects', in E. Wilmshurst and S. C. Breau (eds.), *Perspectives on the ICRC Study on Customary International Humanitarian Law* (Cambridge University Press, Cambridge, 2007), p. 199.

1777 *The ICRC Study on Customary International Humanitarian Law*, *supra* note 21, p. 327.

1778 Cryer, *supra* note 107, p. 250.

1779 *The ICRC Study on Customary International Humanitarian Law*, *supra* note 21, Rule 90, pp. 316 *et seq.*

## 8.7 Intergovernmental Organisations and the Prohibition of Sexual Violence in Armed Conflicts

The UN Security Council has in several resolutions condemned the practice of sexual violence in armed conflicts.[1780] As Security Council resolutions, they are binding on all United Nations (UN) member states. Resolution 1325, passed in 2000, was the first to specifically address the effects of war on women.[1781] It recognised that women and children are especially affected by armed conflict and are increasingly targeted by combatants, and reaffirmed the need to implement fully international humanitarian and international human rights law. It also called on all parties to such conflicts to take special measures to protect women against rape and other forms of sexual abuse. Resolution 1820 particularly remarked on 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 [...]".[1782]

Both Resolution 1325 and 1820 recognise that the protection of women is a matter of "the maintenance and promotion of international peace and security".[1783] 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 urge all states to establish effective systems for investigating and punishing perpetrators of sexual violence within the context of armed conflict.[1784] Resolution 1820 stresses that states must bear prime responsibility for respecting and ensuring the human rights of their citizens, as well as individuals on their territory. The Resolution further insists that parties to an armed conflict refrain from sexual abuse, enforce appropriate military disciplinary measures, uphold principles of command responsibility, instruct troops on the prohibition of sexual violence, dispel myths that fuel sexual violence and move women and children under imminent threat of sexual violence to places of safety.[1785]

The 2009 UN Security Council Resolution 1888 entitled "Women and Peace and Security" builds on previous resolutions and advances the call for an end to the culture of impunity with regard to sexual violence against women in armed conflicts. It emphasises that ending it 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".[1786] It obliges all parties to a conflict to take appro-

1780 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.

1781 UN Doc. S/RES/1325.

1782 Preamble, para. 7.

1783 Preamble, para. 3, para. 11, respectively.

1784 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.

1785 Resolution 1820, para. 3.

1786 UN Security Council Resolution 1888 of 2009.

priate 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 previously mentioned, states are also duty bound to undertake legal and judicial reforms to ensure the prosecution of perpetrators.[1787]

A problem is the divergence that exists between 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 1325 (2000) on the impact of armed conflict on women and children – nearly 10 years after its promulgation.[1788] This may be due in part to an absence of clear monitoring mechanisms for implementation. The great challenge lies in strengthening respect for UN resolutions among member states and encouraging their domestic implementation.

In a report by the UN Commission on Human Rights on systematic rape committed during armed conflict, the importance was made clear of establishing an awareness of the seriousness of crimes of sexual and gender-based violence at the national level and to deal properly with such 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".[1789] It is noted that it is not uncommon for there to exist a general lack of will or an inability to prosecute 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 victims provided with effective redress.[1790]

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

1787 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 […]."

1788 Report of the Secretary-General, Women and Peace and Security, UN Doc. S/2009/465, 16 September 2009, para. 49. Ten 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.

1789 UN Doc. E/CN.4/Sub.2/2005/33, *supra* note 702, para. 40.

1790 UN Doc. E/CN.4/Sub.2/1998/13, *supra* note 10, para. 8.

> the victim. Rape is defined in gender-neutral terms, as both men and women are victims of rape.[1791]

The report further elaborates on the elements:

> [L]ack 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 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 […].[1792]

The unique characteristics of rape in armed conflicts are thus accorded emphasis, bearing in mind the inherent coercive circumstances. Force is consequently deemed to be more appropriate as an element than non-consent. Of significance is that 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 a crime against humanity.[1793] In Resolution 1670 of 2009, the Parliamentary Assembly asserted that sexual violence against women during armed conflict is a crime against humanity and a war crime.[1794] The Resolution understands the existence of such sexual violence to be a matter of gender inequality and "patriarchal societal modes".[1795]

Various human rights documents have urged the eradication of sexual violence committed also in the course of armed conflicts. The 1993 World Conference on Human Rights paid close attention to the situation of 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".[1796] In the 1995 Beijing Declaration the systematic rape of women in such circumstances is noted: "All violations of this kind, including in particular murder, rape, including systematic rape, sexual slavery and forced pregnancy require a particularly effective

1791 *Ibid.*, para. 24.

1792 *Ibid.*, para. 25.

1793 Resolution 1212 (2000), Council of Europe. *See also* Recommendation 1403 (1999) on Kosovo.

1794 Resolution 1670 (2009), Sexual Violence against Women in Armed Conflict, Parliamentary Assembly, Council of Europe, para. 1.

1795 *Ibid.*, para. 9. It is seen as "gender-based persecution" in para. 10(3).

1796 Vienna Declaration and Programme of Action, A/CONF.157/23, 12 July 1993, para. 38.

response."[1797] It observed that "parties to conflict often rape women with impunity, sometimes using systematic rape as a tactic of war and terrorism".[1798] The 2003 Protocol on the Rights of Women in Africa obliges states to protect women in these situations against sexual exploitation and calls for such acts to be considered war crimes, genocide, or crimes against humanity.[1799]

Acknowledgment of this perilous situation, particularly for women, has therefore been advanced in the international community together with the realisation that impunity often follows as a consequence. The eradication of impunity for sexual violence has become a principal objective, and obligations imposed on states to criminalise and punish perpetrators have increased. As will be seen subsequently, though the international community has become more efficient in the way of creating *ad hoc* tribunals and a permanent court of international criminal law, the main responsibility still lies with the individual state to provide protection – thus the focus of this book on national implementation in the process of condemning rape.

1797 Beijing Declaration, para. 132.

1798 *Ibid.*, para. 135.

1799 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 on the extent of state obligations in relation primarily to the International Criminal Court (ICC). This considers the level of state cooperation and national implementation of international crimes such as rape, in order to evince state obligations on its definition. The analysis of the jurisprudence of *ad hoc* tribunals will serve several purposes regarding this focus. The case law has influenced the definition of rape adopted by the ICC which affects many member states and it may continue to do so. It has also affected 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.[1800] Lastly, the reasoning in the cases raises important questions on the nature of rape and its elements in the context of international criminal law.

As will be demonstrated, unlike the position in the international human rights field, a substantial number of cases and regulations exist concerning the definition of rape, though the results are somewhat inconsistent. Similar concepts are discussed as in human rights law and municipal law, such as non-consent, force, the *actus reus* and the *mens rea* of the crime. However, particular concerns are raised regarding the coercive nature of the context in which rape often occurs under international criminal law. The degree to which coercion informs the definition of rape tends to be the main issue. The "contextual" elements for each international crime, *e.g.* requiring the con-

1800 *See* in respect of 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: M. H. Arsanjani, 'The Rome Statute of the International Criminal Court', 93 *American Journal of International Law* 22 (1999), p. 25. In general: M. Karagiannakis, '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', 12:2 *Leiden Journal of International Law* (1999), p. 480.

text of a widespread attack or armed conflict, are therefore particularly important. The chapter will conclude with a general discussion on the possibilities of harmonising the approach to the prohibition of rape under international criminal law and international human rights law, or whether the distinct nature of the regimes necessitates a continued fragmented course.

## 9.2 Prosecution of Rape – The *Ad Hoc* Tribunals

The International Criminal Tribunal for Rwanda (ICTR), International Criminal Tribunal for the former Yugoslavia (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. The tribunals have reviewed conventions such as the United Nations (UN) Convention against Torture and the 1949 Geneva Conventions, customary international law, for example, 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 interchanging 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.[1801] The difference between the charges of rape as a crime against humanity and as a war crime is that the former 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.[1802] Genocide requires the intent to destroy part of or a whole group, based upon nationality, ethnicity, race or religion.[1803] Owing to the difficulty of proving that the intended assault was part of an orchestrated plan, the prosecutor of the ICTY has mainly charged rape as a grave breach or a violation of the laws and customs of war – that is, war crimes.[1804] In the ICTR rape has successfully been charged as all three crimes, with convictions also achieved for genocide.[1805]

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 con-

1801 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.

1802 *See* Articles 3 and 4 of the ICTR Statute and Articles 2, 3 and 5 of the ICTY Statute.

1803 Article 2 ICTR Statute, Article 4 ICTY Statute.

1804 S. Murphy, 'Progress and Jurisprudence of the International Criminal Tribunal for the Former Yugoslavia', 93 *American Journal of International Law* 57 (January 1999), p. 88.

1805 *See in the following The Prosecutor* v. *Jean-Paul Akayesu*, *supra* note 30.

cern in previous conflicts. The tribunals have also successfully given substance to the prohibition of rape by defining the crime. As will be seen in the following sections, the legacy of both *ad hoc* tribunals concerning the definition of rape has been one of ambivalence, balancing the consideration for sexual autonomy with the particular coercive aspects of armed conflicts, and 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 been analysed to a limited extent in case law as it does not inform whether the *definition* should 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 they are of interest because they reflect issues such as the balance between the rights of the accused versus the victim.[1806] The first version proposed by the judges held that in cases of sexual assault "consent shall not be allowed as a defence".[1807] This reflected the view that an inquiry into the non-consent of the victim was 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 was necessary. The procedural rule would then reflect a difference between rape in peacetime as opposed to that in armed conflict. This first version has also been her-

1806 The drafting process of Rule 96 clearly reflects the balancing act between the due process rights of the accused versus diminishing the traumatisation 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 peace, the possibility of false reporting must always be taken into account for the purposes of due process rights. Certain authors hold that while 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, *supra* note 407, p. 642.

1807 UN Doc. IT/32 (1994).

alded as a step towards eliminating gender prejudice in the courtroom.[1808] Arguably, the victim would be spared the humiliation of publicly recanting the details of the event, as well as his or her emotions and behaviour while countering allegations of consenting to the act.

The second version was clearly solicitous. All possible avenues of defence were to be open to the defendant, maintaining the due process rights of an accused person and thereby ensuring a fair trial. Though the first draft considered the oppressive nature of armed conflicts, it was criticised for encroaching on the rights of the defendant by finding him or her guilty based upon the context of widespread violence rather than on an investigation into the specific actions of the accused.[1809] A blanket rule of classifying all sexual relations as rape between members of opposing sides to the conflict was to be avoided.[1810] The draft was accordingly revised and instead provided for the possibility of making use of consent as a defence, but listed various situations where it was automatically negated, which remains in the current version – for example, in cases of duress or detention. Those situations where consent was disallowed as a defence were, however, sensitive to the particulars of armed conflict and in consequence rather broadly worded.

The rule is important from several standpoints and in certain aspects it differs greatly from most procedural rules found in domestic jurisdictions. Though the rule refers to employing consent as a "defence", the ICTY in the *Kunarac* case dismissed the traditional understanding that such a defence would shifting of the burden of proof on to the accused. Instead it interpreted "consent as a defence" in the Rule as outlining various coercive situations where non-consent was presumed, such as detention. In such circumstances it is presumed that consent cannot be freely given and that any apparent compliance expressed by the victim would not be considered to be voluntary. It is significant that the Tribunal emphasised that the above-mentioned situations were not the only conditions where consent was negated and avoided providing a static and specified list.[1811]

### 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.[1812] According to reports, ap-

1808 Fitzgerald, *supra* note 407, p. 641.

1809 *Ibid*., p. 641. The discussions concerning the introduction of the rule were greatly divided. Certain feminist groups argued that consent should never be raised as a defence owing 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 would be highly unlikely as a successful claim.

1810 Halley, *supra* note 264, p. 88.

1811 *Prosecutor* v. *Kunarac, Kovac and Vukovic*, *supra* note 409, para. 464.

1812 According to the UN report on Rwanda prior to the establishment of the Tribunal, the acts of genocide followed a particular pattern. Husbands and male children were killed

proximately 800,000 people were killed.[1813] The Special Rapporteur found that "rape was the rule and its absence the exception" and estimated that between 250,000 and 500,000 people were raped.[1814] It is calculated that between 2,000 and 5,000 children were born of rape from the conflict, variously dubbed "children of bad memories" or "little killers".[1815] Based upon the number of victims as well as the nature of the rapes that were committed, the UN expert concluded that sexual violence was systematic and employed as a tactic by the perpetrators.[1816] Attacks were indiscriminate and the victims included underage girls and elderly women, pregnant women and the "untouchable", such as nuns and corpses.[1817] Many incidents of rape were gruesome and often occurred in the shape 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 mutilation such as having breasts cut off or tree branches or bottles pushed into their vaginas.[1818] Militiamen carrying the HIV-virus used the disease as a form of weapon, intending to ensure a slow death.[1819] The resulting traumas were judged to be especially serious by the UN Rapporteur due to the taboos attached to such acts in the African tradition. Immense shame was caused to the victims including social exclusion, especially in cases where a raped woman became pregnant.[1820]

As a result of the conflict, the Rwandan justice system was 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 because of the dismal chances of 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 for Rwanda, limiting its jurisdiction to those who had committed genocide and other international crimes 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.[1821] What it does lack, however, is a definition of rape, the rea-

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first, usually 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* UN Doc. E/CN.4/1996/68, *supra* note 12, para. 13.

1813 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.

1814 UN Doc. E/CN.4/S-3/1 of 25 May 1994, *supra* note 638, UN Doc. E/CN.4/1996/68, *supra* note 12, para. 16.

1815 Mukangendo, *supra* note 717, p. 40.

1816 UN Doc. E/CN.4/1996/68, *supra* note 12, para. 16.

1817 *Ibid*., para. 17.

1818 *Ibid*., para. 18.

1819 *Ibid*., para. 20.

1820 *Ibid*., para. 22.

1821 Article 3(g) (Crime against Humanity) and Article (e) (Common Article 3 of the Geneva Conventions), Statute of the ICTY.

son being that the elements of rape had not previously been discussed in the international arena. This therefore became the task of the ICTR, which was further developed through the case law of the ICTY. Though the crimes might be customary in essence, the ICTR Statute also reflects treaty-based crimes in conventions that Rwanda had ratified, thereby not raising the question of their customary nature or the legality of the Tribunal.[1822] As of 2009, 36 of 87 indictees have been charged with rape and other forms of sexual violence. In the 13 completed cases, 4 were convicted of rape.[1823]

#### 9.2.1.1 The *Akayesu* Case – A Conceptual Approach to Rape

The 1998 case of *The Prosecutor v. Jean-Paul Akayesu* is deemed a landmark case in classifying sexual violence as genocide, as well as promulgating a definition of rape at the international level for the first time.[1824] This judgment was also historic in that it represented the first conviction for genocide in an international tribunal. Jean-Paul Akayesu, mayor of the Taba commune of Rwanda, was initially charged with 12 counts of genocide, crimes against humanity and war crimes. No charges included gender-related crimes despite diligent documentation submitted by non-governmental organisations (NGOs) and UN representatives on the widespread commission of rape. The indictment was only amended to include charges of sexual violence after several witnesses during the trial testified to ghastly instances of rape. That evidence, combined with international pressure to include gender-related crimes, as well as the presence of female Judge Navanethem Pillay, led to an amendment.[1825] Akayesu was convicted of aiding and abetting sexual violence by allowing it to occur in the bureau communal while he was present and by facilitating its commission through verbal encouragement, thus conveying official tolerance of such conduct.[1826]

This judgment afforded a harrowing insight into the use of rape in the context of war. Tutsi women were subjected to repeated instances of sexual violence, in many cases by several perpetrators and often in public.[1827] Rape usually preceded murder and many of these onslaughts were launched near mass graves recently dug with the

1822 Gallant, *supra* note 67, p. 306. In fact, in UN Doc. S/1995/134, *supra* note 1800, 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 upon international instruments "regardless of whether they were considered part of customary international law".

1823 A. Obote-Odora, 'The Prosecution of Rape and Other Sexual Violence', No. 52 *Development Dialogue,* (November 2009), p. 180. *See also* S/2009/362, *supra* note 12, para. 10.

1824 *The Prosecutor* v. *Jean-Paul Akayesu*, *supra* note 30.

1825 *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), *supra* note 707, para. 38.

1826 *The Prosecutor* v. *Jean-Paul Akayesu*, *supra* note 30, para. 693.

1827 *Ibid.*, para. 731.

intent to dispose of the victims.[1828] As to the purpose of such rapes, the Tribunal noted that sexual violence caused extensive harm and that in cases of mass violence as witnessed in Rwanda, it was employed as a means to subjugate and annihilate the collective enemy – in this instance the Tutsis. Witness testimony referred to statements by Akayesu and others in this vein: "[L]et us now see what the vagina of a Tutsi woman tastes like", in connection to the attacks.[1829] The Tribunal emphasised that the injury of sexual violence extended beyond the individual to the collective. In finding that a widespread and systematic attack on the civilian ethnic population of Tutsis had taken place, the Tribunal declared that such incidents of rape amounted to crimes against humanity.[1830] The Chamber also found that the crimes of rape 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".[1831] 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."[1832] In framing the rapes as crimes against humanity and genocide, the Tribunal asserted that rape committed in wartime fulfils different purposes from sexual violence inflicted in peacetime, which was also reflected in the definition of the offence.

In attempting to define the crime of rape, the Trial Chamber concluded that at the time there existed no established definition in international law and therefore evaluated the criminalisation in national jurisdictions to arrive at general principles. Though it found that domestic penal codes had historically 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".[1833] 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.[1834]

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

1828 *Ibid.*, para. 733.

1829 *Ibid.*, para. 732.

1830 *Ibid.*, para. 695.

1831 *Ibid.*, para. 731.

1832 *Ibid.*, para. 732.

1833 *Ibid.*, para. 597.

1834 In Rule 96(ii) of the Rules of Procedure and Evidence of the ICTR, the issue of consent is explicitly dealt with and lists 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.

in a mechanical description of objects and body parts".[1835] It held that rape and sexual violence were "some of the worst ways (to) inflict harm on the victim as he or she suffers both bodily and mental harm".[1836] 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."[1837] 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."[1838] The construction of the definition of torture as a concept rather than a list of acts was thus judged to be 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."*[1839]

The Trial Chamber argued that the degree 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".[1840] The particular setting 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 requiring proof is the "physical invasion of a sexual nature". There need be no establishment of either force or non-consent. The focus of attention shifted from the common view of evaluating the subjective state of the perpetrator and victim to the objective surrounding facts, in effect concluding that no individual could consent 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".[1841]

The definition is also intentionally gender-neutral, applying both to male and female victims. The Tribunal, in a gender-conscious manner, moved away from the restrictive view that sexual intercourse alone constitutes rape and instead included acts involving the insertion of objects and/or the use of bodily orifices not considered to be intrinsically sexual. For example, in the Tribunal's view the act of thrusting a piece of

1835 *The Prosecutor* v. *Jean-Paul Akayesu*, *supra* note 30, para. 687.

1836 *Ibid.*, para. 731.

1837 *Ibid.*, para. 687.

1838 *Ibid.*, para. 597.

1839 *Ibid.*, para. 688. Emphasis added.

1840 *Ibid.*, para. 688.

1841 *Ibid.*, para. 687.

wood into the sexual organs of a woman, as depicted in witness statements, constituted rape.[1842] 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 led to a concentration on the *intent* of the act – that is, as a sexual invasion, rather than its actual technicalities. This is progressive in that the definition opens the way 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 considers the experience of the victim as the starting point. However, the definition is still qualified to the extent that there needs to be a "physical invasion", not including, for instance, sexual touching, which could be considered a lesser form of sexual violence. The judgment has been criticised for its dwelling on "invasion" of the body, which is seen by some as referring to "penetration".[1843] 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.[1844]

The legal reasoning concerning the definition is relatively sparse. It does not, for example, 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 result in greater possibilities for prosecution.[1845] 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".[1846] As Prosecutor Louise Arbour observed: "[T]he judgment is truly remarkable in its breadth and vision, as well as in the 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."[1847] Apart from the definition, the decision is also of consequence in that it regards rape as being subsumed under the crime of genocide and crimes against humanity, and 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 under the breach against a group. Catherine MacKinnon holds that rape must be defined in terms of its function in collective

1842 *Ibid.*, para. 686.

1843 Quénivet, *supra* note 135, p. 13.

1844 H. Tonkin, 'Rape in the International Arena: The Evolution of Autonomy and Consent', 23 *University Tasmanian Law Review* 243 (2004), p. 249.

1845 K. Askin, 'Sexual Violence in Decisions and Indictments of the Yugoslav and Rwandan tribunals: Current Status', 93 *American Journal of International Law* (January 1999), p. 100.

1846 UN Doc. E/CN.4/2001/73, *supra* note 651, para. 38.

1847 Press release, ICTY Office of the Prosecutor, Statement by Justice Louise Arbour, ICTY Doc. CC/PIU/342-E (4 September 1998).

crimes and that 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.[1848]

#### 9.2.1.2 Beyond the *Akayesu* Judgment

The definition of rape was again discussed in the *Musema* judgment within the context of genocide.[1849] 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 commented that rape was conducted as a part of war tactics: "[A]cts 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."[1850] 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 because of the "dynamic ongoing evolution of the understanding of rape [in national jurisdictions] and the incorporation of this understanding into principles of international law".[1851] 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 had consulted. Similar to the *Akayesu* case, the Chamber found that "the essence 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".[1852] As such, a determination of what constitutes rape would be conducted 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 would better accommodate evolving norms of criminal justice – for example, as in the expansion of encompassing also oral sexual acts within the rape definition.[1853]

Subsequent case law demonstrates contradiction on the part of the Tribunal, at times arguing for retaining the conceptual approach and then adopting the approach of the ICTY in the *Kunarac* decision, discussed below. In *Kunarac*, the ICTY held that a non-consent based standard alone would fully acknowledge the sexual autonomy of the victim. In *Semanza*, the ICTR confirmed that non-consent should be "assessed

1848 MacKinnon, *supra* note 466, p. 955.

1849 *Prosecutor* v. *Musema*, *supra* note 757.

1850 *Ibid.*, para. 933.

1851 *Ibid.*, para. 228.

1852 *Ibid.*, para. 226.

1853 *Ibid.*, para. 228.

within the context of the surrounding circumstances" – largely borrowing the approach of the ICTY in the *Kunarac* case.[1854] The following day, the Trial Chamber yet again applied the *Akayesu* definition in the *Niyitegeka* case, albeit not finding the defendant guilty.[1855] 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.[1856]

This was affirmed in the *Kamuhanda* proceeding in 2004 where the Tribunal yet again reviewed the previous jurisprudence of both the ICTR and the ICTY in defining rape. It explained the contrast between "a physical invasion of a sexual nature" – that is, the conceptual definition of *Akayesu*, and "any act of a sexual nature", as that of the difference between rape and sexual assault.[1857] Concluding that the ICTY had changed its course in *Kunarac* from the approach reflected in the *Furundzija* judgment, it found the non-consent-based approach to be more convincing. It also ruled that *mens rea* was to be understood as meaning the intent to effect sexual penetration and the knowledge of its occurring without consent.[1858]

The *Muhimana* case further exemplifies the systematic nature of rape committed during the conflict.[1859] 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 specific incident, Muhimana invited others to see "what naked Tutsi girls look like" following the rape[1860] 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".[1861] 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

1854 *The Prosecutor* v. *Laurent Semanza*, *supra* note 663, para. 344.

1855 *The Prosecutor* v. *Eliezer Niyitegeka*, 16 May 2003, ICTR, Case No. ICTR-96-14-T, <www.unictr.org/Portals/0/Case/English/Niyitegeka/judgement/index.pdf>, visited on 10 November 2010.

1856 *The Prosecutor* v. *Juvénal Kajelijeli*, 1 December 2003, ICTR, Case No. ICTR-98-44A-T, <www.unictr.org/Portals/0/Case/English/Kajelijeli/judgement/031201-TC2-J-ICTR-98-44A-T-JUDGEMENT%20AND%20SENTENCE-EN_.pdf>, visited on 10 November 2010, para. 914.

1857 *The Prosecutor* v. *Jean de Dieu Kamuhanda*, *supra* note 589, para. 546.

1858 *Ibid*., paras. 707-709.

1859 *The Prosecutor* v. *Mikaeli Muhimana*, *supra* note 764.

1860 *Ibid*., para. 33.

1861 *Ibid*., para. 265.

consent".[1862] It thereby found that a lack of consent was not necessary as an element of the crime. Instead, lack of consent was to be categorised as evidence of coercion. Interestingly, the ICTY in its later case law qualifies force as evidence of lack of consent, thus affording 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 the 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".[1863] 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."[1864] It therefore supported the conceptual approach in *Akayesu*, as it also encompassed the elements present in *Kunarac*.[1865] It thereby sought to reconcile two distinct definitions of the two *ad hoc* tribunals. In the case, the prosecution argued that the incident of a victim being disembowelled by cutting her open with a machete from her breasts to her vagina constituted rape. However, the Chamber was of the opinion that while the act interfered with the sexual organs, it did not constitute a physical invasion of a *sexual* nature.[1866]

The Tribunal in *Gacumbitsi* in 2006 again had reason to explore the parameters of the definition of rape and the concept of non-consent.[1867] 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 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 described an incident where the accused had driven around, using a megaphone, exhorting young Hutu men to have sex with young girls and "in the event they resisted, they had to be killed in an atrocious manner".[1868] Following 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 that 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".[1869] Witness TAQ was raped while heavily

1862 *The Prosecutor v. Mikaeli Muhimana*, Summary of Judgment, para. 31.

1863 *Ibid*., paras. 34-35.

1864 *The Prosecutor* v. *Mikaeli Muhimana*, *supra* note 764, para. 559.

1865 *Ibid*., para. 551.

1866 *Ibid*., para. 557. Rather, instead it was analysed under the classification of murder.

1867 *The Prosecutor* v. *Sylvestre Gacumbitsi*, *supra* note 788.

1868 *Ibid*., para. 215

1869 *Ibid*., paras. 207-208.

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".[1870]

The Tribunal found Gacumbitsi guilty of genocide and rape as a crime against humanity. This caused the Tribunal to review previous jurisprudence on rape, concluding that the *Akayesu* and *Kunarac* judgments must be the prevailing views on rape, and while 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.[1871] However, the Trial Chamber was not explicit on whether those threats were necessary to establish non-consent. It is probable that it followed the *Kunarac* standard in viewing threats of force merely as evidence of non-consent.

At the Appeals Chamber the prosecution subsequently 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 guidance on the matter. According to the prosecution, neither the victim's non-consent nor the perpetrator's knowledge of it 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 significance 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 instead non-consent is a possible affirmative defence, the accused would carry the burden of producing evidence in support of the defence that the victim had consented. In short, the issue of non-consent is a matter of which side has the burden of proof. The prosecution argued that rape only comes before the Tribunal's jurisdiction within the context of such serious offences or situations as genocide, armed conflict or a widespread or systematic attack on a civilian population, circumstances where genuine consent would be impossible.[1872] The Appeals Chamber observed that the Trial Chamber had found the circumstances 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.[1873]

The Appeals 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

1870 *Ibid.*, para. 203.

1871 *The Prosecutor* v. *Sylvestre Gacumbitsi*, Summary Judgment, para. 48.

1872 *The Prosecutor* v. *Sylvestre Gacumbitsi*, *supra* note 592, para. 148.

1873 *Ibid.*, para. 150.

> 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 understand the reference to consent as a 'defence' in Rule 96 to have been used in this technical way.[1874]

As such, Rule 96 does not change the definition of the crime of rape but rather defines those circumstances where 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.[1875]

The Appeals Chamber thereby found a practical solution to focus on the non-consent of the victim while taking into account the commonly coercive circumstances of armed conflict, which negates genuine consent. This entails a greater concentration on the context rather than on the injured party, which avoids examining the behaviour of the victim in situations of obvious coercion – such as detention, further causing humiliation. Importantly, it dismissed the prosecution's argument that the fact that the case fell within the jurisdiction of the Tribunal was sufficient to establish non-consent – that is, that the sexual act occurred in the setting of genocide, armed conflict or a widespread or systematic attack against a civilian population.[1876] 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 reconfirmed the requirement that the perpetrator must be aware, or had reason to be aware, of the coercive circumstances that would negate the possibility of genuine consent.[1877]

In the 2006 case of *Muvunyi*, the Tribunal again noted that "[t]he jurisprudence of the *ad hoc* tribunals reveals a rather chequered history of the definition of rape".[1878]

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1874 *Ibid*., para. 154, *Prosecutor* v. *Kunarac, Kovac and Vukovic*, *supra* note 409, para. 463. Emphasis added.

1875 *The Prosecutor* v. *Sylvestre Gacumbitsi*, *supra* note 592, para. 155.

1876 *Ibid*., para. 153.

1877 *The Prosecutor* v. *Sylvestre Gacumbitsi*, *supra* note 788, para. 157.

1878 *The Prosecutor* v. *Tharcisse Muvunyi*, 12 September 2006, ICTR, Case No. ICTR-2000-55A-T, <www.unhcr.org/refworld/publisher,ICTR,,,48abd529d,0.html>, visited on 10 November 2010, para. 517.

On similar lines to the *Muhimana* case it confirmed that the *Akayesu* and *Kunarac* judgments were not incompatible and stated 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.[1879]

Since both the *Akayesu* and *Kunarac* approaches reflect this objective of protecting sexual autonomy, they may be said to reconcilable.

#### 9.2.1.3 Conclusions

The ICTR has simultaneously applied two distinct definitions of the crime of rape, exercising a conceptual framework in the cases of *Akayesu* and *Muhimana*, while adopting a definition based upon the ICTY's decision in *Kunarac*, using non-consent as the fundamental element of rape in several cases: *Semanza, Kajelijeli,* and *Kamahunda*. The later cases of *Gacumbitsi* and *Muvunyi* have further cemented the impression that the *Kunarac* definition is at the forefront also in the jurisprudence of the ICTR. Though appearing to be highly divergent solutions in defining the crime, the Tribunal has consistently 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 determination. The *Akayesu* approach, however, would in its efforts to avoid specificity most probably entail a wider scope of *actus reus*. Though the *Akayesu* definition allows flexibility and in idealistic manner attempts, to a certain extent, to consider the experience of the victim in determining the scope of rape, it is at the same time unclear and may contravene 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 proved as 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 […]".[1880] In what follows, 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.

1879 *Ibid*., para. 521.

1880 MacKinnon, *supra* note 466, p. 952. This will be discussed further below.

### 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 for the purpose of so-called ethnic cleansing.[1881] Estimates of the extent of sexual violence vary but demonstrate that up to 60,000 rapes were committed during this armed conflict.[1882] The most common form of attack occurred in detention camps, military headquarters, in apartments maintained as soldiers' residences and at times in the homes of victims.[1883] Detention centres were also established for the sole purpose of sexually abusing women, with separate camps for each sex. Both men and women were sexually assaulted by soldiers, camp guards, paramilitaries, or even civilians who were able to enter camps and choose women. Gang-rapes were common and torture accompanied most of the reported rapes. It was not unusual for assaults to occur in the presence of other prisoners or for detainees to be forced to rape one another. Victims were at times sexually assaulted with foreign objects, such as broken glass bottles and guns, and some men were castrated.[1884] Sexual assault would also occur in conjunction with fighting and often in public in order to convey a message to the opposing party. NGOs reported the existence of propaganda campaigns, enticing armed combatants to commit rape and other forms of sexual violence.[1885]

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 […]."[1886] The indication of a plan was based upon the fact that rapes occurred simultaneously with military action or activities to displace certain ethnic civilian groups. Testimony of victims recorded that perpetrators, in connection with such attacks, at times stated that they were ordered to commit rape or otherwise carry out such assaults to discourage the families from returning to the area. The Commission unequivocally found that most reports of rape contained an ethnic motivation.[1887]

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1881 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.

1882 Ellis, *supra* note 12, p. 226.

1883 *Prosecutor* v. *Kunarac, Kovac and Vukovic*, *supra* note 497, para. 132.

1884 UN Doc. S/1994/674/Add.2 (Vol.V), 28 December 1994, Rape and Sexual Assault, Final Report of the UN Commission of Experts Established Pursuant to Security Council Resolution 780, (1992), pp. 6 and 8.

1885 Boon, *supra* note 417, p. 629.

1886 UNSC 1994: Annex IX Conclusions, p. 9.

1887 UN Doc. S/1994/674/Add.2 (Vol.V), 28 December 1994, p. 8.

Sexual assault was reportedly committed by all warring factions and was not limited to a particular ethnic group. However, the great majority of victims were Bosnian Muslims and most of the alleged perpetrators Bosnian Serbs.[1888] The main targets of rape in the Yugoslavia conflict were women of child-bearing age, which accorded with the purpose of impregnating women of a certain ethnic origin to halt procreation of a particular group. Pregnant women were subsequently often detained until it was too late to obtain an abortion. Prominent members of the community and educated women were also likely targets.[1889] The trauma pursuant to rape was particularly severe among the Muslim community in Bosnia, where it is customary for women to remain chaste until marriage.[1890] The Commission reported that "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 […]".[1891] The ostracism and rejection by the community that often followed these sexual assaults heightened the ordeal faced by the returning women, causing them deep shame and humiliation. Certain women suffered trauma to the point of inability to conceive or leading to unwanted pregnancies and fewer marriage possibilities. The Commission in fact stated that rape was 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 personal decisions and bodily functions. This loss of control infringes on the victim's human dignity […]."[1892]

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 while the Rules of Procedure and Evidence were drafted by the

1888 *Ibid*., p. 6.

1889 *Ibid*., pp. 7-8.

1890 R. Gutman, 'Foreword', in A. Stiglmeyer (ed.), *Mass Rape: The War Against Women in Bosnia-Herzegovina* (University of Nebraska Press, 1994), p. x.

1891 UN Doc. S/1994/674/Add.2 (Vol.V), 28 December 1994, p. 8.

1892 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 on 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*, *supra* note 714, Transcript, p. 960.

judges of the Tribunal. Rape is explicitly mentioned as a crime against humanity in the Statute, unlike the Statute of the ICTR.[1893] 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".[1894] Since precedent from international criminal trials was scant, the judges relied to a great extent on national penal codes and procedural rules, both from common law and civil law traditions, while acknowledging the particular circumstances of the conflict in former Yugoslavia.[1895]

#### 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.[1896] It was the first case where the Tribunal considered a definition of rape and though it did not analyse the offence beyond concurring with the *Akayesu* judgment, the important aspect is that it supported a conceptual understanding of rape and constituted one of three definitions adopted by the Tribunal.[1897]

*Furundzija* was the first war crimes prosecution in which rape and sexual assault were the sole charges.[1898] These proceedings were also of particular interest because of the development of the definition of rape and the fact that the case was built on the rape of a single person, demonstrating that the occurrence of rape need not be widespread in order to represent a serious breach of international criminal law. The case concerned a Bosnian Muslim woman who was arrested during the conflict in central Bosnia Herzegovina and taken 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. Furundzjia encouraged the assault, without participating physically, and was accordingly indicted on two counts of violating of the laws or customs of war, as well as torture and outrages upon personal dignity, including rape. In an effort 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.[1899] It also noted the prohibition of rape within international

1893 UN Doc. S/25704 at 36, adopted by the Security Council on 25 May 1993, UN Doc. S/RES/827 (1993), Article 5(g).

1894 Report of the Secretary-General, UN Doc. S/25704, para. 34.

1895 Fitzgerald, *supra* note 407, p. 639.

1896 *Prosecutor* v. *Delalic et al.*, *supra* note 334. *See further* chapter 9.2.2.

1897 *Ibid.*, 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 and 1066.

1898 *Prosecutor* v. *Furundzija*, *supra* note 28.

1899 *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 provi-

human rights law, as a violation of the prohibition of torture and physical integrity.[1900] The prohibition of rape *per se* is thus regulated by customary international law.

As to the definition of rape, the Tribunal stated that only a very few elements 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".[1901] 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 extensive reliance on any one legal tradition.[1902] Considering the fact of the varying approaches found in any two separate legal systems, and even within systems, it was an ambitious undertaking. It acknowledged, however, that such an assessment had to be exercised 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

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sions 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 Nuremburg Tribunal, rape was expressly classified as a crime against humanity under Article II (1) (c) of Control Council no. 10. The Tokyo International Miltary 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."

1900 *Ibid.*, paras. 170-171.

1901 *Ibid.*, 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, *supra* note 362, p. 22.

1902 *Ibid.*, para. 178.

> law into international criminal proceedings is avoided, as well as the attendant distortions of the unique traits of such proceedings.[1903]

The Tribunal found that though sources of international law provided no insight into a definition of rape, and national penal codes represented the sole possibility of 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:

> 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.[1904]

It found substantial variations in national laws with respect to the putative victim, such as whether the offence of rape could be committed against a victim of either sex or solely women, and whether or not penetration should be an element. There were outstanding discrepancies in the approach to forceful oral sex in all of the jurisdictions evaluated. In certain states it was considered rape but in others the lesser offence of sexual assault. Though noting that most legal systems in common law and civil law traditions looked upon rape as the 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.[1905] Unable to find a general principle in domestic laws owing to disparate attitudes, it focused instead on the concept of the protection of human dignity. The Tribunal argued:

> 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

1903 *Ibid*., para. 178.

1904 *Ibid*., para. 179.

1905 *Ibid*., para. 181.

> 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.[1906]

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 notions of rape.[1907] The argument, however, was rejected, with the Tribunal asserting:

> 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 […].[1908]

The accused further argued that a greater stigma was attached 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 also rejected 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.[1909]

The Tribunal then 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 to be rape. The Tribunal held that "such an extremely serious sexual outrage" as forced oral penetration constitutes rape – that is, a lesser transgression of human dignity could be considered as sexual assault. Though the Tribunal liberally applied the definition of rape to forceful oral penetration, it was not extended to penetration by the perpetrator's tongue or fingers, which could within encompassed by the *Akayesu* approach.

Specificity and accuracy in defining the *actus reus* was viewed as a necessity for providing essential due process guarantees. The Trial Chamber thus preferred a more detailed definition. It did, however, emphasise the importance of distinguishing be-

1906 *Ibid.*, para. 183.

1907 *Ibid.*, para. 184.

1908 *Ibid.*, para. 184.

1909 *Ibid.*, para. 184. Emphasis added.

tween rape, which is specified as a crime against humanity in the ICTY Statute, and other less grave forms of sexual assault, which could variously be prosecuted as "other inhumane acts". It therefore stressed that rape is to be regarded as "the most serious manifestation of sexual assault".[1910] The elements of rape in international law are considered to consist in 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.[1911]

All laws that came under analysis contained an element of either non-consent, force or coercion, which are the three main criminal elements of most rape definitions in domestic laws, though the wording varies considerably.[1912] The topic of consent was only mentioned in passing when the Tribunal proclaimed that "any form of captivity vitiates consent".[1913] Though the Trial Chamber in its comparative examination of national laws concluded that non-consent was 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 […]".[1914] The definition is deliberately 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 within the context of human dignity. The approach by the ICTY in this case was conducted in a distinctly different manner from that of the ICTR in the *Akayesu* judgment, preferring a more careful positivist examination, and providing a thorough legal basis when reviewing international treaties, customary law, jurisprudence, and domestic legislation. The *Akayesu* decision was rendered only a few months prior to the *Furundzija* judgment, but the conceptual approach established by the ICTR was fundamentally rejected in order to avoid the sort of criticism that followed *Akayesu* on lack of clarity. The *Furundzija* judgment, however, was nevertheless criticised for its narrow focus on penetration, which could arguably reinforce gender stereotypes of sexual violence, rather than viewing the harm from the victim's perspective.[1915] The decision also seemed to be somewhat arbitrary in that the Tribunal extensively referred to human dignity as the source for determining what constitutes

1910 *Ibid.*, para. 175.
1911 *Ibid.*, para. 185.
1912 *Ibid.*, para. 180.
1913 *Ibid.*, para. 271.
1914 *Ibid.*, para. 181.
1915 De Brouwer, *supra* note 518, p. 114.

rape and thereby qualified forced oral penetration as such, while simultaneously restricting the possibilities of a finding of rape to a few specifically enumerated acts. The discussion on human dignity as representing the gauge for rape is more similar to the conceptual framework of *Akayesu*. Though the definition has not been adopted in subsequent cases heard by the ICTY, it is particularly relevant to the extent 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 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 ground-breaking case in the area of sexual violence in current international criminal law, in relation to both the elements of rape and torture.[1916] It was the first judgment by the ICTY to recognise rape as a crime against humanity, holding that "rape is one of the worst sufferings a human being can inflict upon another".[1917] The charges rested 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 was 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 were placed in separate detention facilities. Women and children were systematically raped by members of the armed forces, either by individual perpetrators or gang-rapes.[1918]

In deliberating on 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 under 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 articulated constituted the *actus reus* of the crime of rape in international law, it found prong (ii) 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.[1919]

1916 *Prosecutor* v. *Kunarac, Kovac and Vukovic*, *supra* note 409.

1917 *Ibid*., para. 655.

1918 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.

1919 *Prosecutor* v. *Kunarac, Kovac and Vukovic*, *supra* note 409, para. 438. Emphasis added.

It further noted the contradiction in the *Furundzija* judgment of accepting non-consent as a relevant factor in many national penal codes while not incorporating it into the final definition.[1920] 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 a corresponding 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".[1921] It thereby conducted its own review in order to make evident 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.[1922]

It pointed to the fact that common law systems typically define rape by the absence of the victim's free will or genuine consent and that this appears to the case in most states.[1923] It found that while force, threat of force or coercion are relevant, those factors are not exhaustive. 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.[1924] Thus the accentuating of force in the *Furundzija* decision resulted in a definition that was too restrictive. Sexual autonomy was therefore deemed to be the basis for the determination of whether or not a certain sexual activity constitutes rape. Sexual autonomy is violated whenever "the person subjected

1920 *Ibid*., para. 440.

1921 *Ibid*., para. 439.

1922 *Ibid*., para. 442.

1923 This has been criticised *e.g.* by De Brouwer, *supra* note 518, p. 120, in that lack of consent is primarily featured in common law systems and is not representative of most criminal law systems.

1924 *Prosecutor* v. *Kunarac, Kovac and Vukovic*, *supra* note 409, 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 and Belgium.

to the act has not freely agreed to it or is otherwise not a voluntary participant".[1925] On the issue of force or the threat of force, the Tribunal stated:

> 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.[1926]

Force or coercion are thus aspects that may prove the absence of consent. Of particular interest to understanding the concept of consent, perhaps also with regard to rape committed in peacetime, the Tribunal observed that it is important to recognise the deception of the victim or the victim's vulnerability that renders her unable to refuse sex – for instance "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".[1927] By mentioning the importance of the surrounding 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 they were subjected to repeated rapes, which would also negate consent as a defence in accordance with 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.[1928]

1925 *Ibid.*, para. 457.

1926 *Ibid.*, para. 458. Emphasis added.

1927 *Ibid.*, para. 452.

1928 *Ibid.*, para. 460.

Also:

> [T]here 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.[1929]

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".[1930] In fact, the Trial Chamber also concluded that its findings did not differ greatly from the reasoning in the *Furundzija* case, since the Trial Chamber there emphasised that the terms coercion, force or the threat of force were not to be interpreted narrowly and that the element of coercion would encompass most conduct that also negates consent.[1931] 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.[1932] 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 time arguing that it did not "disavow the Tribunal's earlier jurisprudence".[1933] The Appeals Chamber further emphasised that the surrounding circumstances in those cases where charges of rape are brought as crimes against humanity tend to be "almost universally coercive" to such a degree that "true consent will not be possible".[1934] The places of detention where the women were imprisoned in Foca amounted to "circumstances that were so coercive as to negate any possibility of consent".[1935]

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

1929 *Ibid*., para. 129.

1930 Cassese, *supra* note 958, p. 79.

1931 *Prosecutor* v. *Kunarac, Kovac and Vukovic*, *supra* note 409, para. 459.

1932 *Ibid*., para. 129.

1933 *Prosecutor* v. *Kunarac, Kovac and Vukovic*, *supra* note 497, para 129.

1934 *Ibid*., paras. 130 and 132.

1935 *Ibid*., para. 132.

reasonable belief that the victim could have consented.[1936] 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 the fact that D.B did not have sex with him on her own free will but that she had only complied out of fear.[1937]

> 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.[1938]

Furthermore, the Tribunal continued by rejecting Kunarac's statements that he was not aware of the fact that the victim only initiated sex with him because she was in fear of her life, stating that it was

> 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.[1939]

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 in certain cases they had keys and were free to leave. The women performed housework and engaged in sexual relations with their captors. The defendants argued that these relationships were consensual and that they were merely protecting the women.[1940] This raised questions 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:

> [W]here 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

1936 *Prosecutor* v. *Kunarac, Kovac and Vukovic*, *supra* note 409, paras. 644-647.

1937 *Ibid*., para. 644.

1938 *Ibid*., para. 645.

1939 *Ibid*., para. 646.

1940 *Ibid*., paras. 63, 156, 772 and 780.

> 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.[1941]

This in an excellent manner demonstrates the possibility of maintaining a consent-based definition of rape, focusing on the sexual autonomy of a person, while recognising the particular circumstances that may exist in armed conflicts. The Tribunal clearly stated that the general level of violence and the exacerbated situation affecting Muslim girls were important negating factors in Kunarac's mistake of fact defence.

Kunarac further argued in the Appeals Chamber that "nothing short of continuous resistance provides adequate notice to the perpetrator that his attentions are unwanted". This was rejected as being "wrong on the law and absurd on the facts".[1942] A similar contention that the victim must show "permanent and lasting resistance" was also raised in the *Kvocka* case but was rejected.[1943]

The definition in *Kunarac* has been applied by the ICTY as well as the ICTR in the following cases: *Kvocka*, *Haradinaj*,[1944] *Kamuhanda*,[1945] *Semanza*,[1946] *Stakic*,[1947] *Kajelijeli*,[1948] *Gacumbitsi*[1949] *and Muhimana*,[1950] affirming its general acceptance. Sexual autonomy as the main focus in defining rape, developed in the *Kunarac* decision, was particularly noted in the *Kvocka* judgment.[1951] The ICTY upheld the definition of rape as advanced in the *Kunarac* case and reiterated that "coercive conditions are inherent in situations of armed conflict" and "any form of captivity vitiates consent".[1952] With the Tribunal affirming the *Akayesu* definition in the *Celibici* case and applying a force-based approach in *Furundzija*, three different definitions of rape have thus been forwarded by the same body.

The legacy of *Kunarac* is that the use of force cannot be considered an element of rape *per se*, but can be presented as evidence of non-consent. Coercive circumstances without force, however, may be sufficient to prove such lack of consent, thereby acknowledging that there are means other than force with which to violate a person's

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1941 *Ibid.*, para. 464.

1942 *Prosecutor* v. *Kunarac, Kovac and Vukovic*, *supra* note 497, para. 128.

1943 *Prosecutor* v. *Kvocka*, 28 February 2005, ICTY, Case No. IT-98-30/1-A, Appeal Judgment, <www.icty.org/x/cases/hadzihasanovic_kubura/acdec/en/030716.htm>, visited on 10 November 2010, paras. 393 and 395.

1944 *Prosecutor* v. *Ramush Haradinaj, Idriz Balaj and Lahi Brahimaj*, 3 April 2008, ICTY, Case No. IT-04-84-T, <www.icty.org/x/cases/haradinaj/tjug/en/080403.pdf>, visited on 10 November 2010, p. 69.

1945 *The Prosecutor* v. *Jean de Dieu Kamuhanda*, *supra* note 589, para. 709.

1946 *The Prosecutor* v. *Laurent Semanza*, *supra* note 663, para. 345.

1947 *Prosecutor* v. *Milomir Stakic*, *supra* note 897, para. 755.

1948 *The Prosecutor* v. *Juvénal Kajelijeli*, *supra* note 1856, para. 915.

1949 *The Prosecutor* v. *Sylvestre Gacumbitsi*, *supra* note 788, para. 321.

1950 *The Prosecutor* v. *Mikaeli Muhimana*, Summary of Judgment, 28 April 2005, paras. 34-35.

1951 *Prosecutor* v. *Miroslav Kvocka*, *supra* note 30, para. 177.

1952 *Ibid.*, para. 178, based upon the *Celebici* and *Furundzjia* cases.

sexual autonomy and to inhibit freedom of choice. The *Kunarac* decision has not escaped criticism. Anne-Marie De Brouwer calls the introduction of the element of "non-consent" absurd, given the context in which rape usually occurs in international criminal law – that is, in detention.[1953] However, the definition does acknowledge the particular conditions of sexual violence in armed conflicts by excluding as a matter of course consent in coercive situations.

When reviewing the jurisprudence of the tribunals it appears that the context where rape occurs is a vital factor in elevating it to the level of an international crime and in defining the offence. The harm of rape experienced by the victim may be similar whether committed in peacetime or during armed conflict. However, owing to its widespread nature and overall specific intent during war, rape can be prosecuted as an international crime and is accordingly deemed to be graver in character. This is due to the emphasis placed on the harm to the collective in international criminal law, acknowledging that single instances of rape are better suited to domestic criminal jurisdictions.

### 9.2.3 Conclusions Based upon the Case Law of the ICTR and ICTY

One of the frequently heralded main achievements of the ICTY and ICTR is the progress made in recognising gender-based violence.[1954] As mentioned, despite a considerable weight of evidence and witness testimony on sexual violence during the Nuremberg trials, these types of violations were largely ignored in the judgments of the Military Tribunal, further confirming the innate existence of gender-based crimes as a 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 praised for such gender-sensitivity and for rejecting the approach to rape found in the 1949 Geneva Conventions as a violation of the woman's honour, such indications still remain in case law. For example, in the *Stakic* judgment the ICTY concluded: "For a woman, rape is by far the ultimate offense, sometimes even worse than death because it brings shame on her",[1955] thus connecting rape with dishonour. However, the use of such language is limited and should not overshadow the achievements of the tribunals.

The fact that rape is prosecuted under the *chapeau* of other crimes, for example, genocide or torture, has been criticised as minimising the potential deterrent effect on sexual violence because the language does not indicate that the crime punished is

1953 De Brouwer, *supra* note 518, p. 120.

1954 T. Meron, *The Humanization of International Law* (Martinus Nijhoff, Leiden, 2006), p. 179, J. Halley, 'Rape at Rome: Feminist Interventions in the Criminalization of Sex-Related Violence in Positive International Criminal Law', 30 *Michigan Journal of International Law* (Fall 2008), De Brouwer, *supra* note 518, p. 17.

1955 *Prosecutor* v. *Stakic*, *supra* note 897, 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.

that of rape.[1956] This is of particular importance when considering the impunity with which rape has been treated historically. Criticism has also been levelled at the fact that the indictments on sexual violence at the tribunals fail to reflect the common occurrence of such assaults in the conflicts.[1957] The example of the *Lukic* trial demonstrates this. Despite substantial witness testimony in other trials on mass rapes perpetrated by Lukic, in the actual trial of Lukic, charges of sexual violence were deliberately omitted for reasons of expediency. The Prosecution stated: "(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."[1958]

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.[1959] The *Furundzija* judgment provides legal certainty with its concrete definition. The *Kunarac* decision in a progressive 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 international humanitarian law (IHL).

The definition in the *Kunarac* case has since been applied in great many of the cases heard by the ICTY where it has been confirmed as being 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 *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 excessively conceptual definition in *Akayesu*. It is of significance 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 associated coercive surroundings such as detention camps.

1956 Askin, *supra* note 622, p. 133.

1957 Lukic Trial Ruling provokes Outcry, IWPR's ICTY – Tribunal Update, No. 562, iwpr.net, Simon Jennings, 7 August 2008.

1958 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.

1959 Obote-Odora, *supra* note 1823, p. 183.

Unfortunately, at the time of the construction of the Rome Statute of the ICC, the existing definitions 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 an armed conflict and that such an element would lead to a focus on the rape victim's preceding behaviour.[1960]

The above discussed definitions of rape in the case law of the *ad hoc* tribunals have generated much debate among scholars on the virtues of the various approaches, *i.e.* a force, non-consent, or coercion-based focus. The suitability of a non-consent standard has been particularly questioned. Anne-Marie De Brouwer, following the *Kunarac* decision, listed various reasons why a non-consent-based definition is inappropriate.[1961] 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 beyond this even more of them apply non-consent as a standard in practice when determining for example coercion.

A second and 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 in coercive circumstances where the question of consent is redundant. She states: "[I]n the context of oppression or violence where the conditions may be even more extreme, non-consent is a highly irrelevant element of rape."[1962]

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, declares 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".[1963] Schomburg and Petersen argue that what separates international crimes from ordinary domestic crimes is the "international element" which presumes mass atrocities. This in turn renders the question of consent superfluous because such situations are inherently coercive.[1964] In a way, 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*, declaring that the fact that the case comes within the jurisdiction of

1960 Halley, *supra* note 1954, p. 99.

1961 De Brouwer, *supra* note 518, p. 120.

1962 De Brouwer, *supra* note 518, pp. 120-121. *See also* Kalosieh, *supra* note 410, p. 122.

1963 UN Doc. E/CN.4/Sub.2/1998/13, *supra* note 10, para. 25.

1964 Schomburg and Peterson, *supra* note 518, p. 128. *See also* Kalosieh, *supra* note 410, p. 121, MacKinnon, *supra* note 466, p. 952, De Brouwer, *supra* note 518, p. 121.

the Tribunal is not sufficient to assume non-consent. The burden of proof would still fall on the prosecution to present evidence as to the coercive circumstances, albeit this could easily be established under such conditions. Additionally, as viewed in the case law of both tribunals the same evaluation of non-consent is rarely applied in practice as that in domestic procedures because of the coercive and brutal circumstances common to 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 genocide.[1965] 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, for example, Rwanda were similar to dating.[1966] However, it is not a question of consenting to genocide or rape, but whether the sexual relations in question are consensual, since rape is one of the few crimes where the act itself 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 would impose an excessively high threshold of evidence.[1967] A counter-argument, founded on feminist theories, is that rape in times of war is but a continuation of sexual violence in peacetime. Women are constantly under "oppression or violence" and that attacks on an individual's sexuality are always extreme situations regardless of the surrounding circumstances.[1968] 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 war.

The same argument concerning rape trials at the domestic level is also raised in this context – that is, concern that humiliating questions would be put during the proceedings on the victim's state of mind and conduct, if the definition centred on the non-consent of the complainant. De Brouwer insists that such questions in the context of armed conflict and international crimes are inappropriate.[1969] Is it more inappropriate than during trials at the domestic level? Arguably, because of the gravity of international crimes, it is indeed less relevant to question the frame of mind of the victim. In *Akayesu* the witnesses often simply referred to being raped but did not need to describe the physical acts this involved.[1970] However, even in such an extreme situation

1965 De Brouwer, *supra* note 518, p. 121.

1966 MacKinnon, *supra* note 466, p. 952.

1967 *Ibid.*, p. 953.

1968 Copelon, *supra* note 263. *See also* discussion in Halley, *supra* note 1954, p. 66.

1969 De Brouwer, *supra* note 518, p. 122. *See also* Kalosieh, supra note 410, 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".

1970 *The Prosecutor* v. *Jean-Paul Akayesu*, *supra* note 30, paras. 686-687.

as that which prevailed in the Foca camp, the question of consent was still proffered in the *Kunarac* case even after testimony by a victim that, while at the rape camp, she was raped more than 150 times over a period of 40 days.[1971] 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".[1972]

As the ICTY establishes in *Kunarac*, coercive circumstances vitiate consent and cause an investigation into the victim's frame of mind unnecessary. The conditions required to establish the international crimes are "almost universally coercive". Is the presumption of non-consent based upon the context appropriate? The difficulty with applying "coercive circumstances" as a standard is that the determination of what constitutes coercive in effect becomes a measurement of normalcy. As in times of peace, judging what precisely 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 within the concept.[1973] However, in the field of international criminal law it is often claimed 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? This was rejected by the ICTR in *Gacumbitsi*, which affirmed that the fact that rape fell within the jurisdiction of the Tribunal did 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 of 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 being more important than the actual events. In such situations as referred to in *Kunarac*, where women were placed in a camp and consequently had sexual relations with great many 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. [1974] 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 might represent an example of where the decisions of the tribunals have been context-specific, interpreting the elements in light of the particular circumstances of those conflicts. This determination may not have been made in non-ethnic conflicts.

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1971 *Prosecutor* v. *Kunarac, Kovac and Vukovic*, Transcripts, 25 April 2000, pp. 2235-2236, witness no. 95.

1972 *Ibid*., Transcripts, 19 April 2000, p. 1981.

1973 *See e.g.* MacKinnon, *supra* note 214, p. 174, McGregor, *supra* note 192, MacKinnon, Catherine, *Women's Lives, Men's Laws*, Brownmiller, *supra* note 281, pp. 430-432, Estrich, *supra* note 491, Schulhofer, *supra* note 215.

1974 Engle, *supra* note 867, pp. 804-805.

The jurisprudence of the *ad hoc* tribunals in all of the mentioned cases dwells 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, with 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 to distinguish between light sexual touching and penetration so as not to place those acts in the same category.[1975] The ICTY did in fact insist that all forms of sexual violence are equally appalling, but for sentencing purposes a distinction must be maintained.[1976] 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 seeks to create a gender-neutral standard that does not exclude the male victim, nor single out women as the weaker class of victim. The gender-neutrality of the definition has disappointed specific feminist authors who argue that sexual violence is primarily an oppression of women and that the language should reflect that fact.[1977] However, as has been established particularly in the Yugoslavia conflict, men have also suffered rape. As discussed earlier, excluding a whole group of potential victims because of gender would not increase the protection of women.

A concern regarding the definitions developed by the ICTY and the ICTR is that they may contravene the principle of legality, with individuals being prosecuted retroactively for newly created crimes. The prohibition of rape is not of recent origin as an international crime. It was included in the 1949 Geneva Conventions and in two of its Additional Protocols. It was prosecuted to a limited extent at 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.[1978] However, the exercise of defining the crime is a new endeavour. Because 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 permitted to interpret provisions on offences. The unique nature and development of international law often leads to a less strict interpretation of the principle of legality than that found in domestic criminal law. International law norms are often broadly constructed to be interpreted by both international courts or tribunals but also by domestic legal systems through domestic

1975 Quénivet, *supra* note 135, p. 13.

1976 *Prosecutor* v. *Furundzija*, *supra* note 28, para. 186.

1977 Quénivet, *supra* note 135, p. 14.

1978 De Brouwer, *supra* note 518, p. 128.

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 in that so long as the various definitions abide by the *essence* of the crime, the tribunals are allowed wide powers of interpretation. Applying a vague principle such as human dignity to extend the *actus reus* of rape can nevertheless be criticised. Another aspect of the legality principle is that of 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 with regard to 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. Similar arguments were raised on the production of the Nuremberg trials, as well as in connection with the establishment of the two *ad hoc* tribunals by the UN. Because international criminal law is a relatively new area of international law and as such has remained undeveloped until its revitalisation over the past few decades, questions of legality are expected, since much of the discipline has developed mainly through case law. The establishment of the ICC built on the foundations of a multilateral treaty and a document containing definitions of the crimes is a major step in the direction of providing a consistent definition and practice of the crime of rape. The establishment of the ICC is therefore a progression of supreme importance in making international criminal law a multilateral enterprise, abiding by principles of specificity and legality.

The methodology employed by the *ad hoc* tribunals in evincing a definition of rape is of particular interest from a legal-technical standpoint. Inasmuch as 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 proved themselves to be inadequate in responding to prime issues in human rights law and international criminal law and that general principles will increasingly become an important source.[1979] This has been confirmed in the cases heard by the ICTY and ICTR, which have made evident such principles from domestic criminal codes and procedures as well as human rights standards. The same could be said of the jurisprudence of the European Court of Human Rights (ECtHR), particularly in 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 avoiding some of the practical problems of generating custom, through state practice and *opinio iuris*.

However, as Hilary Charlesworth asserts, particularly on women's human rights, reliance 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.[1980] A risk therefore exists that a gender-bias in domestic laws is transposed into international law. This could, for instance, pertain to the focus on penetration in the *actus reus* of the definitions.

1979 Bassiouni, *supra* note 53, p. 768.

1980 Charlesworth and Chinkin, *supra* note 33, p. 79.

Another concern is that the review of domestic laws tends to focus solely on certain legal systems, predominantly those of the West. The ICTR failed to specify which of the states it had compared in drawing its conclusions. The ICTY's analysis, however, seems to have been 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 or not the jurisprudence creates a legacy beyond the jurisdictions of Rwanda and former Yugoslavia. The case law of the tribunals is restricted to the subject matter of those particular states and conflicts. However, the *ad hoc* tribunals did not solely base their case law upon their respective statutes but also on customary international law and general principles.[1981] 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 at customary level, the interpretation of the offences will similarly constitute customary international law.[1982] However, considering the numerous 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 the later cases of the ICTY of a non-consent-based standard, this may certainly at least consist of one contributing factor in the development of such a norm in international law. Certain elements are also common to the case law – for instance regarding the *actus reus* and gender-neutrality of the definition.

In a recent case the Special Court of Sierra Leone discussed on a general level the utility of the jurisprudence of the *ad hoc* tribunals:

> 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.[1983]

This view is similarly held by many authors.[1984] The jurisprudence also directly influenced the definition of rape in the Elements of Crimes of the ICC. As Patricia Viseur Seller notes, "[t]he ad hoc tribunals by trying and convicting perpetrators (for sex-

1981 UN Doc. E/CN.4/Sub.2/2004/12, *supra* note 529, para. 10.

1982 Karagiannakis, *supra* note 1800, p. 480.

1983 *Case No. SCSL-04-15-T against Sesay, Kallon, Gbao*, *supra* note 641.

1984 McDougall, *supra* note 1741, p. 346. McDougall notes: "[J]urisprudence 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, *supra* note 1954, p. 179, in stating: "The ICTY has also given a robust, yet credible, reading to international customary law."

based crimes) fomented a legal climate beyond its jurisdiction that made it conducive to draft several sex-based crimes into the Rome Statute […]".[1985] The ICC definition was promulgated through a process of compromise by the majority of the world's states that participated in the conferences that created 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 make use of the jurisprudence of the *ad hoc* tribunals as guidance for its deliberations. Various states have also made similar statements, particularly in connection with implementing international criminal law statutes on the domestic level.[1986]

One must recall that the definitions expressly 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.[1987] Kelly Askin further argues 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 such cases.[1988] 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 both the ECtHR and the Inter-American Commission on Human Rights, which could indicate that the main principles of such definitions may extend even beyond this field of law. Francoise Hampson in a UN report on the administration of justice contends that the definitions of the international *ad hoc* tribunals can be applied in situations outside of the context of armed conflicts or mass violence.[1989] Interestingly, as Alex Obote-Odora has found, the jurisprudence of the tribunals has not only created important legal precedents for the ICC, but for national courts as well. For example, the Democratic Republic of Congo (DRC), Niger, Senegal and Ghana have all drafted implementing legislation or have established review committees for law reforms to implement the gender-related jurisprudence of the ICTR.[1990] This indicates that because of the novelty in the area of defining rape in international law, the reasoning of the tribunals has had a broad impact. It must also

1985 P. Viseur Seller, 'Individual(s) Liability for Collective Sexual Violence', in K. Knop (ed.), *Gender and Human Rights* (Oxford University Press, Oxford, 2004), p. 163.

1986 *See e.g.* Sweden, SOU 2002:98, p. 216. *See also* Obote-Odora, *supra* note 1823, pp. 189-190.

1987 De Brouwer, *supra* note 518, p. 108.

1988 Askin, *supra* note 622, p. 132.

1989 UN Doc. E/CN.4/Sub.2/2004/6, *supra* note 528, 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.

1990 Obote-Odora, *supra* note 1823, pp. 189-190.

be borne in mind that they are largely based upon 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 this 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, together with the jurisprudence of the two *ad hoc* tribunals of Rwanda and former Yugoslavia.[1991] 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. The Court was established pursuant to a UN Security Council resolution.[1992] The Statute is of interest since, to an extent, it 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".[1993]

Rape and other forms of sexual violence are qualified as crimes against humanity[1994] as well as violations of Common Article 3 of the 1949 Geneva Conventions, by way of "outrages upon personal dignity, in particular humiliating and degrading treatment".[1995] 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), abusing a girl between 13 and 14 years of age and (iii), abducting a girl for immoral purposes".[1996]

Rape is not defined in the Statute. However, principles bearing upon 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.

1991 Statute of the Special Court for Sierra Leone, pursuant to Security Council resolution 1315 (2000) of 14 August 2000.

1992 SC Res. 1315 of 14 August 2000.

1993 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.

1994 Article 2, Statute of the Special Court for Sierra Leone.

1995 *Ibid*., Article 3.

1996 Article 5, Statute of the Special Court for Sierra Leone.

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.[1997] 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 its judgment the Trial Chamber first noted the prohibition of rape as customary international law[1998] 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.[1999]

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.[2000]

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

1997 *Case No. SCSL-04-16-T against Brima, Kamara, Kanu*, 20 June 2007, Special Court for Sierra Leone, <www.sc-sl.org/CASES/ProsecutorvsBrimaKamaraandKanuAFRCCase/TrialChamberJudgment/tabid/173/Default.aspx>, visited on 10 November 2010.

1998 *Ibid.*, para. 692.

1999 *Ibid.*, para. 693.

2000 *Ibid.*, para. 694.

of the crime difficult to satisfy. Circumstantial evidence may therefore be used to demonstrate the *actus reus* element of rape."[2001]

This definition of rape, however, was abandoned in a subsequent case. In March 2009 judgment was given against three senior leaders of the Revolutionary United Front (RUF) by the Special Court.[2002] 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.[2003] 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.[2004] 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 before she was killed.[2005] Captives were also forced to engage in intercourse with one 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.[2006]

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.[2007]

The first two paragraphs are identical to the definition provided in the Elements of Crimes of the ICC.[2008] The elements are further explained by the Court but largely follow the reasoning provided by the ICC. The penetration of "any part of the body"

2001 *Ibid*., para. 695.

2002 *Case No. SCSL-04-15-T against Sesay, Kallon, Gbao*, *supra* note 641.

2003 *Ibid*., para. 1185.

2004 Fn. 2268 of the case. HRW Report on Sexual violence, p. 28.

2005 *Case No. SCSL-04-15-T against Sesay, Kallon, Gbao*, *supra* note 641, paras. 1191-1195.

2006 *Ibid*., paras. 1205 and 1307.

2007 *Ibid*., para. 145.

2008 *See* Article 7(1)(g)-1, Elements of Crimes, ICC.

refers to genital, anal or oral penetration.[2009] The definition is also consciously gender-neutral.[2010] The reference to persons unable to provide consent relates to victims of tender age, those under the influence of a substance, or those suffering from an illness or disability.[2011] Consent in paragraph (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 no longer relied on its earlier definition of rape.

As was often the case before the ICTR, many witnesses described being raped without the Prosecution seeking to clarify which specific acts had occurred. The Court acknowledged that it is natural that some witnesses would be reluctant to provide explicit details of sexual violence "especially in Sierra Leonean society where stigma often attaches to victims of such crimes".[2012] 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."[2013]

The Court in its appraisal of the facts particularly noted the coercive context as a factor in the evaluation of the offence. Regarding the rapes in the district of 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."[2014]

The enforced intercourse of a couple was also considered to be 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 given of material facts to the accused.[2015] In several instances the fact that the Prosecution did not include male victims in the indictment was raised by the Court.[2016]

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.[2017] The Chamber stated:

> The Chamber observes that sexual violence was rampantly committed against the civilian population in an atmosphere in which violence, oppression and lawlessness prevailed.

2009 *Case No. SCSL-04-15-T against Sesay, Kallon, Gbao*, *supra* note 641, para. 146.

2010 *Ibid.*, para. 146.

2011 *Ibid.*, para. 148.

2012 *Ibid.*, para. 1285.

2013 *Ibid.*, para. 1285.

2014 *Ibid.*, para. 1287.

2015 *Ibid.*, para. 1303.

2016 *Ibid.*, paras. 1303 and 1307.

2017 Article 3 of the Statute. Para. 1347 of the judgment.

> 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 pregnant women and forced sexual intercourse between male and female civilian abductees.[2018]

> 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.[2019]

As to the impact on the community, the Court noted:

> [T]he 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.[2020]

The Court consequently found that the rapes constituted crimes against humanity, acts of terrorism and outrages upon personal dignity.[2021]

The impression gained 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 was discussed, two distinctive definitions were offered without an analysis as to the reasons for the departure from the first definition. The latest case fully adopted the definition found in the Elements of Crimes of the ICC, with a focus on force, the threat of force or coercion. Non-consent is merely mentioned for purposes of excluding certain categories of individuals, based upon age, inebriation or mental incapacity, hence paragraph (ii) of Rule 96. Yet part (i) of the Rule describes force, threat of force or coercion as circumstances that automatically vitiate consent, implying that the issue of non-consent is relevant and may be examined in other situations. Are these provisions compatible? A

2018 *Case No. SCSL-04-15-T against Sesay, Kallon, Gbao*, *supra* note 641, para. 1347.

2019 *Ibid*., para. 1348.

2020 *Ibid*., para. 1349.

2021 *Ibid*., p. 678.

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 pursuing different courses 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 law. 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 section will principally analyse obligations for states in prohibiting and defining rape at the domestic level – that is, 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 offence is included in the Elements of Crimes, a separate document of the Court, both of which will be examined in this section. The main question is to what extent states should enact domestic penal codes pertaining to the international crimes, and whether 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 specific events, as made 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. It is hoped that this will be cured by the establishment of the ICC. The ICC was established after protracted negotiations arising from discussions directly following the Nuremberg trials. The International Law Commission was deputed by the UN General Assembly to examine the possibilities of a permanent court that would attend to the most serious international crimes, of the type examined by the Nuremberg trials. However, varying political interests and objectives among the members together with a reluctance to relinquish state sovereignty caused the idea to stall until the 1990s.[2022]

2022 G.A. Res. 260B(III) (9 December 1948), UN. Doc. A/180, (1948): "[I]n 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, *supra* note 352, p. 64, Lee, *supra* note 626. 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.

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 later trends in warfare with atrocities increasingly directed at civilians also furthered the impetus to end the culture of impunity and to encourage deterrence with regard to such barbarity.[2023] Few states have prosecuted international crimes, be it on the basis of universal jurisdiction, treaty obligations or simply under domestic legislation unrelated to either.[2024] Reasons for the extensive impunity enjoyed by the perpetrators 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 war crimes do occur, the acquiescence of the state is usually a characteristic of the international crimes.[2025] 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 following every major armed conflict resulting in atrocities, as well as escape criticism of the application of "victor's justice", even though concerns of political agendas in the work of the ICC have also arisen.[2026] The foundation of the Court would thus have greater legitimacy.[2027] It was also hoped that a permanent court would work preventively in defeating impunity, rather than acting subsequent to a conflict.[2028] The International Law Commission (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.[2029] The Rome Statute of the International Criminal Court entered into effect on 1 July 2002 after receiving the requisite number of ratifications by states. The Court thus differs from the

2023 D. Nill, 'National Sovereignty: Must it be Sacrificed to the International Criminal Court?', 14 *Brigham Young University Journal of Public Law* 119 (1999), p. 120. The preamble of the Rome Statute emphasises 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".

2024 Discussed in chapter 9.4.

2025 Ferdinandusse, *supra* note 88, 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.

2026 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 R. Cryer, *Prosecuting International Crimes: Selectivity and the International Criminal Law Regime* (Cambridge University Press, Cambridge, 2005), p. 225.

2027 McGoldrick *et al.*, *supra* note 403, p. 460.

2028 Preamble of the Rome Statute.

2029 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, *supra* note 626.

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.[2030] The character of the international crimes is regularly couched 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.[2031] The prevention and punishment of these crimes is 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 great number of states that have become members – at the time of writing 108 nations.[2032] It may also have an impact on third states through its wide scope of jurisdiction and restatement of customary international law.[2033] The ICTY 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.[2034]

The Rome Statute is moreover 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 with which *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.[2035] Arguably, from a legal standpoint, the

2030 Arsanjani, *supra* note 1800, 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.

2031 Preamble of the Rome Statute.

2032 *See* website: <www.icc-cpi.int/about.html>, visited on 10 March 2010.

2033 The Court has jurisdiction over an individual who is a national of a member state, where the crime has occurred on the territory of a member state or where 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.

2034 *Prosecutor* v. *Furundzija*, *supra* note 28, para. 227.

2035 Nill, *supra* note 2023, p. 129.

*ad hoc* tribunals generally do not achieve the desired level of consistency in the interpretation and application of international law inasmuch as their statutes are inevitably tailored to meet the demands of the specific situation that led to their creation.[2036] 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, ensures that the principle of legality is adhered to in an unprecedented fashion in the temporary tribunals. This is furthermore important in maintaining a rule of law approach in international law by abiding by the principle of *nullum crimen, nulla poena sine lege* – that is, no retroactive punishment. The new Court must thus meet the grand expectations of eradicating impunity, deterring future abuses, and promoting the rule of law.[2037]

### 9.3.2 The Rome Statute and the Prohibition of Rape

The ICC and its jurisdiction are both governed principally by the Rome Statute but also by two subsidiary documents to assist 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 constituent parts 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 – for example, 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.[2038]

According to the Rome Statute rape can be considered to be a crime against humanity (Article 7(1)(g)-(1)) or a war crime (Article 8(2)(b)(xxii)). It 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 crimes. 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.[2039]

Many of the NGOs present at the PrepCom meetings were concerned that the draft Statute was not gender-sensitive, nor mirrored advances in international humanitarian law regarding sexual violence – as reflected, for example, in the jurisprudence of the two *ad hoc* tribunals. A group was therefore created among the NGOs called the "Women's Caucus for Gender Justice in the ICC".[2040] The most noteworthy effect

2036 J. Pejic, 'Creating a Permanent International Criminal Court', 29 *Columbia Human Rights Law Review* (1998), p. 293.

2037 Broomhall, *supra* note 352, p. 1.

2038 *See* McGoldrick *et al.* who maintain that the ICC is given wide discretion in interpreting the offences because of the broad definition of crimes, McGoldrick *et al., supra* note 403, p. 464.

2039 Article 6(b), fn. 3 of the Elements of Crimes.

2040 Oosterveld, *supra* note 867, p. 39.

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 moreover successfully lobbied for the introduction of provisions for the protection of witnesses and victims together with a gender balance in the recruitment of personnel to the Court.[2041] 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 admittance of the word "gender" rather than "sex" in the Statute, the incorporation of sexual violence generally attracted little discussion.[2042] 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 must fall under the *chapeau* of one of the three crimes.[2043] This arguably "hides" or diminishes the sexual aspect of the crime, thereby not acknowledging the actual harm to the victim.[2044] An instance of rape cannot simply be prosecuted as a violation *per se*. Further elements must be proved for the act to be included in one of the categories of international crimes. Rape should arguably form a category of its own in order to attach the appropriate level of gravity to the crime and to increase the possibilities for prosecutions without the additional evidentiary requirements. Ciara Damgaard argues that the effects of gender-based crimes on victims are no less severe when committed as individual isolated acts, as opposed to systematic violence.[2045] The reason, however, for the limited list of categories of crimes is to restrict prosecutions to the most serious crimes, be it a matter of quantity in that the attack in question was widespread, or for being committed with a particular intent. Such elements must then also be attached to the crime of rape. The surrounding circumstances of the rape offence are therefore essential for its prosecution 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 it. An important difference between the ICC and the two *ad hoc* tribunals is that they were created by Security Council resolutions and were largely based upon the 1949 Geneva Conventions. The Rome Statute and its Elements of Crimes, on the other hand, is the product of four years of state negotiations and took into consideration not only the 1949 Geneva Conventions and the 1977 Additional

2041 Arsanjani, *supra* note 1800, p. 23.

2042 *Ibid.*, p. 40.

2043 Damgaard, 'The Special Court for Sierra Leone: Challenging the Tradition of Impunity for Gender-Based Crimes?', 73 *Nordic Journal of International Law* 485 (2004), p. 498, Halley, *supra* note 1954, p. 73

2044 B. Bedont, 'Gender-Specific Provisions in the Statute of the International Criminal Court', in F. Lattanzi and W. Schabas (eds.), *Essays on the Rome Statute of the International Criminal Court*, Vol. 1 (Ripa Fagnano Alto, Il Sirente, 1999), p. 196.

2045 Damgaard, *supra* note 2043, p. 498.

Protocols, but also general customary international law and the jurisprudence of 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 also include all the categories of crimes in the *chapeaus*. That is, 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 without 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 only 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 necessary investigation or prosecution.[2046] 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 it 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 greatest possible degree of state sovereignty, while at the same time providing a mechanism to eradicate impunity.[2047] Complementarity was viewed as a necessity for the purpose of attracting a large number of ratifying states, many of which might otherwise have been unwilling had the Court been given more extensive powers. The rationale of introducing complementarity is not only the interest of states 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 violations occur.[2048] The principle also recognises the *obligation* of the state to exercise its criminal jurisdiction over the international crimes.

Thus the protection of internal affairs of states 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 a crime.[2049] The ICC

2046 Article 17 of the Rome Statute.

2047 Informal Expert Paper: The Principle of Complementarity in Practice, ICC – Office of the Prosecutor, ICC-01/04-01/07-1008-AnxA 30-03-2009, 2003, <www.icc-cpi.int/iccdocs/doc/doc654724.pdf>, visited on 10 November 2010, p. 3. *See also* K. Doherty and T. McCormack, '"Complementarity" as a Catalyst for Comprehensive Domestic Penal Legislation', 5 UC *Davis Journal of International Law* (1999), p. 151.

2048 Informal Expert Paper: The Principle of Complementarity in Practice, *supra* note 2047, p. 3.

2049 Article 18(5) of the Rome Statute.

will subsequently evaluate the information and decide whether the proceedings have been conducted in good faith.[2050] The greatest impact of the ICC is therefore the encouragement of effective enforcement of international criminal law in countries where crimes have occurred.[2051] To a certain extent, the ICC thus becomes a part of the state legal process as it conducts a form of judicial review when assessing the willingness and ability of the particular domestic justice system. The ICC thus not only performs the duty of a regular court but in this sense also exercises a supervisory function over national criminal jurisdictions.

The premise of the complementarity regime is that the ICC will restrict its review solely to a few cases and that the Court and its Rome Statute will instead serve to encourage states to re-evaluate their domestic legislations and equip their domestic legal systems to deal with 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".[2052] Similarly, in an address in 2004, Moreno-Ocampo announced the Court's strategy as that of taking "a positive approach to complementarity. Rather than competing with national justice systems for jurisdiction, we will encourage national proceedings wherever possible".[2053] 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.

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2050 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(4) of the Rome Statute.

2051 Broomhall, *supra* note 352, p. 84.

2052 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), <www.icc-cpi.int/NR/rdonlyres/D7572226-264A-4B6B-85E3-2673648B4896/143585/030616_moreno_ocampo_english.pdf>, visited on 10 November 2010.

2053 Moreno-Ocampo, Luis, Prosecutor of the ICC, Statement of the Prosecutor to the Diplomatic Corps (12 February 2004), <www.iccnow.org/documents/OTPStatementDiplo-Briefing12Feb04.pdf>, visited on 10 November 2010. 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 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, *supra* note 2047. *See also* W. Burke-White, 'Proactive Complementarity: The International Criminal Court and National Courts in the Rome System of International Justice', 49 *Harvard International Law Journal* 53 (Winter 2008), p. 56.

### *9.3.4 The Rome Statute and the Scope of State Cooperation*

#### 9.3.4.1 A Duty to Implement the Crimes?

The question of whether or not 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 demonstrates divergent interpretations. Certain states have expressed the view that the complementarity regime requires the adoption of the international crimes,[2054] whereas others hold that no such direct requirement exists.[2055] State practice thus highlights the lack of clarity as to the appropriate level of implementation, with many states still lacking implementing legislation.[2056] There are also different opinions among scholars on whether an obligation exists to adopt the crimes and, additionally, whether states must incorporate the exact wording of the crimes or if domestic "ordinary" crimes[2057] are sufficient.[2058]

Explicit obligations for state parties under the Rome Statute include *cooperating with* and *assisting* the ICC.[2059] However, these obligations primarily refer to the surrender of suspects, the gathering of evidence and protection of victims and witnesses.

2054 *See e.g.* the Dutch Explanatory Memorandum on the substantive implementing legislation (Wet Internationale Misdrijven, Kamerstukken II 2001/02, 28 337, no. 3, MvT) in J. Kleffner, 'The Impact of Complementarity on National Implementation of Substantive International Criminal Law', 1 *Journal of International Criminal Justice* 86 (April 2003), p. 91. "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."

2055 *See e.g.* Sweden SOU 2002:98.

2056 *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.*

2057 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.*

2058 Darryl Robinson has *e.g.* argued that there is no obligation to adopt the international crimes. *See* D. Robinson, 'The Rome Statute and its Impact on National Law', in A. Casses *et al.* (eds.), *The Rome Statute of the International Criminal Court: A Commentary, Volume II* (Oxford University Press, Oxford, 2002) and J. Stigen, *The Relationship Between the International Criminal Court and National Jurisdictions, The Principle of Complementarity* (Martinus Nijhoff, Leiden, 2008), p. 321. For the opposite view, *see* M. Roscini, 'Great Expectations: The Implementation of the Rome Statute in Italy', 5 *Journal of International Criminal Justice* 493 (2007), p. 496.

2059 Part. 9 of the Rome Statute: International Cooperation and Judicial Assistance.

Apart from the complementarity mechanism, the obligation of national implementation finds *implicit* support in the text of the Rome Statute. The Preamble to the Statute declares 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 in stating: "[T]he 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."[2060] 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 that the "most serious crimes of concern to the international community as a whole must not go unpunished" and that "their effective prosecution must be ensured by *taking measures at the national level* and by enhancing international cooperation".[2061]

The object and purpose of the treaty thus demonstrates the intention of imposing such a duty on states. With the ultimate goal of ending impunity, coupled with the complementarity regime, it is apparent that the minimum requirement is that state parties allow for the possibility of prosecuting 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".[2062] The ICC can only function effectively 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 a duty to adopt necessary legislation already existed concerning a few of the core crimes before the adoption of the Rome Statute. Because the Statute draws inspiration from international treaties, such as the UN Genocide Convention, as well as customary international law – evidenced, for example, through the jurisprudence of the *ad hoc* tribunals – certain duties exist on a parallel level through these sources.[2063] The grave breaches regime in the 1949 Geneva Conventions also implies duties and while the extent of these is unclear, certain writers maintain that the failure of states to enact the necessary domestic legislation and prosecute the crimes could generate some form of state responsibility.[2064] The prohibition of torture also requires implementing legislation, evident in the UN Convention against

2060 Paper on Some Policy Issues Before the Office of the Prosecutor, ICC-OTP, September 2003, <www.icc-cpi.int/NR/rdonlyres/1FA7C4C6-DE5F-42B7-8B25-60AA962ED8B6/143594/030905_Policy_Paper.pdf>, visited on 7 February 2010, p. 5.

2061 Emphasis added.

2062 Kleffner, *supra* note 2054, p. 93.

2063 *Ibid.*, p. 91.

2064 Burke-White, *supra* note 2053, p. 201. However, how this state responsibility would lead to actual accountability is uncertain since the Court deals with individual responsibility.

Torture.[2065] However, the conclusion that a duty exists to provide for domestic jurisdiction for the crimes does not clarify the *extent* of the duty, for example, 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.

#### 9.3.4.2 Modes of Implementation

In general, states have a rather wide "margin of appreciation" in choosing the method of implementing their international law obligations, depending on the state's relationship to international law.[2066] 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 dislodge procedures that are familiar to its citizens and court officials.[2067] However, according to Article 27 of the Vienna Convention on the Law of Treaties, states cannot invoke the provisions of their internal law to justify for the failure to discharge international obligations.[2068] 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.

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2065 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*, *supra* note 28, paras. 149-150.

2066 P. Malanczuk, *Akehurst's Modern Introcudtion to International Law*, 7th ed. (Harper Collins, London, 1997), p. 63, A. Zahar and G. Sluiter, *International Criminal Law* (Oxford University Press, Oxford, 2008), 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.

2067 J. B. Terracino, '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 best suited to choose a suitable manner of implementation. Ferdinandusse, *supra* note 88, p. 133.

2068 As Ferdinandusse warns, states frequently overestimate the degree of flexibility provided and overstep the appropriate boundaries. Ferdinandusse, *supra* note 88, p. 134.

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 the case with human rights treaties. According to Gardocki: "The direct application of criminal law conventions would, at the present moment, be 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 […]."[2069] Certain states that in principle allow the direct application of international law have rejected this notion regarding criminal law treaties due to lack of precision.[2070] The birth of the Rome Statute, however, may have brought increased possibilities for directly applying the provisions in states that have such a relationship with international law, as it is more specific and precise than its predecessors. It is, nevertheless, advised that monist states should not rely solely on automatic incorporation because the Rome Statute might affect a multitude of national laws, such as substantive and procedural criminal law and possibly constitutional provisions.[2071]

In dualistic states that implement the Rome Statute into their domestic legislations, national law has to be amended so as to ensure that they can exercise their jurisdictions. Certain countries have introduced references to the Rome Statute in their legislations, whereas others incorporate a detailed list of the crimes, using the exact definitions set out in the Statute.[2072] Yet other member states have also incorporated the Statute crimes but have subsequently redefined the violations, some in broader terms whereas others have adopted more restrictive interpretations.[2073] As a matter of practicality it is also common for states simply to opt for relying on similar, already existing descriptions of offences in their domestic criminal laws – that is, those crimes that do not qualify as international crimes.[2074] The legislative process is thereby circumvented by avoiding reforms, with domestic courts and prosecutors already familiar with the scope of the existing crimes. Ordinary crimes are naturally easier to prove as the additional elements attached to the international crimes, such as the widespread 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

2069 L. Gardocki, 'Legal Problems Emerging From the Implementation of International Crimes in Domestic Criminal Law', 60 *Revue Internationale de Droit Penale* 91 (1989), p. 94.

2070 Ferdinandusse notes a trend of a greater reluctance to directly apply provisions of international criminal law. Ferdinandusse, *supra* note 88, p. 3.

2071 Robinson, *supra* note 2058, p. 1850.

2072 *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 laws the crimes of the Rome Statute. *See* AG/RES 2433, Promotion of and Respect for International Humanitarian Law, 3 June 2008, OAS, para. 6.

2073 *See e.g.* France and Ecuador, who have broader definitions concerning genocide.

2074 Ferdinandusse, *supra* note 88, p. 106.

the national definition of the crime. In conclusion, states may, depending on their legal systems, 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 that followed the adoption of the Rome Statute in 1998, few states had enacted comprehensive legislation that adequately covered the subject matter of the ICC.[2075] The great majority of countries would therefore need to conduct an extensive review of their penal legislations to see whether they cover the core crimes and their definitions as well as the requisite rules of evidence and procedure to conduct trials of this magnitude. 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 only 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 becomes automatically admissible, if it meets other requirements such as reaching the requisite level of gravity.[2076] However, in cases where the state *is* investigating or prosecuting or *already has* completed such proceedings, further factors must be taken into account. The state with jurisdiction over the case in question must be genuinely "unable" or "unwilling" to proceed.[2077] The ICC therefore conducts a review of the adequacy of the criminal

2075 Doherty and McCormack, *supra* note 2047, p. 150. For example, in Sweden as of 2010, no implementing legislation exists, despite a legislative proposal of 1998. *See* SOU 2002:98.

2076 Informal Expert Paper: The Principle of Complementarity in Practice, *supra* note 2047, pp. 7-8.

2077 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, *supra* note 2047, 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 it is 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 Prosecutor in Informal Meeting of Legal Advisors of Ministries of Foreign Affairs, Statement by Luis Moreno-Ocampo, 24 October 2005, <www.icc-cpi.int/NR/rdonlyres/9D70039E-4BEC-4F32-9D4A-CEA8B6799E37/143836/

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.[2078] The elements of unwillingness and inability call into

LMO_20051024_English.pdf>, visited on 10 November 2010 , p. 6. *See also* Letter of Prosecutor dated 9 February 2006, Concerning the Situation in Iraq, <www.icc-cpi.int/NR/rdonlyres/F596D08D-D810-43A2-99BB-B899B9C5BCD2/277422/OTP_letter_to_senders_re_Iraq_9_February_2006.pdf>, visited on 7 February 2010, 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.

2078 Informal Expert Paper: The Principle of Complementarity in Practice, *supra* note 2047 p. 10. 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, *supra* note 2060, 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* Policy Paper on the Interests of Justice, ICC, September 2007, <www.icc-cpi.int/NR/rdonlyres/772C95C9-F54D-4321-BF09-73422BB23528/143640/ICCOTPInterestsOfJustice.pdf>, visited on 10 November 2010. 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 S/2009/362, *supra* note 12, 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 or 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 also* Committee against Torture, Concluding Comments on Burundi, 20 November 2006, UN Doc. CAT/C/BDI/CO/1, para. 11 and S/2009/362, *supra* note 12, para. 27.

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 matter of admissibility of cases before the Court is of the utmost importance. This is because it begs the question of whether a country that does not include rape as an element of the three international crimes in its domestic legislation, or a state that maintains 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, for example, the offence of rape.

#### 9.3.4.4 Unwillingness

The term "unwillingness" concerns the intent of the state when either prosecuting or deciding not to prosecute individuals and is deemed to exist in 1) cases where the proceeding themselves or the judicial decisions seek to shield persons from justice, 2) where there has been an unjustified delay in the proceedings, or 3) where the proceedings are not conducted independently or impartially.[2079] Investigations must be undertaken in a *bona fide* fashion. It is likely that the Court will turn to jurisprudence from human rights bodies in appraising the proper requirements for national criminal proceedings concerning such aspects as delays or a lack of independence.[2080] The will, or intent, of the state can be expressed by any branch of the government, be it the executive, legislative and adjudicative division.[2081] The International Court of Justice (ICJ) has stated: "From 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 as do legal decisions or administrative measures."[2082] 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, such as amnesty laws.[2083] However, it must be remembered that it is only at the stage of

2079 Article 17 (2) a-b of the Rome Statute.

2080 Stigen, *supra* note 2058, p. 9.

2081 *Ibid.*, p. 255.

2082 *Case Concerning Certain German Interests in Polish Upper Silesia, supra* note 964, p. 19.

2083 *See e.g.* Robinson, *supra* note 2058, 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'." *See* B. Broomhall, 'The International Criminal Court: A Checklist for National Implementation',

investigation or prosecution in the national system that the ICC will review unwillingness – that is, 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 relates to the particular case, the Court will in practice evaluate procedural and substantive criminal laws as impediments to prosecution, such as expressing an intent to safeguard accused persons.[2084] A group of experts engaged by the ICC to clarify the terms of complementarity has acknowledged:

> It 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.[2085]

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 Criminal Procedure Code contains provisions that prevent the effective prosecution of these acts."[2086] Procedural laws requiring the medical examination of rape victims, causing a reluctance to report rape, were also mentioned as limiting access to justice and therefore a matter of unwillingness.[2087] The prosecutor, however, has 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."[2088]

Certain authors contend that where an ICC crime is prosecuted as an ordinary crime, this can amount to shielding, as discussed further below. However, this is contested by many states.[2089] Arguably the *intent* of the state to, for example, shield individuals cannot be inferred in cases where the state genuinely has intended to inves-

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in C. Bassiouni (ed.), *ICC Ratification and National Implementing Legislation*, 13 quarter Nouvelles Etudes Penales, Association Internationale de droit Pénal (1999), pp. 148-149.

2084 Informal Expert Paper: The Principle of Complementarity in Practice, *supra* note 2047, p. 13.

2085 *Ibid.*, p. 11.

2086 Report of the International Commission of Inquiry on Darfur, para. 586.

2087 *Ibid.*, para. 587.

2088 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.

2089 Stigen, *supra* note 2058, p. 260, Terracino, *supra* note 2067, p. 12.

tigate or prosecute but lacks the requisite legislation, either not having implemented the crimes or by relying on "ordinary" crimes.[2090] 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".[2091] The second consideration of inability – 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 conflict has led to a substantial collapse of the legal system in the country.[2092] 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".[2093] However, it did list a "lack of substantive or procedural penal legislation rendering the system 'unavailable'", as a consideration of the admissibility review.[2094]

There is much support 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.[2095] 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 is of the opinion 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.[2096] 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 national proceedings.[2097] The legislative framework would thus be an impediment to

2090 Terracino, *supra* note 2067, p. 13.

2091 Article 17(3) of the Rome Statute.

2092 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, *supra* note 2054, p. 89.

2093 Informal Expert Paper: The Principle of Complementarity in Practice, *supra* note 2047, p. 15.

2094 *Ibid.*, p. 15.

2095 Doherty and McCormack, *supra* note 2047, p. 152, Stigen, *supra* note 2058, p. 265, and Terracino, *supra* note 2067.

2096 Broomhall, *supra* note 352, p. 91.

2097 UN Doc. E/CN.4/Sub.2/1998/13, *supra* note 10, para. 95. "A crucial concern in evaluating the competence of national judicial systems to try international crimes is the extent to

a genuine investigation or prosecution of the crime in question. The consequence is 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 open to prosecute the international crimes due to an absence of domestic laws may end in an admissibility finding through the criteria of "inability" and only 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 be present in the domestic laws of member states. The implicit obligation to include the sub-categories would entail a duty to enact legislation domestically providing for the prosecution of rape. It should be noted that the criminalisation of rape is to a large degree already universal among states, so the more interesting question will be to further determine whether a particular definition of rape must be adopted.

#### 9.3.4.6 Ordinary Crimes

The complementarity regime and the admissibility criteria appear 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?

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. While 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 the introduction of

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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 […] [T]he 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 and Jarvis, *supra* note 335, p. 220.

international crimes.[2098] Member states have been left with the choice as to the degree with which they wish 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 observe that despite the lack of clear guidelines for the evaluation of inability and unwillingness criteria by the court, coupled with the "margin of appreciation" that states retain in the method and extent of domestic implementation, many member states have still seized the opportunity of introducing far-reaching legislative reform.[2099]

Certain states have not only adopted the crimes in the Rome Statute domestically but also the definitions contained in the Elements of Crimes. They have also either required or allowed their domestic courts to take into account future interpretations of the crimes by the ICC in case law.[2100] UK legislation, for example, 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."[2101] 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.[2102] However, many countries that have implemented legislation subsequent to ratification of the Rome Statute show lacunas in the law, and at the same time it is not uncommon to include broader definitions of certain crimes, thereby managing to create legislation that is both under inclusive and over inclusive, depending on the crime.[2103] The most common problem regarding under inclusion is that of utilising common crimes for prosecution that do not cover all the acts intended by the Rome Statute.[2104]

At the national level, international crimes since the Second World War have in many cases been prosecuted as ordinary crimes with several states declaring that they regard the prosecution, for example, of war crimes as ordinary crimes as being valid.[2105] Pillage as a war crime, for instance, may be prosecuted as theft in certain states. Torture is at times recast as assault. Denmark has chosen this avenue of relying on ordinary crimes rather than 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 normally have attained the level of war crimes but were instead framed as armed robbery and abduction.[2106] Certain problems are at-

2098 Zahar and Sluiter, *supra* note 2066, p. 489.

2099 *Ibid.*, p. 490.

2100 *Ibid.*, p. 113.

2101 Article 50, International Criminal Court Act 2001, UK.

2102 International Criminal Court Act 2002, Australia.

2103 Ferdinandusse, *supra* note 88, p. 117.

2104 *Ibid.*, pp. 119 *et seq.*

2105 *Ibid.*, p. 19. *See e.g.* an Argentinian court which stated explicitly that international crimes may be prosecuted as ordinary crimes, *ibid.*, p. 205.

2106 The Special International Crimes Office, <www.sico.ankl.dk/page34.aspx>, visited on 4 March 2010. Sweden has previously received criticism for not criminalising torture in

tached to the prosecution of "common" crimes in that the Danish authorities in several instances have been unable to pursue investigations owing to the ten year limitation period, whereas international crimes do not carry such statutes of limitation.[2107]

Can the prosecution of an act as an ordinary crime bring about a finding of inadmissibility? States and scholars have approached the question in various ways. The statutes of the *ad hoc* tribunals contain a provision allowing the tribunals to interfere in cases where the state has characterised the particular crime as an "ordinary" crime.[2108] The ICTY *in dicta* on the *Tadic* case 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".[2109] In the preparatory negotiations of the Rome Statute, a similar provision such as that in the *ad hoc* statutes was proposed but met with resistance by participating states.[2110] 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.[2111] 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 an accused person is prohibited if the individual concerned has been effectively prosecuted by another court "for conduct also proscribed under" the Statute.[2112] Arguably, this provision demonstrates that the characterisation of a 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.[2113]

However, Jo Stigen insists that domestic provisions must adequately reflect the gravity of the crime concerned and mirror the extraordinary nature of the crimes.[2114]

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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.

2107 Human Rights Watch, Universal Jurisdiction in Europe, The State of the Art, Volume 18, No. 5 (D), June 2006, p. 24.

2108 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".

2109 *Prosecutor v. Tadic, supra* note 76, para. 58.

2110 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* J. T. Holmes, 'The Principle of Complementarity', in Roy Lee (ed.), *The International Criminal Court: The Making of the Rome Statute – Issues, Negotiations, and Results* (Kluwer Law International, The Hague, 1999), p. 58 and Stigen, *supra* note 2058, p. 335.

2111 Stigen, *supra* note 2058, p. 321, Newton, *supra* note 1693, p. 71.

2112 Article 20(3) of the Rome Statute.

2113 Ferdinandusse, *supra* note 88, p. 205.

2114 Stigen, *supra* note 2058, p. 335.

Jann Kleffner further notes that it may be difficult to find an "ordinary" crime that is equivalent in nature to the international ones.[2115] A difficulty lies in finding the components of the international crimes in most domestic criminal legislation, which could give rise to state inaction through 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 envisage. Pillaging, for example, a war crime in the Rome Statute, could be characterised as the ordinary crime of theft. In many cases it may not be sufficient to rely on existing legislation as the discrepancies are often too significant between national law and the Rome Statute, chiefly in the definitions of the crimes but also with regard to the penalties attached. The sentence available 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 depends, however, on the crime in question, since murder in most countries is considered the gravest of offences. Other crimes would most likely warrant stricter penalties than those already available in the domestic legislation. Not only may the severity of the punishment 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 open to the defence, which could result in a finding of unwillingness with a view to shielding the accused.

The prosecution of international crimes as ordinary domestic offences may thus trivialise their gravity 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.[2116] As Julio Bacio Terracino suggests, national prosecutions based upon ordinary crimes "would undermine the fundamental idea on which the international criminal justice system is founded".[2117] It is generally agreed that the rules governing the criminal prosecution of international crimes must differ from those of common crimes because apart from the interests of the individual victim, they protect the interests of the international community and "humanity as a whole".[2118] Being classified as the crimes of most serious concern to the international community entails that they "transcend the individual because when the individual is assaulted, humanity comes under attack and

2115 Kleffner, *supra* note 2054, p. 96.

2116 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, *supra* note 2058, p. 498.

2117 Terracino, *supra* note 2067, p. 19.

2118 Kleffner, *supra* note 2054, p. 98.

is negated".[2119] Additionally, it may be of symbolic value to reflect, in national legislation, that the crimes are of international concern and not the sole 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.[2120] However, this is not uncontested. Jann Kleffner maintains 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 so as to fail in their proceedings.[2121] Simply using already existing crimes on the domestic level would not lead to a finding that the state party was unable to execute its proceedings. Darryl Robinson further argues that, hypothetically, states may pass 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 do not reflect the severity of the particular international crime. In instances where no national law equivalent exists, the state is clearly unable to prosecute.[2122] It thus seems that the use of ordinary crimes *per se* does not produce an admissibility finding. As stated, the ICC will review legislation solely in connection with a specific case and investigation/prosecution, and whether the law leads to 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 bring on 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 or not 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, having occurred in an armed conflict, for example, 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 them to have two parallel crimes of rape, depending on the circumstances – that is, rape as an international crime and also as an ordinary offence. Not accepting the application of ordinary crimes could bring about separate domestic categories and a higher level of stigma being attached to the same act, such as rape, depending on the setting in which it occurred. To a certain extent, this is the purpose of international criminal law – the sole condemnation of crimes of the utmost gravity. It may, however, create practical

2119 *Prosecutor* v. *Erdemovic*, *supra* note 727, para. 28.

2120 Zahar and Sluiter, *supra* note 2066, p. 489. Zahar and Sluiter in fact argue that it *is most likely* that it will lead to an inability finding.

2121 Kleffner, *supra* note 2054, p. 96.

2122 Robinson, *supra* note 2058, p. 1861. *See also* Newton, *supra* note 1693, p. 71.

problems in adjudicating on 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 took place. Both solutions thus raise particular problems and it remains to be seen if this matter 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 is to examine the question of whether states must also adopt a particular definition of the offence. Its definition can be found in the document entitled 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.[2123]

During the negotiations three legal models of defining rape were mainly used as a basis: the common law definition of rape, which exists in many municipal laws; the definition set down by the ICTY in its *Furundzija* decision; and the *Akayesu* case of the ICTR.[2124] The final definition most closely resembled the elements of the *Furundzija* judgment, but is a combination of the case law of the *ad hoc* tribunals that existed at the time. The *Kunarac* judgment of the ICTY, which has since largely influenced the case law of the ICTR and the ECtHR, had not then been rendered and was therefore not considered.

The definition intentionally employs 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 applying terms such as "perpetrator" and "victim", rather than "he" or "she". Though most 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 – as 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.[2125] In the attempt to adopt wide and neutral terminology, the definition focuses on the "invasion" of another human be-

2123 Article 7(1)(g)-1, Elements of Crimes.

2124 Boon, *supra* note 417, p. 645.

2125 Fns. 15 and 16 of the Article, Elements of Crimes.

ing, 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.[2126] 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.[2127] 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, for instance 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 would most likely be interpreted to mean the ears or eyes of the victim.[2128] The vagina or anus may also be penetrated with an object or "any other part of the body", which most likely refers to fingers or the tongue of the perpetrator.[2129] The definition is here slightly wider than that in the *Furundzija* case since penetration can be performed with fingers and the tongue, and penetration with a sexual organ is included in orifices other than vaginal, anal or oral. Unlike the *Akayesu* decision, the subjective perception of whether a sexual violation has occurred is not a defining factor 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 probably seen as a welcome development by many states.[2130] The point at issue is whether, in its clarity, it is too restrictive. Many agree that a definition of rape must, in a sense, be exclusive to maintain its extreme seriousness as opposed to other acts of sexual assault, and that a concrete definition is the correct approach.[2131] 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",[2132]and could potentially include forced nudity, forced masturbation or forced touching of the body.[2133]

As concerns the elements of force and non-consent, yet again one sees an apparent mixture between the existing jurisprudence of the ICTY and ICTR at the time. In order for invasion of a sexual nature to amount to rape, the types of circumstances

2126 K. Dörmann, *Elements of War Crimes under the Rome Statute of the International Criminal Court*, Sources and Commentary, ICRC (Cambridge University Press, Cambridge, 2003), p. 327.

2127 De Brouwer, *supra* note 518, p. 131. Twenty-four states were clearly in favour of the concept "invasion".

2128 *Ibid*., p. 133.

2129 *Ibid*., p. 133.

2130 De Brouwer, *supra* note 518, p. 133.

2131 *Ibid*., p. 133, *Furundzija* case, *supra* note 28, para. 186, where it is argued that it is important for sentencing purposes.

2132 Rome Statute, Article 7(1)(g).

2133 De Brouwer, *supra* note 518, p. 136.

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.[2134] Examples of classes of people in this group may include children, the elderly, disabled people and persons under the influence of drugs or alcohol.[2135]

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 seeks to ensure that with regard to certain categories of persons, where force or coercion may not be necessary to accomplish an act of rape through inability to make informed decisions on sexual autonomy, such persons are still protected. Whether there are other categories that do 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 conflict or widespread violence, the perpetrator can accomplish rape without using direct force or the threat of force.[2136] Coercion is exemplified with 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 such threat, which is referred to with the element of "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, for instance, take into consideration economic and cultural constraints.[2137] 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 and civil law systems, since the Rome Statute was negotiated by states with various legal backgrounds and 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 – that is, it is not obligatory. The matter of consent is here raised as a possibility of defence with the burden of proof resting with the defence. Non-consent in the traditional sense is therefore still not a fundamental element of the definition.

2134 Article 7(1)(g)-1 Elements of Crimes, fn. 16, p. 12.

2135 De Brouwer, *supra* note 518, p. 134.

2136 Tonkin, *supra* note 1844, p. 259.

2137 Viseur Sellers, *supra* note 867, p. 26, fn. 134.

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;
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.[2138]

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 consent of the witness. The argument was that not all sexual activity during periods of civil unrest or armed conflict can be classified as coercive, especially in situations where civilians are free to carry out their normal lives. Arguably, though there might be a general sense of coercion in an area, it may not necessarily affect the victim. As a compromise, the defence of consent was allowed by the ICC, but first had to pass a relevance test.

The *mens rea* of the perpetrator is regulated in Article 30 of the Rome Statute in relation to all the core crimes:

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2138 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 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, supra* note 30, *The Prosecutor* v. *Mikaeli Muhimana, supra* note 764.

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.[2139]

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, the threat of force or coercion, or that that the victim was unable to give genuine consent.

The work of defining rape was a long process characterised by the 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 backgrounds.[2140] Certain states were hesitant owing to concern with regard to the consequences for national legislation in *e.g.* criminalising sexual conduct within marriage. Some 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

2139 Article 30 of 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. Article 8(2)(b)(xxii)(4), Article 7, Intro(2) and Article 6(b)(2), The Elements of Crimes.

2140 Boon, *supra* note 417, p. 637, C. Steains, 'Gender Issues', in R. Lee (ed.), *The International Criminal Court: The Making of the Rome Statute – Issues, Negotiations, and Results* (Kluwer Law International, The Hague, 1999), pp. 366-370.

laws.[2141] Such a provision would, for instance, have excluded rape between husband and wife, which in certain countries is not considered a violation. It proved particularly difficult issue to gain consensus on the issue of non-consent, with various countries requiring higher standards of proof, such as physical or verbal resistance. Certain delegations contended that an explicit mention of non-consent should be included in the definition as it is often the key element with which the culpability of wrongful sexual activity between adults is measured.[2142] Other delegates opposed this view with the argument that a lack of consent could never be an element of rape in the context of an armed conflict, nor that non-consent was inherent to the elements of force or the threat of force.[2143]

The definition of rape in the Elements of Crimes has been both proclaimed and criticised. It assuredly 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 being both negative and positive to the extent 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 shifted from the traditional understanding of rape as a crime against morality and honour. This signals a new movement in the international criminalisation of sexual crimes with an increased emphasis on principles such as human dignity and autonomy.[2144] However, though the definition of rape by the ICC purports to achieve a provision that reflects the goal of protecting sexual autonomy, it is lacking in effort in comparison with the ICTY, with its convergence on force or coercion. The response in fact has been mixed, particularly with regard to this element of the offence.[2145] The definition has been described as misguided in its focus on force, in that it fails to consider the harm to personal autonomy.[2146] On the other hand, various authors have insisted that an evaluation of consent is inappropriate in these settings.[2147] 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 then been promulgated by the ICTY. As such, the definition of rape in the Rome Statute

2141 PCNICC/1999/WGEC/DP.39, 3 December 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.

2142 Boon, *supra* note 417, p. 639.

2143 *Ibid.*

2144 *Ibid.*, p. 631.

2145 De Brouwer, *supra* note 518, 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, *supra* note 417, p. 634.

2146 Cryer, *supra* note 92, p. 210, arguing that most domestic laws simply require a lack of consent of the victim.

2147 *See* discussion in chapter 9.2.3.

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 hearing cases of rape. It is generally understood that the ICC will examine the jurisprudence of the *ad hoc* tribunals for assistance when needed.[2148] The impact of the case law of the ICTY and the ICTR on the Elements of Crimes is apparent and hardly surprising. 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 which would bring the interpretations of the crimes in line with their jurisprudence.[2149] 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.[2150] However, it is unlikely that this would pertain to the elements of rape.

There is some indication that the definition of rape in the Elements of Crimes is not generally accepted by other adjudicatory bodies. The ICTY, for instance, 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, 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 those 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 by both *ad hoc* tribunals and because it is more compatible with the notion of sexual autonomy and the ICC Rules of Procedure and Evidence.[2151]

### 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 contravention of the principle of legality.[2152] The choice to construct an Elements of Crimes as well as to define the crimes in detail was therefore a result of the importance attached to the principle of legality during the Rome Conference. A strong inclination towards legal

2148 Stigen, *supra* note 2058, p. 8.

2149 PCNICC/1999/WGEC/DP.1.

2150 D. Hunt, 'The International Criminal Court, High Hopes, "Creative Ambiguity" and an Unfortunate Mistrust in International Judges', 2 *Journal of International Criminal Justice* (2004), p. 60.

2151 Cryer, *supra* note 92, 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) of the Rome Statute.

2152 De Brouwer, *supra* note 518, p. 104.

precision and predictability was evident in those discussions.[2153] During the preparatory meetings there was general agreement that the crimes should "be defined with the clarity, precision and specificity required for criminal law in accordance with the principle of legality".[2154] This was partly due to uncertainty on the definitions of the crimes in customary international law. The participants sought the establishment of a court whose subject-matter was clearly defined in its instruments.[2155] It is an example of the influence on human rights law in this area, in ensuring the due process rights of the accused person. The rules must be as clear and specific as possible. As stated by Antonio Cassese, whereas grey areas are often encountered in public international law, such uncertainty cannot be allowed in international criminal law.[2156] As already 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.[2157] 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" – that is, 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 as well as applicable treaties, principles and rules of international law, including the international law of armed conflict. In addition, 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. Furthermore, 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

2153 McGoldrick *et al*., *supra* note 403, p. 44. Certain states were prominent in the discussions on the priniciple 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, *supra* note 626, p. xivi.

2154 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, *supra* note 1439, p. 445.

2155 Broomhall, *supra* note 352, p. 31, McGoldrick *et al*., *supra* note 403, p. 44.

2156 Cassese, *supra* note 958, p. 21, M. Evans, *International Law* (Oxford University Press, Oxford, 2003), p. 725.

2157 Lee, *supra* note 626, p. 31. As Lee notes, while not all definitions are perfect, to be able to reach an agreement was in itself an important contribution.

language of Article 21 indicates the 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.[2158]

While the question is ambiguous on whether or not there are state obligations to enact legislation on the crimes, responsibilities pertaining to their *definitions* are thus clear. Since the Elements of Crimes is not obligatory for the Court in its adjudicatory role, such a duty 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".[2159]

An implicit obligation may exist, again, through the principle of complementarity. Restrictive definitions of rape could preclude the possibility of prosecuting the offence as an international crime. Hypothetically, this could end in 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".[2160] 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 that consider male eyewitness testimony to be of greater value than that of women. Francoise Hampson, of the UN Sub-Commission of Human Rights, states that in such extreme cases it could be said that the national system is fundamentally flawed and could open the way for an international trial.[2161] Hampson further argues that a failure on a state's part could result in acquittals which would otherwise not have arisen before the court. The complementarity regime would then bring about a weakened system of international protection.[2162] In her opinion differences in national substantive law or rules of procedure when implementing international criminal law could be the cause of 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".[2163] 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,

2158 McGoldrick *et al.*, *supra* note 403, p. 44.

2159 Boon, *supra* note 417, p. 631.

2160 UN Doc. E/CN.4/Sub.2/2004/6, *supra* note 528, para. 13.

2161 *Ibid.*

2162 UN Doc. E/CN.4/Sub.2/2004/12, *supra* note 529, para. 8.

2163 UN Doc. E/CN.4/Sub.2/2004/6, *supra* note 528, para. 14.

an evaluation of the domestic laws in member states regarding the definition of and procedural laws relating to rape would to a certain extent be carried out.

The Elements of Crimes could possibly further add to an emerging definition of rape in customary international law. Though the crimes included in the Rome Statute already constitute customary international law, the same cannot be said for the definitions of the crimes. Considering the overwhelming acceptance, albeit at times through compromise at the PrepCom talks, 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.[2164] There was indeed a general agreement that the definitions of the crimes of the ICC should reflect customary international law in order to gain wide acceptance and to avoid creating new law.[2165]

Beyond such possible obligations, the document may also serve as an inspiration for domestic law reform. Brigid Inder, a representative from the Women's Initiatives for Gender Justice and the International Criminal Court, assures that the creative implementation of the international crimes might well 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 could simultaneously influence the domestic definition of rape as an ordinary crime.[2166] Several countries have provided for requirements in their domestic legislation that their domestic courts apply the Elements of Crimes. This includes the United Kingdom, which also has a provision obliging its courts to take into account the relevant case law of the ICC.[2167] In New Zealand, the Elements of Crimes has been accorded status in domestic proceedings.[2168] Nevertheless, various organisations have voiced concern over the fact that many member states are failing in implementing the Rome Statute or are adopting narrow definitions of the crimes.[2169] 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 rape. An instance is Bosnia-Herzegovina, which still requires that any sexual violence occurs following "force or by threat of immediate

2164 C. Kress, '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.

2165 P. Kirsch, 'Foreword', in K. Dörmann (ed.), *Elements of War Crimes under the Rome Statute of the International Criminal Court, Sources and Commentary* (ICRC, Cambridge University Press, Cambridge, 2003), p. xiii.

2166 On Women's Initiatives for Gender Justice and the International Criminal Court: An Interview with Brigid Inder, WHRnet, August 2004.

2167 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."

2168 International Crimes and International Criminal Court Act 2000, Public Act 2000 No. 26, Article 12(4)(a).

2169 International Criminal Court: The Failure of States to Enact Effective Implementing Legislation, Amnesty USA, 7 September 2004.

attack upon her life or limb or the life or limb of a person close to her".[2170] Such a definition disregards the evolution in international criminal law through the jurisprudence of the *ad hoc* tribunals. Thus while the Elements of Crimes is not explicitly binding on member states, it may still create certain obligations for them or, at a minimum, serve as inspiration for domestic legal reform.

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 the ability of judges to develop the law. It has been criticised for restricting the role of judges to a substantially mechanical function in applying the principles and definitions, a result of the mistrust of states at the PrepCom meetings. This could restrain the efficiency of judges and the mandate of the Court.[2171] 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 for 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 straightjacket imposed by a rigid code" or it risks becoming obsolete.[2172] According to Hunt, though there is value in the codification of previous practices, the minute detail of the crimes in the instrument can stultify further growth in the law.[2173] As regards rape, the Elements of Crimes are an important step in clarifying possible customary elements. However, in certain respects it prevents both the development of the definition and the acknowledgement of more recent understandings of rape, such as that from the jurisprudence of the *ad hoc* tribunals. Considering the rather conservative definition of rape on the part of the ICC, such freedom in this regard would have been most useful.

### *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 Democratic Republic of Congo (DRC), the Central African Republic,

2170 Article 172(1)(h) (persecution) of the Criminal Code of BiH (CC BiH).

2171 Hunt, *supra* note 2150, p. 56.

2172 *Ibid*., p. 58.

2173 *Ibid*., 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. Von Hebel and Kelt, *supra* note 579, 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. D. Robinson and H. von Hebel, 'Reflections on the Elements of Crimes', in R. Lee (ed.), *The International Criminal Court, Elements of Crimes and Rules of Procedure and Evidence* (Transnational Publishers, Ardsley, NY, 2001), p. 229.

Uganda and Darfur, Sudan.[2174] The cases have not concerned gaps or a lack in domestic legislation, but rather a failure to capture the accused, deficient procedures in the legal systems, or an unwillingness to prosecute assailants, for example, by being complicit in the execution of the crimes.[2175]

The conflicts all feature sexual violence as a common feature, be it sexual enslavement, rape, mutilation or forced marriage.[2176] Katanga and Ngudjolo, the first suspects charged with gender-based crimes by the ICC, were commanders of two militia groups and were suspected of orchestrating mass rapes in the DRC. The manner in which it was performed confirmed the structured form of sexual violence in armed conflicts. The prosecutor of the ICC described it thus:

> 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 command-

2174 DRC: Germain Katanga/Mathieu Ngudjolo Chui, date of charge 12 June 2008, CAR: Jean-Pierre Bemba Gombo, date of charge 23 May 2008, Uganda: Joseph Kony: date of charge: 27 September 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 three million deaths and thereby constituting one of the deadliest conflicts in Africa. The situation in CAR investigated by the ICC concerns the *coup d'etat* 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 within five months. *See* document ICC-OTP-BN-20070522-220-A_EN, The Hague, 22 May 2007, <www.icc-cpi.int/NR/rdonlyres/B64950CF-8370-4438-AD7C-0905079D747A/144037/ICCOTPBN20070522220_A_EN.pdf>, visited on 10 November 2010. Vast numbers of the population have been murdered, thousands have been raped, and millions live displaced in camps in Darfur, Sudan. *See e.g.* Situation in Darfur, Sudan, *The Prosecutor* v. *Omar Hassan Ahmad Al Bashir*, 4 March 2009, International Criminal Court, Warrant of Arrest for Omar Hassan Ahmad Al Bashir, ICC-02/05-01/09, <www.icc-cpi.int/iccdocs/doc/doc639078.pdf>, visited on 10 November 2010.

2175 *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: Background Situation in the Central African Republic, 22 May 2007, International Criminal Court, ICC-OTP-BN-20070522-220-A_EN, The Hague, *supra* note 2174, Sudan: Pre-Trial Chamber I, Warrant of Arrest for Ahmad Harun, No.: ICC-02/05-01/07, 27 April 2007.

2176 Women's Coalition for Gender Justice, Making a Statement, June 2008, p. 3.

> ers alike and also by soldiers who were punished and sent to prison. The fate reserved to captured women was widely known.[2177]

The charges based upon sexual violence against commanders and leaders in all situations investigated by the ICC is an affirmation that such crimes are given prominence 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.[2178] 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 a "lack of understanding of gender-based violence at the policy level […] [which] is limiting the effectiveness of the ICC to prosecute these crimes".[2179] 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 law".[2180] The Coalition mentions that sexual violence only receives a cursory mention in the reports of the prosecutor of the ICC to the UN Security Council and does not aspire to prominence because it is not considered important enough.[2181] Is this critique valid? In several of the cases, gender-based crimes, whether rape or sexual enslavement, have been one of the main charges.[2182] Such offences have thus been consistently acknowledged by the prosecutor. What remains to be seen is to what extent the Court applies the definition of rape contained in the Elements of Crimes.

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2177 Situation in the Democratic Republic of the Congo, *The Prosecutor* v. *Germain Katanga and Mathieu Ngudjolo Chui*, 12 June 2008, International Criminal Court, Amended Document Containing the Charges Pursuant to Article 61 (3) (a) of the Statute, ICC-01/04-01/07-584-Anx1A, <www.iclklamberg.com/Caselaw/DRC/Katanga/OTP/ICC-01-04-01-07-584-Anx1A-ENG.pdf>, visited on 10 November 2010, para. 89.

2178 Women's Coalition for Gender Justice, Making a Statement, June 2008, p. 9.

2179 *Ibid*., p. 14.

2180 *Ibid*., p. 14.

2181 *Ibid*., p. 20.

2182 In CAR the main priority was gender-based violence. *See* ICC-OTP-BN-20070522-220-A_EN, *supra* note 2174. *See e.g.* Situation in the Democratic Republic of the Congo, 2 July 2007, International Criminal Court, Warrant of Arrest for Germain Katanga, ICC-01/04-02/07, <www.icc-cpi.int/iccdocs/doc/doc349648.PDF>, visited on 10 November 2010, Situation in the Democratic Republic of the Congo, 6 July 2007, International Criminal Court, Warrant of Arrest for Mathieu Ngudjolo Chui, ICC-01/04-02/07, <www.icc-cpi.int/iccdocs/doc/doc453054.PDF>, visited on 10 November 2010, Situation in the Central African Republic, 23 May 2008, International Criminal Court, Warrant of Arrest for Jean-Pierre Bemba Gombo, ICC-01/05-01/08, <www.icc-cpi.int/iccdocs/doc/doc504390.PDF>, visited on 10 November 2010.

### 9.3.8 Impact of the ICC

The adoption of the Rome Statute and the subsequent establishment of the ICC together represent not only a vast advancement of gender aspects in international criminal law, but also in IHL and international human rights law. As the first permanent international criminal court it has a unique opportunity to develop the international jurisprudence on 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 the ratifying states. The extent to which states will need to replace their existing laws to meet their obligations under the Rome Statute depends on existing laws and legal systems, but it is presumed that all state parties will require a certain level of modification. It appears that states must adopt legislation implementing the international crimes, and it is also encouraged that member states apply the definitions of the crimes contained in the Elements of Crimes. It is plausible that restrictive definitions of rape could produce a finding of admissibility by the Court. An incentive therefore exists to adopt this definition. Ultimately, the Court will act as a setter of standards in the interpretation and application of international law and provide a model for national authorities in the administration of criminal justice, influencing domestic interpretations.[2183] 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 jurisdiction".[2184] 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 takes precedence over another. Rather, each definition has authority in the particular jurisdiction of that tribunal or court.[2185] Sellers raises concern over the legitimacy of such a multitude of definitions and whether this might undermine equal access to justice, depending on the jurisdiction to which a case may apply.[2186] 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 […]."[2187] The various approaches to defining rape thus lead to a fragmentation of international criminal law.

2183 Nill, *supra* note 2023, p. 127.

2184 Report of the 69th Conference, p. 406.

2185 Viseur Sellers, *supra* note 867, p. 27.

2186 *Ibid.*, p. 27.

2187 W. Burke-White, 'The International Criminal Court and the Future of Legal Accountability', 10:1 *ILSA Journal of International and Comparative Law* (2003), p. 204.

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 affirms, 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 similar to that in national law.[2188] The decisions of international criminal tribunals are not binding precedents for the tribunals themselves nor for domestic courts, hence the divergent conclusions on the definition of 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 for faith in public international law, as well as its effectiveness. While 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, in non-member states, as the Statute in large parts is considered customary international law.[2189] 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, which elucidates previously developed customary law and contributes to its further development.[2190] 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.[2191] The *ad hoc* tribunal for East Timor also largely based its definitions upon the Rome Statute.[2192]

Furthermore, third states may still be affected by the Court's jurisdiction should their citizens 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 with non-member states, and does not require the consent of the state.[2193] As such, the Court is

2188 Ferdinandusse, *supra* note 88, p. 113. *See also* C. Leathley, 'An Institutional Hierarchy to Combat the Fragmentation of International Law: Has the ILC Missed an Opportunity?', 40 *New York University Journal of International Law & Policy* 259 (2007).

2189 G. Danilenko, 'The ICC Statute and Third States', in A. Cassese *et al.* (eds.), *The Rome Statute of the International Criminal Court: A Commentary*, Volume II (Oxford University Press, Oxford, 2002), p. 1872, Kleffner, *supra* note 2054, p. 110. As mentioned, the ICC also has the possibility of prosecuting individuals from non-member states.

2190 120 voted in favour, 7 against and 21 abstained. *See* Chronology of the International Criminal Court, <www.icc-cpi.int/Menus/ICC/Home>, visited on 8 February 2010.

2191 *Prosecutor* v. *Tadic*, *supra* note 584, para. 223, *Prosecutor* v. *Furundzija, supra* note 28, para. 227. *See also Regina* v. *Bartle. ex parte Pinochet*, 38 *I.L.M.* 581 (House of Lords, 1999).

2192 Kleffner, *supra* note 2054, p. 100.

2193 Article 12 of the Rome Statute.

empowered to complement domestic jurisdictions of states that have not ratified the Rome Statute nor have agreed to be bound on an *ad hoc* basis. All states are therefore urged to implement the provisions of the Statute in order to avoid examination by the Court.[2194] The Court's influence is therefore much wider than that of affecting member states alone, both through the flexible concept of jurisdiction as well as the influence on customary law.

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 their jurisprudence. The resonance may thus be wide, as it is likely that it will also make an impact on the decisions of human rights courts and national courts adjudicating on 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 also have a ripple effect on the development of international human rights, since *e.g.* the ICTY with regularity refers to human rights instruments for interpretation, such as the International Covenant on Civil and Political Rights (ICCPR) and the European Convention on Human Rights (ECHR). As such, interpretations of those documents may in the future take into consideration the reasoning of the tribunals, which one has already seen in the European Court of Human Rights.[2195] Fausto Pocar, judge of the ICTY, predicts that the definition and interpretation of the rights and prohibitions in the Rome Statute on human rights will further influence their application outside the scope of the ICC. It may thus have a bearing on both the formation of customary norms and treaty provisions.[2196]

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, which primarily occur in the course of armed conflicts, can influence the human rights law equivalent. Would it be appropriate to use interchangeably 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, for example, 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.[2197] Furthermore, the ECtHR has referred to the *Kunarac* case in *M.C.* v. *Bulgaria* in defining rape. As will be further discussed, 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

2194 R. Clark, 'Crimes against Humanity and the Rome Statute of the International Criminal Court', in M. Politi and G. Nesi (eds.), *The Rome Statute of the International Criminal Court, A Challenge to Impunity* (Ashgate, Aldershot, 2001), p. 101.

2195 Murphy, *supra* note 1804, p. 96.

2196 F. Pocar, 'The Rome Statute of the International Criminal Court and Human Rights', in M. Politi and G. Nesi (eds.), *The Rome Statute of the International Criminal Court, A Challenge to Impunity* (Ashgate, Aldershot, 2001), p. 69.

2197 *Ibid*., p. 69.

applying a human rights stance to criminal law provisions.[2198] In conclusion, the impact of the Rome Statute and the ICC will hopefully have a substantial impact on the criminal laws on rape in member states, but also in a wider perspective influence other states and bodies as well as customary norms.

## 9.4 Universal Jurisdiction for the Crime of Rape?

Though the effect of the law developed by the ICC concerns the criminal law jurisdictions of a large number of member states, and may also indirectly affect non-member states, the concept of universal jurisdiction must in addition be briefly discussed as its reach, by definition, is universal. Both the system of the ICC and universal jurisdiction pursue similar goals in offering jurisdiction over certain acts of exceptional gravity, chiefly those 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 reverse.[2199] The importance of discussing whether or not 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 on the part of states to enact legislation prohibiting rape and to prosecute such offences on the basis of such jurisdiction.

Jurisdiction may be defined thus: "[T]he limits of the legal competence of a State or other regulatory authority to make, apply, and enforce rules of conduct upon persons."[2200] Universal jurisdiction allows states to prosecute persons suspected of committing offences considered to be of universal concern to the international community, even where a state lacks the traditional forms of jurisdiction, such as territoriality or nationality.[2201] Whereas the traditional forms of jurisdiction rest upon a nexus between the state and the offence, universality is founded on the *nature* of the offence that is deemed to affect the interests of all states.[2202] The Princeton Principles on Universal Jurisdiction, created by a working group consisting of universities and interest groups such as the International Commission of Jurists, is one of few attempts to define universal jurisdiction.[2203] The definition of the term is stated in Principle 1:

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2198 Bagaric and Morss, *supra* note 299, p. 200.

2199 Broomhall, *supra* note 352, p. 106.

2200 Evans, *supra* note 38, p. 336.

2201 Meron, *supra* note 1954, p. 118, Bassiouni, *supra* note 255, p. 227. Territoriality as a jurisdictional principle entails that a 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 upon nationality allows states to regulate the acts of its citizens, even when occurring extraterritorially. Passive personality is based upon the notion of states protecting their citizens and extends jurisdiction to offences perpetrated against citizens of that state. Protective jurisdiction also exists, which is based upon the national interests affected.

2202 Bassiouni, *supra* note 255, p. 229.

2203 Princeton University Program in Law and Public Affairs, The Princeton Principles on Universal Jurisdiction 28 (2001).

> [C]riminal 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 in question has 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 because clearly a state's jurisdiction is linked to its sovereignty and a claim to universality may potentially cause disputes between states.[2204]

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.[2205] 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 by way of three points: 1) no other state can exercise 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.[2206]

The nature of the principle is elusive and has in practice been interpreted in different ways by states due to a lack of 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*.[2207] As David

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2204 C. Bassiouni, 'The History of Universal Jurisdiction and its Place in International Law', in Stephen Macedo (ed.), *Universal Jurisdiction: National Courts and the Prosecution of Serious Crimes Under International Law* (University of Pennsylvania Press, Philadelphia, 2003), p. 39, Brownlie, *supra* note 960, p. 297. Bassiouni warns that the jurisdictional principle must not be allowed to become like a wildfire, uncontrolled in its application as 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 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 device. 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 would be both time-consuming and require extensive resources. *See* Bassiouni, *supra* note 1649, p. 154.

2205 Evans, *supra* note 38, p. 348.

2206 Bassiouni, *supra* note 1649, p. 96.

2207 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

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."[2208] It has been described as a principle "for whom the bell tolls"[2209] and a subject of neglect.[2210] At times the principle of universal jurisdiction has been confused with other theories on extraterritorial criminal jurisdiction, further muddling the issue, as is evident in military laws, emergency laws or customs duties.[2211] 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 in that 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, for example, regarding the grave breaches regime of the Geneva Conventions, and possibly torture in the UN Convention against Torture.[2212] Arguments for a mandatory jurisdiction in relation to *ius cogens* norms also exist.[2213]

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line between *lex lata* and *de lege ferenda*. *See* discussion in Bassiouni, *supra* note 1649, p. 95.

2208 D. J. Scheffer, 'Symposium: Universal Jurisdiction: Myths, Realities, and Prospects: Opening Address', 35 *New England Law Review* 233 (2001), p. 233.

2209 A. Cassese, 'Is the Bell Tolling for Universality? A Plea for a Sensible Notion of Universal Jurisdiction', 1 *Journal of International Criminal Justice* 589 (2003).

2210 Broomhall, *supra* note 352, p. 105.

2211 Extraterritorial Criminal Jurisdiction, European Committee on Crime Problems, Council of Europe, Strasbourg 1990, p. 16.

2212 On grave breaches: B. Broomhall, 'Towards the Development of an Effective System of Universal Jurisdiction for Crimes under International Law', 35 *New England Law Review* 399 (2000-2001), p. 401. Dörmann, *supra* note 2126, p. 129, G. Gilbert, *Responding to International Crime* (Brill, Leiden, 2006), p. 91, D. Shelton, *Encyclopedia of Genocide and Crimes against Humanity*, Vol. 1 (Macmillan, Detroit, 2005), p. 339. *See also Prosecutor* v. *Tadic*, *supra* note 76, para. 79, on the 1949 Geneva Conventions: "[T]he Conventions create universal mandatory criminal jursidiction among Contracting States". On torture: UN Doc. A/HRC/4/33, 15 January 2007, para. 41. Bassiouni, *supra* note 1649, 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 C. Bassiouni and E. Wise, *Aut Dedere Aut Judicare: The Duty to Extradite or Prosecute in International Law* (Martinus Nijhoff, Leiden, 1995).

2213 Cryer, *supra* note 92, p. 61, C. Damgaard, *Individual Criminal Responsibility for Core International Crimes: Selected Pertinent Issues* (Springer, Heidelberg, 2008), p. 60, M. von Sternberg, 'A Comparison of the Yugoslavian and Rwandan War Crimes tribunals: Universal Jurisdiction and the "Elementary Dictates of Humanity"', 22 *Brooklyn Journal of International Law* 111 (1996), Shaw, *supra* note 2213, p. 673, Bassiouni, *supra* note 1649, p. 104, K. Askin, 'International Criminal Law and the ICC Statute: Crimes against Women', in K. Askin and D. Koenig (eds.), *Women and International Human Rights Law*, vol. 2 (Transnational Publishers, Ardsley, NY, 2000), p. 7.

There is presently an overlap between crimes that incur universal jurisdiction and *aut dedere aut judicare* obligations – that is, a duty to prosecute or surrender a suspect in relation to a certain grave crime. Universal jurisdiction is certainly related to the principle but is of a wider scope. These principles must remain distinct because universal jurisdiction does not in general entail such a duty to prosecute but is merely a voluntary exercise.[2214] 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.[2215] The duty to prosecute or extradite persons accused of international crimes naturally entails an increased acceptance of universal jurisdiction as a means of achieving these goals. As the Committee on Crime Problems of the Council of Europe has held, the maxim *aut dedere aut judicare* is increasingly referred to in international treaties but as with universal jurisdiction the manner in which it is implemented varies among countries.[2216]

Several different interpretations have been given to the principle in practice and doctrine. Luc Reydams has divided them into three categories. The "co-operative general universality principle" establishes jurisdiction for international and common crimes in cases where extradition of an alleged offender is not possible. These regulations frequently contain *aut dedere aut judicare* obligations.[2217] The "co-operative limited universality principle" concerns only international crimes and provides for jurisdiction where an offender is present on the territory.[2218] Lastly, the "unilateral limited universality principle" is truly universal in character, allowing any state to investigate, even in cases of *in absentia*, based upon the nature of the crime.[2219] This last form of universality is rarely seen in municipal laws and unknown in treaty law.[2220] Most states do not require that the offender cannot be extradited but that he or she is present on the territory.[2221]

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 univer-

2214 G. Bottini, 'Universal Jurisdiction after the Creation of the International Criminal Court', 36 *New York University Journal of International Law & Policy* 503 (2003-2004), 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.

2215 Bassiouni, *supra* note 1649, p. 153.

2216 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.

2217 Reydams, *supra* note 77, pp. 28-35.

2218 *Ibid.*, pp. 35-38.

2219 *Ibid.*, p. 38.

2220 *Ibid.*, p. 223.

2221 *Ibid.*, p. 221.

sal jurisdiction.[2222] Similarly, the understanding and practical application of the jurisdiction has been somewhat haphazard among states. Whereas certain countries have introduced the jurisdiction in their domestic legislation where an 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.[2223] The fear that states will rampantly prosecute on a whim has not been realised – quite the opposite, with legislators and judges practising 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 elusive 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.[2224] Universal jurisdiction is also increasingly provided for in treaties, such as the UN Convention against Torture.[2225] The underpinning rationale for the crimes that are generally 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.[2226]

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2222 *Case Concerning the Arrest Warrant of 11 April 2000* (*DRC* v. *Belgium*), 14 February 2002, ICJ, ICJ Reports 2002. The DRC initiated proceedings before the ICJ, opposing the arrest warrant granted 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. Though 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 founded 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 Guillame and Rezek held that international law does not support universal jurisdiction, apart from possibly piracy. Higgins, Koojimans, Buergenthal and Van den Wyngaert stated that there was no law prohibiting such jurisdiction.

2223 Extraterritorial Criminal Jurisdiction, European Committee on Crime Problems, Council of Europe, Strasbourg 1990, p. 15.

2224 Cassese, *supra* note 958, p. 294.

2225 Zahar and Sluiter, *supra* note 2066, p. 498.

2226 Evans, *supra* note 38, 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", I. Brownlie, *Principles of Public International Law* (Oxford University Press, Oxford, 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

Piracy and slave-trading are frequently held as the two crimes that developed the idea of universal jurisdiction, since these transgressions occurred across borders and no state could establish a traditional jurisdiction.[2227] Nations had a common interest in protecting themselves against the threat of piracy. The prohibition on both piracy and slavery has developed on the customary level, though various treaties also exist pertaining to slavery, albeit not all of them allowing universal jurisdiction.[2228]

Certain authors maintain 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 offences.[2229] Peremptory norms that are also 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".[2230] 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."[2231] 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*.[2232] These peremptory norms are binding upon all legal systems and all persons regardless of treaty provisions.[2233] 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.[2234] Accordingly, universal jurisdiction does not as a

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the basis of universal jurisdiction is that the crimes constitute violations against mankind. Bassiouni, *supra* note 255, p. 229.

2227 Broomhall, *supra* note 2212, p. 402.

2228 *See e.g.* Article 4 UDHR, Article 8 ICCPR, Article 4 ECHR, Article 5 African Charter, Article 6 American Convention.

2229 Von Sternberg, *supra* note 2213, Shaw, *supra* note 2213, p. 673. Bassiouni, *supra* note 1649, p. 104, Askin, *supra* note 2213, p. 7, Burchard, *supra* note 771, p. 162.

2230 *Regina* v. *Bartle* (24 March 1999), Opinion of Lord Browne-Wilkinson. It should be noted that the House of Lord's opinions are those of each lord and have been criticised for leaving a vague contradictory impact. The relationship between *jus cogens* and universal jurisdiction has *e.g.* been criticised in R. Jennings, 'The Pinochet Extradition Case in the English Courts', in L. Boisson de Chazournes and V. Gowlland-Debbas (eds.), *The International Legal System in Quest of Equity and Universality* (Martinus Nijhoff, The Hague, 2001), p. 683.

2231 *Regina* v. *Bartle* (24 March 1999), Opinion of Lord Millett.

2232 Copelon, *supra* note 263, p. 197.

2233 Askin, *supra* note 205, p. 240.

2234 Boot, *supra* note 100, p. 56.

matter of course exist upon the conclusion that a norm is *ius cogens*[2235] and that crimes beyond the scope of *ius cogens* norms may also incur universal jurisdiction.[2236]

The Princeton Principles list seven crimes that are considered to be "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.[2237] The list is suggestive 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.[2238] The possible basis for universal jurisdiction of the ICC crimes varies depending on the violation. As for *war crimes*, a basis for universal jurisdiction arguably exists to a certain extent. The Geneva Conventions of 1949 have been cited as an example that would permit such a wide use of jurisdiction, though it is not explicitly mentioned.[2239] The duty to enforce the provisions through the penal system could implicitly entail a right for state parties to apply

2235 Bottini, *supra* note 2214, p. 518, L. Damrosch, 'Comment: Connecting the Threads in the Fabric of International Law', in S. Macedo (ed.), *Universal Jurisdiction: National Courts and the Prosecution of Serious Crimes under International Law* (University of Pennsylvania Press, Philadelphia, 2003), p. 94, M. Inazumi, *Universal Jurisdiction in Modern International Law: Expansion of National Jurisdiction for Prosecuting Serious Crimes under International Law* (Intersentia, Antwerpen, Oxford, 2005), p. 125

2236 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.

2237 Principle 2. *See also* discussion on the list of crimes in Broomhall, *supra* note 2212. 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 have 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 contribute 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 the state must include but not limit its universal jurisdiction to such crimes that have been recognised by international law. 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 October 2002), Principles 1 and 7.

2238 Meron, *supra* note 1954, 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, *supra* note 2213, pp. 668-671.

2239 Bassiouni, *supra* note 1649, p. 103.

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 involves *aut dedere aut judicare* obligations, it has led to a general assumption that it also affords mandatory universal jurisdiction.[2240] 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".[2241] The principle can, for instance, be applied to 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 they are incorporated in the Rome Statute. Provisions are included in the domestic legislation of several states but the jurisprudence has been minimal. However, there is support for the application of universal jurisdiction for crimes against humanity. Since crimes against humanity have not been the focus of a specific treaty, the application of universal jurisdiction in this case rather stems 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.[2242]

As concerns *genocide*, the 1948 UN Convention on the Prevention and Punishment of the Crime of Genocide states in 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 are required to enact domestic criminal legislation allowing for the prosecution of that 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 universal. The ICTY and the ICTR have tried cases of genocide, both based on the territoriality principle.

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2240 Dörmann, *supra* note 2126, p. 129, Zahar and Sluiter, *supra* note 2066, p. 498, Sassòli and Bouvier, *supra* note 40, 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, asserts that universal jurisdiction for war crimes has not reached customary status as of yet, considering the lack of consistent state practice. *See The ICRC Study on Customary International Humanitarian Law*, *supra* note 21, p. 607 and Bassiouni, *supra* note 1649, p. 51. Though collective enforcement mechanisms have or do exist, such as the Yugoslavia, Rwanda or Nuremburg trials, these were established based upon traditional jurisdictional theories such as territoriality or passive personality, *i.e.* the victim's nationality.

2241 Meron, *supra* note 1746, p. 569.

2242 Zahar and Sluiter, *supra* note 2066, p. 498.

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, a support which can also be found in the judgments of the ICTY and the ICTR.[2243] 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.[2244] The ICJ in proceedings concerning the application of the Genocide Convention emphasised that it 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".[2245]

Despite the unclear status in respect of the three main international crimes, other treaties oblige states to provide for universal jurisdiction. This includes the UN Convention against Torture, which in Article 5(2) requires 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 similarly to the grave breaches provision it refers to obligations of *aut dedere aut judicare*, it has been interpreted to constitute a duty to establish universal jurisdiction, further supported by the *travaux préparatoires*.[2246] The jurisdiction, however, is qualified by the requirement of the presence of the indi-

2243 Meron, *supra* note 1954, p. 125, Bottini, *supra* note 2214, p. 537, Bassiouni, *supra* note 1649, p. 54, Zahar and Sluiter, *supra* note 2066, p. 498, Broomhall, *supra* note 2212, 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 & Bosnia & Herzegovina v. Serbia & Montenegro*, Order of 13 September 1993, Separate Opinion of Judge *ad hoc* Lauterpacht, <www.icj-cij.org/docket/files/91/7323.pdfp>, visited on 10 November 2010, 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, M. Kamminga, 'Lessons Learned from the Exercise of Universal Jurisdiction in Respect of Gross Human Rights Offenses', 23 *Human Rights Quarterly* 940 (2001), p. 945. *See*, *however*, W. Schabas, 'National Courts Finally Begin to Prosecute Genocide, the "Crime of Crime"', 1:1 *Journal of International Criminal Justice* (2003) for the opposite view.

2244 *The Prosecutor* v. *Bernard Ntuyahaga*, 18 March 1999, ICTR, Decision on the Prosecutor's Motion to Withdraw the Indictment, Case No. ICTR-98-40-T, <www.unictr.org/Portals/0/Case/English/Ntuyuhaga/decisions/withdraw.pdf>, visited on 10 November 2010.

2245 *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-eigth session, UN Doc. A/51/10 (1996), p. 29.

2246 UN Doc. A/HRC/4/33, 15 January 2007, para. 41. Bassiouni, *supra* note 1649, p. 56.

vidual concerned. The only alternative for a state with an alleged perpetrator present on its territory is to extradite that person to other appropriate states.[2247] A few cases have discussed the applicability of universal jurisdiction with regard to the prohibition of torture. In the matter 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.[2248] It was well established, for example, 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 grounds that the Senegalese authorities had failed to take the necessary legislative measures to establish the possibility of practicing universal jurisdiction.[2249] 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:

> [E]very 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.[2250]

All of 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, in that they already constitute 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*.[2251] 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.[2252]

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2247 *See* Article 7 of the UN Convention against Torture.

2248 *Suleymane Guengueng et al.* v. *Senegal,* Communication No. 181/2001, UN.Doc. CAT/C/36/D/181/2001, 17 May 2006, (HRC).

2249 *Ibid*., paras. 9.5-9.6 and 9.8.

2250 *Prosecutor* v. *Furundzija*, *supra* note 28, para. 156.

2251 Askin, *supra* note 11, p. 349.

2252 Askin, *supra* note 2213, p. 9.

States must thus establish jurisdiction over the crime of rape in their domestic laws, depending on the contextual elements, or have the option of doing so.

An issue that arises particularly in the domestic implementation of the Rome Statute by member states but which can also cause concern with regard to universal jurisdiction is the question of whether states may prosecute violations of the core crimes as "ordinary crimes". That is, 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 universal jurisdiction to prosecute core crimes but not ordinary crimes.[2253] There is therefore an additional incentive to fully implement the international crimes and their definitions domestically, since the possibilities open for applying universal jurisdiction would otherwise be severely limited. In practical terms, 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*.[2254] Some even hold that the customary development entails an obligation concerning these crimes, arising from their *ius cogens* nature and related *erga omnes* obligations.[2255] One can here apply the Kirgis approach of a sliding scale of customary international law, plausibly finding support for custom based upon the particularly severe nature of certain international crimes or human rights violations.[2256] Many authors, however, as of yet find no customary basis for universal jurisdiction for genocide and crimes against humanity.[2257] The lack of consistent state practice would support this. While 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 declares that "[t]here are considerable differences of opinion among

2253 Ferdinandusse, *supra* note 88, p. 204.

2254 Broomhall, *supra* note 2212, p. 405, Kamminga, *supra* note 2243, p. 965.

2255 Bassiouni, *supra* note 255, p. 220.

2256 Kirgis, *supra* note 78.

2257 *See e.g.* D. Hawkins, 'Universal Jurisdiction for Human Rights: From Legal Principle to Limited Reality', 9 *Global Governance* (2003), pp. 347-365. Schabas, *supra* note 2243.

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".[2258] Bassiouni likens universal jurisdiction to a checkerboard in that certain conventions recognise it and limited national practice supports its existence beyond theory, but the application is "uneven and inconsistent".[2259] Such inconsistency largely derives from the different approaches and interpretations of countries and adjudicatory bodies on the meaning of universal jurisdiction. Though states may purport to embrace the application of universal jurisdiction, their regulations may be coupled with such major restrictions that they actually negate its universality, for instance, linking it with traditional forms of jurisdiction, such as territoriality. In certain countries, the presence of the accused on state territory may be required, which is evident in certain conventions expressly requiring such presence, for example, concerning terrorist crimes.[2260] 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 that country.[2261] The French courts have held, in relation to their universal jurisdiction, that while it can be exercised in cases of torture it can only be applied in situations where the accused is present on French territory.[2262]

In most claimed instances of universal jurisdiction, there has in fact been a connection between the crime and the enforcing state, due to the nationality of the victim

2258 Extraterritorial Criminal Jurisdiction: Report of the European Committee on Crime Problems, Council of Europe (1990).

2259 Bassiouni, *supra* note 1649, p. 152.

2260 Bottini, *supra* note 2214, 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: "[I]t 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 upon 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, <www.nizkor.org/hweb/people/e/eichmann-adolf/transcripts/Sessions/>, visited on 10 November 2010 and discussion in Zahar and Sluiter, *supra* note 2066, p. 497.

2261 The International Criminal Court Act 2001, United Kingdom, Articles 67-68.

2262 Article 689-2 of the Criminal Procedure Code. It has also established such jurisdiction for crimes committed in Rwanda and Yugoslavia. *See* A. H. Butler, 'The Growing Support for Universal Jurisdiction in National Legislation', in Stephen Macedo (ed.), *Universal Jurisdiction: National Courts and the Prosecution of Serious Crimes under International Law* (University of Pennsylvania Press, Philadelphia, 2003), p. 74.

or perpetrator, or the impact of the crime on the country in question.[2263] Such types of application of universal jurisdiction, coupled with traditional forms of jurisdiction such as territoriality or nationality, have by certain authors been dubbed universal jurisdiction "plus".[2264] For political reasons such approaches are generally considered to be more pragmatic and appropriate.[2265]

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 for such an exercise, despite the presence of international conventions permitting it.[2266] In order to employ universal jurisdiction, states must thus adopt the necessary domestic legislation that criminalise the relevant violations. As for domestic regulations on jurisdiction, states must either adopt specific legislation providing them with the possibility for universal jurisdiction,

2263 Bassiouni, *supra* note 1649, 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 affects the interests of the enforcing state or where 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 open for states to apply universal jurisdiction already 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 and *Universal Jurisdiction in Europe, The State of the Art*, June 2006, vol. 18, No 5 (D), Human Rights Watch.

2264 A.-M. Slaughter, 'Defining the Limits: Universal Jurisdiction and National Courts', in S. Macedo (ed.), *Universal Jurisdiction: National Courts and the Prosecution of Serious Crimes Under International Law* (University of Pennsylvania Press, Philadelphia, 2003), p. 172.

2265 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 available for investigation of the state in that it may not be allowed even when anticipating the arrival of a suspect, until the individual is actually present on the territory. Cassese, *supra* note 958, pp. 289-90. Are we concerned with the true essence of universal jurisdiction in countries with a universal jurisdiction "plus"? The purist approach to interpreting universal jurisdiction is that it can be exercised where no connection to the enforcing state exists. Arguments, however, have 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.

2266 Bassiouni, *supra* note 2204, p. 46.

such as with the crime of genocide, or they may use their general criminal law and regulations on jurisdiction for that purpose.[2267] Few countries provide for such possibilities in their domestic legislation.[2268] 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".[2269] However, it is doubtful that such a rule would 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 of the accused on the territory of the country in the form of primary residence.[2270] 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 of them involved the participation in the Rwandan genocide of 1994.[2271] Such a liberal application of the principle as the previous law has been much criticised.[2272]

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".[2273] This possibility led to the investigation of the former president of Chile,

2267 Meron, *supra* note 1954, p. 120.

2268 Bassiouni, *supra* note 1649, p. 106.

2269 Principle 3 of the Princeton Principles.

2270 Likewise, if the victim is Belgian or has lived in Belgium for at least three 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.* K. C. Moghalu, *Global Justice: The Politics of War Crimes Trials* (Greenwood Publishing, Westport, 2006), p. 93.

2271 La Cour d'Assises de L'arrondissement Administratif de Bruxelles-Capitale, verdict of 8 June 2001. *See* discussion in L. Reydams, 'Belgium's First Application of Universal Jurisdiction: The Butare Four Case', *Journal of International Criminal Justice* 2003 (1).

2272 Cryer, *supra* note 2026, p. 95.

2273 Article 23(4). *See* translation in Butler, *supra* note 2262, p. 73. However, in the *Guatemalan Generals Case*, the High Court interpreted universal jurisdiction in a restrictive manner, emphasising that universal jurisdiction may only 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. *Guatemalan Generals Case*, Audiencia Nacional, Madrid, Diligencias Previas 331/99, 27 March, 2000, <www.derechos.org/nizkor/guatemala/doc/autojuz1.html>, visited on 10 November 2010. This was subsequently overturned: STC 237/2005, 26 September, 2005, (Spain). Arrest warrants were also granted in 2006 against former presidents Rios Montt and Oscar Mejía Victores,

Pinochet.[2274] The investigation resulted in an extradition order being made in the United Kingdom, where Pinochet was present, albeit such an extradition did not take place due to his ill-health. However, the case initiated several subsequent cases founded on universal jurisdiction, including a case against military officer Adolfo Scilingo of Argentina, who was convicted of attempted genocide during the "dirty war" of the 1970s.[2275] Presence on Spanish territory is not required for initiating an investigation but to conduct a trial. Most investigations in Spain and Belgium have been initiated by private parties, including the Pinochet arrest warrant case.[2276]

The German Code of Crimes against International Law came into force in 2002 and provides for universal jurisdiction over the three international crimes.[2277] Germany has prosecuted several suspects involved in the Yugoslavia conflict.[2278] Extensive discretion is given to the federal prosecutor and despite complaints levelled against several high-ranking officials, including US Defense Secretary Donald Rumsfeld, certain investigations have been declined. Prior to the law of 2002, German courts held that universal jurisdiction could only be exercised 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 starting an investigation where the suspect concerned is not present. The courts have

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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: Arrest Warrant Rios Montt, Audiencia Nacional, Diligencias Previas 331/1999-10, 14 July 2006, <webcache.googleusercontent.com/search?q=cache:WRoMTO690vAJ:www.i-dem.org/wp-content/uploads/documentos/OrdendecapturaRiosMontt.doc+Diligencias+Previas+331/1999-10&cd=1&hl=sv&ct=clnk&gl=se>, visited on 10 November 2010. Documento-Guatemala: Fallo Inconsistente de la Corte de Constitucionalidad Rechaza Extradiciones Solicitadas port España, Amnesty International, 21 December 2007.

2274 *Pinochet Arrest Warrant*, (Auto por el que el 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, <www.derechos.org/nizkor/chile/juicio/captura.html>, visited on 10 November 2010 confirming jurisdiction over genocide and terrorism during the dictatorship in Chile.

2275 *Adolfo Scilingo, Manuel Cavallo*, National Court, Criminal Chamber, 19 April, 2005, <www.derechos.org/nizkor/espana/juicioral/doc/sentencia.html>, visited on 10 November 2010. Article 23.4 of the Organic Law 6/1985 was applied.

2276 Human Rights Watch, Universal Jurisdiction in Europe, The State of the Art, Volume 18, No. 5 (D), June 2006, p. 8.

2277 VStGB [CCIL], 26 June 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."

2278 *See e.g. Nikola Jorgic, Bundesgerichtshof* [BGH] [Federal Court of Justice] 30 April, 1999, <www.haguejusticeportal.net/Docs/NLP/Germany/Jorgic_Urteil_30-4-1999.pdf>, visited on 10 November 2010, 1999 Neue Zeitschrift fuer Strafrecht 396 (F.R.G.).

emphasised the link between the defendant and Germany, such as residency or employment in Germany.[2279]

Other states also provide for universal jurisdiction in cases where an alleged perpetrator is present on the territory.[2280] France has universal jurisdiction over torture and requires the presence of the accused in order to initiate proceedings but can hold trials *in absentia*, which led to the conviction of Ely Ould Dah, a Mauritanian officer who tortured members in the military.[2281] The Netherlands provides for universal jurisdiction for war crimes, crimes against humanity and genocide if the individual concerned is present.[2282] This has culminated in several convictions.[2283] Denmark convicted Refik Saric for his part in murder and torture at a concentration camp in Bosnia, basing its jurisdiction upon the grave breaches provision in the 1949 Geneva Conventions.[2284]

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2279 *Prosecution* v. *Novislav Djajic*, Bayerisches Oberstes Landesgericht, 23 May 1997, <www.haguejusticeportal.net/Docs/NLP/Germany/Djajic_Urteil_23-5-1997.pdf>, visited on 10 November 2010, *Prosecution* v. *Nikola Jorgic*, Oberlandesgericht Düsseldorf, 26 September 1997, <www.haguejusticeportal.net/Docs/NLP/Germany/Jorgic_Urteil_26-9-1997.pdf>, visited on 10 November 2010.

2280 Denmark: Straffeloven 1930, section 8 (5), leading to a conviction of a Ugandan national.

2281 Article 222-1 of the Criminal Code, code penal of 1994. *Ely Ould Dah: Cour de Cassation*, 23 October 2002, No. 02-85379 (France), <www.haguejusticeportal.net/Docs/NLP/France/Ely_Cassation_23-10-2002.pdf>, visited on 10 November 2010.

2282 International Crimes Act of 19 June 2003.

2283 *Sebastien Nzapali*, Rotterdam District Court, 7 April 2004 (The Netherlands), <www.haguejusticeportal.net/eCache/DEF/6/897.html>, visited on 10 November 2010, *Judgment of the The Hague District Court in the Case of Public Prosecutor's Office Number 09/751005-04* (Afghanistan), The Hague District Court, 14 October 2005 (The Netherlands), <www.unhcr.org/refworld/publisher,NTL_HDC,,,440713f14,0.html>, visited on 10 November 2010, *Prosecutor/Knesevic*, Hoge Raad der Nederlanden, [Supreme Court of the Netherlands], 11 November 1997, NJ 1998, 463 (The Netherlands), <www.icrc.org/IHL-NAT.NSF/a42a5edc55787e8f41256486004ad09b/24ab487a98917ce5c1256a09003d6a27!OpenDocument>, visited on 10 November 2010.

2284 *Prosecution* v. *Refik Saric*, Third Chamber of the Eastern Division of the Danish High Court, 25 November 1994, <www.icrc.org/ihl-nat.nsf/39a82e2ca42b52974125673e005081 44/9d9d5f3c500edb73c1256b51003bbf44!OpenDocument>, visited on 10 November 2010. *See also* Switzerland, which 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 (Switzerland), <www.haguejusticeportal.net/eCache/DEF/6/910.TD1GUg.html>, visited on 10 November 2010. 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 with crimes committed in Hungary in 1944 and stated: "[T]he 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." *Regina* v. *Finta*, Supreme Court of Canada, (1994) 1 *S.C.R.* 701, <scc.lexum.umontreal.ca/en/1994/1994scr1-701/1994scr1-701.html>, visited on 10 November 2010. *See also Demjanjuk* v. *Petrovsky*, which also applied the passive

What, then, is the future for universal jurisdiction? As a concept, it has received increasing support among scholars but the practice of states has yet to follow. There have been only a few cases where it has been applied to its 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 of value provided the practice of states accords with it. Despite the scepticism of universal jurisdiction, the application of the principle in domestic courts can form an important complement to the adjudication by regional human rights courts and the ICC.[2285]

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personality principle, albeit in 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 upon universal jurisdiction. The Court stated that the acts committed by the Nazis were "crimes universally recognized and condemned by the community of nations". *Demjanjuk* v. *Petrovsky*, 776 F.2d 571, 6th Cir., US (31 October, 1985), <www.uniset.ca/other/cs4/776F2d571.html>, visited on 10 November 2010. *See also* 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.

2285 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 because 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, *supra* note 100, p. 56, Burke-White, *supra* note 2053, p. 63, Kleffner, *supra* note 2054, p. 25, Bottini, *supra* note 2214, 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, *supra* note 2060, p. 3. The ICC is therefore not intended nor predicted to adjudicate on extensive case-loads. 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, *supra* note 2187, p. 202, L. Arbour, 'Will the ICC have an Impact on Universal Jurisdiction?', 1 *Journal of International Criminal Justice* 585 (2003), Butler, *supra* note 2262, p. 68, Broomhall, *supra* note 2212, p. 408. There is, however, no obligation stemming from the Rome Statute. *See discussion in* Boot, *supra* note 100, 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, with a few countries even arguing that

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 jurisdictions.[2286] A modest version of universal jurisdiction may therefore become an obligatory norm in international law. To avoid excessive *in absentia* trials, the general opinion among legal experts and the international community seems to be a minimum requirement of a presence by the accused on the territory.[2287] However, it is to be emphasised that the norm is under development and has yet to result in positive law.[2288] It is apparent that the principle needs to be clarified and a common approach undertaken to determine its scope and application.

### 9.4.3 Conclusion on Universal Jurisdiction and the Prohibition of Rape

What, then, is 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, in such contexts it can also be prosecuted not only by way 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 upon 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 with it 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 to extend its jurisdictional scope. It also appears that states, most likely, cannot rely solely on "ordinary" crimes as a basis. This entails that legislation must be enacted for such 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 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.

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the Statute establishes a legal obligation to provide for such jurisdiction. Kleffner, *supra* note 2054, p. 107.

2286 Ferdinandusse, *supra* note 88, p. 193, Cassese, *supra* note 958, p. 302.

2287 Meron, *supra* note 1954, p. 123, M. Kamminga, 'Final Report on the Exercise of Universal Jurisdiction in Respect of Gross Human Rights Offences', *International Law Association, London Conference* (2000), p. 2.

2288 Ferdinandusse, *supra* note 88, p. 193.

States must thus be granted wide flexibility in the formulation of domestic provisions. However, the crimes in question must by nature 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 interconnected concepts when discussing the symbiotic relationship between international human rights law and international humanitarian law (IHL) and will be explained in the following chapter.[2289] The question of whether international law is increasingly becoming fragmented as an area of law has chiefly been discussed in the context of the multitude of international adjudicatory bodies.[2290] However, as viewed in the International Law Commission's (ILC) 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.[2291] This is of practical importance for the topic at hand, since it concerns the question of whether fragmentation should be maintained between different areas of public international law or if the objective should be to strive to increase harmonised interpretations of concepts such as the definition of rape or torture. As illustrated throughout this book, similar 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 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?

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2289 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 examine the areas of human rights law and IHL. The discussion hence also directly pertains to ICL.

2290 Yearbook of the International Law Commission 2000, UN Doc. A/CN.4/SER.A/2000, Summary Records, p. 359. *See also* P. Joost, 'Bridging Fragmentation and Unity: International Law as a Universe of Inter-Connected Island', 25 *Michigan Journal of International Law* 903 (Summer 2004).

2291 UN Doc. A/CN.4/L.682, *supra* note 1624.

The *humanisation* process refers to a term primarily coined by Theodor Meron, which describes the increased influence of international human rights law on international humanitarian law, as evident in the promulgation of international criminal law.[2292] 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 that 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.[2293]

The issues of harmonisation and humanisation are linked in that they both raise the question of whether the same concept should be dealt with in a distinct or harmonised fashion – that is, if the nature of the separate branches is such that harmonisation, for example, 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 to mainly intrastate 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 also represents an example of the humanisation process.

Harmonisation would facilitate both international and domestic adjudication in cases of sexual violence, for example, in that a consistent approach and interpretation would be applied. Patricia Viseur Sellers in fact notes a growing conscious cross-fertilisation between these areas of law, particularly with respect to gender-based violence, including sexual violence, as a result of the broadened interest in this subject, as well as the focus on the common ground of human dignity in both areas.[2294] However, the two regimes are of such a distinct nature, with partly divergent goals and processes, that

2292 Meron, *supra* note 1954, Jinks, *supra* note 1699.

2293 According to Quénivet, the arguments for complementarity between the two regimes generally concern three forms of influence and will be raised in the chapter: 1) human rights law may fill in gaps where IHL rules are unclear or do 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. N. Quénivet, 'The History of the Relationship Between International Humanitarian Law and Human Rights Law', in R. Arnold and N. Quénivet (eds.), *International Humanitarian Law and Human Rights Law: Towards a New Merger in International Law* (Martinus Nijhoff, Leiden, 2008), pp. 9-10.

2294 Viseur Sellers, *supra* note 867, p. 28.

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 therefore is whether a mutual definition of rape is a possibility and represents 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 so that similarities and distinctive characteristics can be evinced. The bodies of international human rights law and IHL share a common ideal of protecting human dignity. Several of the protected rights are similar, such as the prohibition of torture, the protection of family rights and certain economic and social rights.[2295] They are, however, dissimilar in that international human rights law aims to protect people against the state's abuse at all times, whereas such protection in the IHL regime only applies in times of armed conflict and does not primarily concern safeguarding of individuals from state mistreatment. Under humanitarian law, different rules apply depending on how an armed conflict is characterised, such as whether it is international or non-international in character. 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.[2296] Furthermore, human rights law traditionally regulates the relationship between states and individuals, whereas humanitarian law mainly concerns the correlation between belligerent states and certain groups of protected people.[2297] IHL contains rules on such things as the conduct of hostilities and treatment of prisoners and civilians, while human rights law applies to every individual by virtue of the person's status as a human being.[2298]

Additionally, IHL seeks to achieve and mainly govern two concurrent precepts – military necessity and humanitarian treatment.[2299] The inevitability of military combat is thereby restrained by humanitarian and human rights concerns. IHL developed

2295 For example the right to food and medical supplies, the protection of public health (*e.g.* Article 23 Fourth Geneva Convention). Family rights are mentioned *e.g.* in Article 27 of the Fourth Geneva Convention and exists in many human rights treaties.

2296 Apart from derogations in times of public emergencies.

2297 Because of the state-centric approach in place at the time of the 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, *supra* note 1697, pp. 44-45, Lopes and Quénivet, *supra* note 1748, p. 215.

2298 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 and refugees.

2299 Jinks, *supra* note 1699, p. 1494. *See also* Best, *supra* note 1699, p. 242 and Rogers, *supra* note 1699, p. 3, who notes that military necessity, humanity, distinction and proportionality are principles of customary law in IHL. Meron, *supra* note 1954, p. 2, holds: "Chivalry and

early as a part of public international law, since it principally regulates interstate relations. It was primarily based upon reciprocal behaviour between two parties at war and the presumed notions of civilised conduct in the face of conflict, rather than the rights-based approach of international human rights.[2300] As noted by Leslie Green, "[t]he 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 […]".[2301] Doswald-Beck and Vité of the International Committee of the Red Cross (ICRC) 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 concentrates on the rights of the recipients of a certain treatment".[2302] 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 questions […]".[2303]

Certain authors maintain that the humanitarian concern is the connecting factor between IHL and human rights law, though with different objectives and 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".[2304] That humanity is a guiding principle in IHL is, for instance, evident in the Martens Clause and Common Article 3 of the 1949 Geneva Conventions, which create limits on military necessity.[2305] However, one must not forget the military's influence on the rules whose interests it partly serves,

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principles of humanity are a competing inspiration for the law of armed conflict, creating a counterbalance to military necessity."

2300 C. Droege, 'The Interplay Between International Humanitarian Law and International Human Rights Law in Situations of Armed Conflict', 40 *Israel Law Review* (2007), p. 313, Green, *supra* note 1697, p. 54, Meron, *supra* note 1954, pp. 1-2.

2301 Green, *supra* note 1697, 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.

2302 Doswald-Beck and Vité, *supra* note 1708.

2303 B. Feinstein, '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 *Northwestern University Journal of International Human Rights* 238 (December 2005), p. 17.

2304 C. Cerna, 'Human Rights in Armed Conflict: Implementation of International Humanitarian Law Norms by Regional Intergovernmental Human Rights Bodies', in F. Kalshoven and Y. Sandoz (eds.), *Implementation of International Humanitarian Law* (Kluwer, The Hague, 1989), p. 34.

2305 Rogers, *supra* note 1699, p. 7. *See also* the preamble to Hague Convention IV, which refers to the "desire to serve the interests of humanity and the ever increasing requirements of civilisation".

which according to some has been "camouflaged" by humanitarian concerns.[2306] The specific objectives of warfare may thus be somewhat diminished. In fact, the United Nations (UN) was at first reluctant to include the laws of war in its work, since it was considered to be the expertise of the ICRC and also because it might undermine its *jus contra bellum* contention.[2307]

Though the emergence of international human rights law was spurred on by the Second World War, its real origins lie in domestic law with widespread implementation at the national level, therefore generating a more effective scheme of supervision and monitoring. The intent of the visionaries during the Enlightenment was to create a more just relationship between the government and its citizens.[2308] The mechanisms of the two regimes are therefore somewhat different – IHL predominantly aims to maintain a preventive function, to be used both promptly and implemented immediately in conflicts with assistance from the Protecting Powers or the ICRC. IHL is thus essentially transitional in nature because its application solely is required during the course of an armed conflict. Human rights regulations also function through promotion and prevention, but further as a means of political bargaining and in reconciliation mechanisms and judicial adjudication, at times requiring long-term effects.

IHL and human rights law further differ to the extent 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".[2309] While the main objective of IHL also is the protection of individuals, such safety 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.[2310] While certain provisions in the 1949 Geneva Conventions and Additional Protocols I and II make reference to rights, no procedural possibilities exist for individual claims due to the inherent limitations that exist in armed conflicts.[2311] Particular

2306 Gardam and Jarvis, *supra* note 335, p. 254.

2307 Quénivet, *supra* note 2293, p. 3.

2308 Droege, *supra* note 2300, p. 312.

2309 Provost, *supra* note 772, 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 1990s, 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. C. Byron, 'A Blurring of the Boundaries: The Application of International Humanitarian Law by Human Rights Bodies', 47 *Virginia Journal of International Law* 839 (Summer 2007), p. 845. Provost, *supra* note 772, 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.

2310 Sassolí and Bouvier, *supra* note 40, p. 264.

2311 Until the recent establishment of the *ad hoc* tribunals and the ICC, their normative framework in part built on IHL norms, the traditional enforcement mechanisms in IHL treaty law consisted primarily of 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

restrictions are also present as to which persons the rights befall. The wide protection afforded non-combatants in the Fourth Geneva Convention is directed solely at "protected persons", excluding a state's own nationals, nationals of co-belligerents and those of neutral third states.[2312] As such, many individuals fall outside the scope of protection. However, the International Criminal Tribunal for the former Yugoslavia (ICTY) in its jurisprudence has widened the scope of interpretation of the concept of "protected persons".[2313] Additional Protocol I of 1977 further grants protection to "all those affected by" an armed conflict, meaning any civilian, that is to say not a combatant – which is also reflected in international criminal law.[2314] According to René Provost, this is an example of the humanisation process of IHL, which increasingly focuses on the humanitarian concerns of the individual unrelated to his/her status in a particular group.[2315]

In conclusion, IHL consists of regulations on the acts of states and combatants, whereas human rights law seeks to protect individuals from the arbitrary invasions of the state. The development of international criminal law has therefore represented an important progression in its allowing individual claims of IHL violations. Meanwhile, the existence of human rights law has provided an important structure for making 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, such as separate regimes with regard to IHL and international human rights law, as well as universal, regional and bilateral protection systems.[2316] Another example is the increased construction of issue-specific tribunals, as evinced by the

Additional Protocols in 1977, but has yet to be called upon. *See* Geneva Convention III, Article125, 126, Geneva Convention IV Articles 142-143 and Article 90, Additional Protocol I.

2312 Article 4, 1949 Geneva Convention IV.

2313 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*, *supra* note 587, paras. 165-168, *Prosecutor* v. *Mucic, Delic, Zenga, Delalic, (Celebici Camp)*, 20 February 2001, ICTY, Case No. IT-96-21-A, Appeal Judgment, <www.icty.org/x/cases/mucic/acjug/en/cel-ajo10220.pdf>, visited on 10 November 2010, para. 73.

2314 Article 9, Additional Protocol I.

2315 R. Provost, 'The International Committee of the Red Widget? The Diversity Debate and International Humanitarian Law', 40 *Israel Law Review* (2007), 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.

2316 ILC Study, UN Doc. A/CN.4/L.682, *supra* note 1624, p. 11.

ICTY and the International Criminal Tribunal for Rwanda (ICTR).[2317] The concept in itself refers both to substantive rules and the various protection systems. International law is not a homogenous arrangement, as it contains these various sections of law and multiple international courts. Norm creation to a large extent occurs 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, such as *ius cogens*, *lex specialis* to resolve the increasing proliferation of categories of international law and similar subject matter.[2318] 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 its institutional and normative framework. While each system is part of the wide category of public international law, its relation to other regimes within this framework is not clear. The result is that each area of law frequently arrives at different solutions to similar legal issues. One fear is that this will generate conflict between systems and inconsistencies in the interpretation of international law.[2319] However, fragmentation is simply a natural development due to the distinct values and purposes in a particular field. It is therefore not a technical problem resulting from a lack of coordination, but instead a result of specialisation. Malcolm Evans has formed the opinion that the proliferation of autonomous normative regimes is unavoidable and may even be a "beneficial prologue to a pluralistic community".[2320] Several factors have contributed to this process of fragmentation: the lack of centralised organs, specialisation of law, parallel regulations and an enlargement of the scope of international law. Globalisation has also encouraged this trend of fragmentation.[2321] International law, in fact, has never existed in a solid state, but rather has always been a fluid body of shifting interrelationships.[2322]

According to Michael Bothe, the sporadic history of creating international law is the reason for its fragmentation, with the international community promulgating

2317 Leathley, *supra* note 2188, p. 261.

2318 UN Doc. A/CN.4/L.682, *supra* note 1624, pp. 30 and 166 *et seq*.

2319 Shaw, *supra* note 2213, p. 66.

2320 Evans, *supra* note 38, p. 77.

2321 Leathley, *supra* note 2188, p. 262.

2322 *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." A. Lindroos, 'Addressing Norm Conflicts in a Fragmented Legal System: The Doctrine of Lex Specialis', 74 *Nordic Journal of International Law* 27 (2005), p. 28.

new areas of law in response to world events, such as human rights law following the Second World War. Accordingly:

> [T]riggering 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.[2323]

Each tribunal or court will naturally consider 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, much less the practice of other adjudicatory bodies, though they frequently refer to prior case law for the sake of consistency. This will clearly lead to divergent judgments on similar issues by different bodies. tribunals may as a matter of course still take into consideration the decisions of other international courts as a subsidiary means, which has been commonly done on 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".[2324]

### *10.3.2* Lex Specialis *versus* 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. Disjointed international law is arguably both a positive and negative attribute. An obvious drawback is the contradiction between rules governing similar situations, such as sexual violence, and mutual state obligations for states under separate regimes. In this sense, the credibility of international law is threatened in addition to its reliability when different rules may be applied to similar circumstances. This lack of specificity in resolving a conflict may in part be resolved by rules such as *lex specialis* v. *lex generalis*.[2325] The *lex specialis* concept derives from a Roman law principle of interpretation and functions as a means of interpreting law. It entails that more specific provisions or fields of law shall be applied rather than more general regulations on the matter. A more specific regulation

2323 M. Bothe, 'The Historical Evolution of International Humanitarian Law, International Human Rights Law, Refugee Law and International Criminal Law', in H. Fischer (ed.), *Crisis Management and Humanitarian Protection: Festschrift fur Dieter Fleck* (Berliner Wissenschafts-Verlag, Berlin, 2004), pp. 37 *et seq.*

2324 A. Cassese, *International Law* (Oxford University Press, Oxford, 2001), p. 45.

2325 UN Doc. A/CN.4/L.682, *supra* note 1624, p. 30.

will naturally be generally more effective in its application than a broad rule.[2326] The concept is not included in the Vienna Convention on the Law of Treaties but has been applied frequently both domestically and internationally. The International Court of Justice (ICJ), for instance, has on several occasions employed 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 designated as clear, efficient and relevant.[2327] The growing referral to *lex specialis* is in fact a result of fragmentation, where more specialised regulations are continually being created. *Lex specialis* as a conflict-resolving mechanism in this context has chiefly been utilised to promote the primacy of IHL over human rights law in cases where no convergence was possible.[2328] 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.[2329] Christopher Greenwood furthermore presumes that *lex specialis* necessarily involves human rights law being applied with reference to IHL.[2330] Why has there been such an overwhelming deference to the use of IHL in situations of armed conflict, when human rights law also applies simultaneously? Not only are the historical backgrounds and objectives of the two regimes different, but also the construction of their regulations. Because the function of IHL is typically to be utilised by military commanders, for practical purposes the regulations are generally more specific than the broad wording of human rights regulations, for instance, concerning the right to life and the treatment of prisoners of war.[2331] Human rights norms tend to be considered as somewhat vague and their realisation unspecified.[2332] Arguably, the UN has traditionally been reluctant to address

2326 *Ibid.*, p. 35.

2327 *Ibid.*, p. 36.

2328 N. Prud'homme, 'Lex Specialis: Oversimplifying a More Complex and Multifaceted Relationship?', 40 *Israel Law Review* (2007), p. 369.

2329 Quénivet, *supra* note 2293, p. 8.

2330 C. Greenwood, 'Scope of Application of Humanitarian Law', in D. Fleck (ed.), *The Handbook of International Humanitarian Law*, 2nd ed. (Oxford University Press, Oxford, 2008), p. 75.

2331 W. Abresch, 'A Human Rights Law of Internal Armed Conflict: The European Court of Human Rights in Chechnya', 16 *European Journal of International Law* 741 (September 2005), p. 743, Best, *supra* note 1699, pp. 247-248, Green, *supra* note 1697, p. 49. This dichotomy between the two fields of law has arguably led to numerous anomalies and inconsistencies. Charlesworth, *supra* note 131, p. 169.

2332 M. Odello, 'Fundamental Standards of Humanity: A Common Language of International Humanitarian Law and Human Rights Law', in R. Arnold and N. Quénivet (eds.), *International Humanitarian Law and Human Rights Law: Towards a New Merger in International law* (Martinus Nijhoff, Leiden, 2008), p. 28. Are human rights law and IHL so profoundly in conflict 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, Henck-

issues related to armed conflict, because such issues have been viewed as falling within the confines of the ICRC.[2333] This has plainly impeded the development and interpretation of human rights law in conflict situations.

However, the automatic application of IHL in situations of armed conflict to the detriment of human rights law is not self-evident. There is no indication that IHL should always be held as the *lex specialis* in any given set of circumstances. As will be examined in the following, the parallel application of both has been analysed in a variety of international and regional contexts, emphasising also the continued application of human rights law in times of armed conflict. The ILC study, while recognising the *lex specialis* principle, also states that the function of the principle should be "limited" as it is but "one factor among others in treaty interpretation".[2334] 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 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.[2335]

In short, beyond its role of resolving 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 ways. Conflicts may still arise when concluding which rule is more specific. Though IHL is generally held to be more specific in nature, human rights norms have been interpreted through the proliferation of adjudicatory bodies and their content has thus become more detailed. Greenwood emphasises that the *lex specialis* principle should not be construed as applying to the general relationship between the two branches of law, but ought to relate to specific rules in specific circumstances.[2336]

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aerts argues that in practice a conflict rarely arises but the issue will instead 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* J-M. Henckaerts, 'Concurrent Application: A Victim Perspective', in R. Arnold and N. Quénivet (eds.), *International Humanitarian Law and Human Rights Law: Towards a New Merger in International Law* (Martinus Nijhoff, Leiden, 2008), p. 262. Conflicts may also naturally arise concerning the right to life.

2333 Gardam and Jarvis, *supra* note 335, p. 174.

2334 UN Doc. A/CN.4/L.682, *supra* note 1624, p. 38.

2335 Study on the Function and Scope of the Lex Specialis Rule and the Question of Self-Contained Regimes, Report by Martti Koskenniemi, UN Doc. ILC(LVI)/SG/FIL/CRD.1 and Add.1, 2004, p. 4.

2336 Greenwood, *supra* note 2330, p. 75.

### 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 International Covenant on Civil and Political Rights (ICCPR). The ICJ declared that "[t]he protection of the International Covenant on 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".[2337]

However, the Court concluded that while the right not to be arbitrarily deprived of one's life does not cease 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.[2338] 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 therefore serve to expound on the broad rights contained in human rights treaties. The ICJ, however, implies that in certain contexts, even during an armed conflict, 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 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".[2339] IHL was in this case employed to interpret human rights rules, but in other factual circumstances such as those concerning judicial guarantees, human rights may instead prevail owing to 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.[2340]

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 in relation to such matters as restrictions on the freedom of movement, the requisition of property and restrictions on 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, thus indicating that both humanitarian and human rights law were applicable in this case.[2341] The Court held that applicable conventions in this case

2337 *Nuclear Weapons Case*, ICJ, Advisory Opinion, para. 25.

2338 *Ibid*., para. 926.

2339 D. Stephens, 'Human Rights and Armed Conflict – The Advisory Opinion of the International Court of Justice in the Nuclear Weapons Case', 4:1 *Yale Human Rights & Development Law Journal* 15 (2001), p. 15.

2340 Prud'homme, *supra* note 2328, p. 374.

2341 *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, 9 July 2004, ICJ, Advisory Opinion, ICJ Reports 2004, para. 106, concerning the occupation by the Israeli government of Palestinian territory.

were human rights treaties such as the Convention on the Rights of the Child (CRC), the ICCPR and the International Covenant on Economic, Social and Cultural Rights (ICESCR).[2342] On the relationship between the two bodies of law, the ICJ stated:

> [T]here 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.[2343]

Though IHL is generally considered to be the *lex specialis*, the Court did in fact accept the simultaneous application of both regimes. The difficulty of this approach is in determining beforehand the outcome of a particular situation, since it does not clarify which condition falls into which category of law. Furthermore, what is the result when a particular issue is dealt with in both areas of law? If a particular situation occurs in an armed conflict, is IHL always the *lex specialis* even where the human rights provision may be more specific? Certain critics have described the judgment as being "utterly unhelpful" and serving only to further provoke the discussion on separation or coherence of the regimes.[2344]

Another question may be whether in 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 adapted to the particular course of events. 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 set of circumstances.[2345] Marco Sassòli and Laura Olson further contend that the principle of *lex specialis* does not necessarily entail that IHL consistently 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".[2346] One therefore has to determine which set of rules is more specific and adapted to the case at hand. Sassoli and Olson caution, however, that *lex generalis* "still

2342 *Ibid.*, paras. 107-114.

2343 *Ibid.*, para. 106.

2344 Quénivet, *supra* note 2293, p. 12 and Prud'homme, *supra* note 2328, p. 378.

2345 C. McCarthy, 'Legal Conclusion or Interpretative Process? Lex Specialis and the Applicability of International Human Rights Standards', in R.Arnold and N. Quénivet (eds.), *International Humanitarian Law and Human Rights Law: Towards a New Merger in International Law* (Martinus Nijhoff, Leiden, 2008), p. 110.

2346 M. Sassòli and L. Loson, 'The Legal Relationship Between International Humanitarian Law and Human Rights Law Where it Matters: Admissible Killing and Internment of

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".[2347] The *lex specialis* principle is thus provided with more flexibility in that it is tried case by case.

Moreover, in the *Case Concerning Armed Activities on the Territory of the Congo*, the ICJ reviewed the occupation not only through the perspective of IHL but also from the point of view of human rights law.[2348] The occupying power in the Democratic Republic of Congo's (DRC) Ituri region, Uganda, was held to have violated 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 Peoples' Rights in killing and torturing the Congolese civilian population.[2349] The ICJ did not make a general statement as to the relationship between the two regimes, but instead concluded that violations had occurred of both areas of law in relation to the same acts of violence.[2350] The specific acts, such as torture and killing, and the scope thereof were therefore not interpreted in accordance with 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 with 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.[2351]

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Fighters in Non International Armed Conflict', 870 *International Review of the Red Cross* (September 2008), p. 603.

2347 *Ibid.*, p. 605.

2348 *Case Concerning Armed Activities on the Territory of the Congo, Democratic Republic of the Congo* v. *Uganda*, 19 December 2005, ICJ, ICJ Reports 2005, ICJ.

2349 *Ibid.*, paras. 217-220.

2350 *Ibid.*, para. 220.

2351 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.[2352] The fact that human rights treaties also regulate behaviour in times of armed conflict is therefore relatively uncontroversial. The more interesting point 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, as it does not clearly indicate which areas of law are *lex specialis* or *generalis* prior to a specific situation. Besides, the principle tends to oversimplify the complex relationship between IHL and human rights.[2353] An increasingly accepted approach is that IHL and international human rights law are "complementary and mutually reinforcing" in so far as a simultaneous application of both sets of rules is possible and also increasingly encouraged.[2354] Various terminology has been used to describe this concept – "pragmatic theory of harmonisation", "cross-fertilisation" or "cross-pollination", all of which imply a need for harmonisation.[2355] Cordula Droege suggests that the term

2352 A. Gross, 'Human Proportions: Are Human Rights the Emperor's New Clothes of the International Law of Occupation?', 18 *European Journal of International Law* 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, Article 15 of the ECHR, Article 4 of the ICCPR, Article 5 of the ICESCR, Article 27 of the American Convention on Human Rights.

2353 Prud'homme, *supra* note 2328, p. 383.

2354 Droege, *supra* note 2300, p. 337, Lindsey, *supra* note 609, p. 30. *See also* Gardam, *supra* note 1764, 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 asserted 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 increasing complementarity. In the writings of scholar Gerald Draper as early as 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* G. Draper, 'The Relationship Between the Human Rights Regime and the Law of Armed Conflict', 1 *Israel's Yearbook of Human Rights* 191 (1971), p. 198.

2355 Droege, *supra* note 2300, p. 339. The harmonisation model in part also 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

*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.[2356] 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 instrument of interpretation.[2357] It simply tells us that because of similarities in values and rights protected, certain principles may influence one another in interpretation and scope. Though various terminologies are employed, a harmonisation approach may also be included in the application of *lex specialis*.[2358]

An increasing number of human rights treaty bodies comment on the interplay between the two areas, and in preference to accepting a predetermined categorisation of *lex specialis* they tend to advocate the adoption of a complementary approach. The Human Rights Committee, for example, stated the following 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 for the purposes of the interpretation of Covenant rights, both spheres of law are complementary, not mutually exclusive.[2359]

This approach does not mention the terms *lex specialis* or *generalis*, avoiding a rigid hierarchy, but instead views IHL and human rights law as two regimes sharing the 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 with reference to the situation at hand while in other circumstances human rights law might 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 being the generally more specific area, but is also open to a mutual application.

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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. 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.

2356 Droege, *supra* note 2300, p. 340.

2357 *Ibid.*, p. 337.

2358 *Ibid.*, p. 389.

2359 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, 3 March 2006, para. 22.

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, as made evident in several resolutions.[2360] For instance, at the Teheran Conference in 1968 a 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".[2361] The Conference did, however, 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 within the context of armed conflict.

The UN Security Council increasingly refers to both IHL and human rights law on matters that concern threats to international peace and security. This is partly due to an awareness that human rights violations are often precursors to armed conflicts and threaten the rebuilding of states. In a reform proposal in 2005, the UN High Commissioner for Human Rights was in fact afforded a more active role in the deliberations of the Security Council.[2362] 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

2360 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, UN Doc. S/RES/237, 14 June 1967.

2361 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." *See* Declaration on Respect for Human Rights in Armed Conflicts, G.A. Res. 2444 (XXIII), UN GAOR, 23rd Sess., Supp. No. 18, at 164, UN Doc. A/7433 (1968). The clearest language supporting the interplay between the two regimes is found in 1970 UN General Assembly Resolution 2675 on basic principles for the protection of civilian populations in armed conflicts, where it is stated: "[F]undamental human rights, as accepted in international law and laid down international instruments, continue to apply in situations of armed conflict." *See* General Assembly Resolution 2675 (XXV), Basic Principles for the Protection of Civilian Populations in Armed Conflicts, 9 December 1970, §1. 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. *See* Declaration on the Protection of Women and Children in Emergency and Armed Conflict, Resolution 3318 (XXIX) of 14 December 1974. Mentioned conventions: ICCPR, ICESCR, Declaration of the Rights of the Child.

2362 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.

of armed conflict and mentioned the Geneva Convention relative to the Protection of Civilian Persons as an example.[2363] 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*".[2364] The Resolution also asserted that "conduct that violates international humanitarian law […] may also constitute a gross violation of human rights". Similarly, a 2008 UN Security Council resolution condemning sexual violence in armed conflicts specifically admonished states to respect and ensure the human rights of their citizens and all individuals present on their territory, thus further indicating the self-evident parallel application of both realms of law.[2365]

Several Special Rapporteurs in the UN system have investigated both regimes simultaneously. The Special Rapporteur on the Iraqi occupation of Kuwait, for example, 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".[2366] 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".[2367] Country mandates on, for instance, Afghanistan, Iraq, and the Sudan have referred to both IHL and human rights law and to such violations as torture, arbitrary

2363 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 also always be respected, in armed conflicts and calls for the simultaneous application of human rights and IHL.

2364 *Ibid*., paras. 6-7.

2365 Security Council Resolution UN Doc. S/RES/1820 (2008). In a 2005 report, the UN Subcommission on the Promotion and Protection of Human Rights 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. 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. 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.

2366 Report on the Situation of Human Rights in Kuwait under Iraqi Occupation, UN Doc.E/CN.4/1992/26, para. 12.

2367 *Ibid*., para. 33.

detention and sexual violence.[2368] Sexual violence in times of armed conflict has specifically been the subject of special reports to the Commission on Human Rights.[2369]

### 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 on developing minimum standards of humanitarian and human rights law.[2370] As viewed, these areas of law are undergoing a definite trend towards convergence. However, gaps still exist where protection of the individual falls short in each area owing to thresholds of applicability.[2371] International humanitarian law consists of rules that differ depending on the nature of a conflict. As such, the classification of the conflict is important for the level of protection provided to the individual. The

2368 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.

2369 *See e.g.* Systematic Rape, Sexual Slavery and Slavery-Like Practices During Armed Conflicts, Report of the United Nations High Commissioner for Human Rights; UN Doc. A/HRC/Sub.1/58/23, 11 July 2006, UN Doc. E/CN.4/Sub.2/2005/33, 11 July 2005, *supra* note 702, UN Doc. E/CN.4/Sub.2/2004/35, UN Doc. E.CN.4/Sub.2/2003/27, 17 June 2003, UN Doc. E/CN.4/Sub.2/2002/28, 18 July 2002, UN Doc. E/CN.4/Sub.2/2001/29, 29 June 2001, UN Doc. E/CN.4/Sub.2/2000/20, 27 June 2000, UN Doc. E/CN.4/2001/73, *supra* note 651. 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 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.

2370 UN Doc. E/CN.4/1998/87, *supra* note 11, UN Doc. E/CN.4/1999/92, *supra* note 1000, Fundamental Standards of Humanity, Report of the Secretary-General Submitted Pursuant to Commission Resolution 1999/86, UN Doc. E/CN.4/2000/94, 27 December 1999, 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, Fundamental Standards of Humanity, Report of the Secretary-General Submitted Pursuant to Commission on Human Rights Decision 2001/112, UN Doc. E/CN-4/2002/103, 20 December 2001, Promotion and Protection of Human Rights, Fundamental Standards of Humanity, Report of the Secretary-General, UN Doc. E/CN.4/2004/90, 25 February 2004, UN Doc. E/CN.4/2006/87, *supra* note 2359, UN Doc. A/HRC/8/14, 28 May 2008.

2371 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. According to the UN Commission on Human Rights "an unexploited potential of complementarity" exists. *See* UN Doc. E/CN.4/sub.2/2005/14, *supra* note 2365, para. 5.

1949 Geneva Conventions, together with the Additional Protocols, primarily protect victims in international conflicts, albeit extending to internal conflicts in limited circumstances.[2372] Though human rights law applies both in times of peace as well as in armed conflict, certain rights can be derogated from in states 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 made 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.[2373] The UN Secretary-General has stressed the difficulty of defining domestic turmoil in terms of international law, where there often tends to be a mixture between political violence and "regular" criminal acts.[2374] Armed groups, for instance, might engage in theft and extortion on a massive scale unrelated to the conflict. As discussed, the nature of conflicts has also changed over past decades, necessitating new regulations or clarifications of existing rules for an adaptation to the present types of conflict, currently characterised by new methods and new actors, with increased privatisation *e.g.* with the support by corporations or armed rebel groups, with conflicts often financed by national or international actors through arms and drugs trade.[2375] 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 such situations in order to better accommodate contemporary circumstances.[2376] One of the main ques-

2372 Additional Protocol II and Common Article 3 concerns non-international conflicts.

2373 UN Doc. E/CN.4/1998/87, *supra* note 11, para. 8.

2374 UN Doc. E/CN.4/1998/87, *supra* note 11, 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.

2375 *See also* UN Doc. E/CN.4/2001/91, *supra* note 2370, para. 7, UN Doc. E/CN.4/1999/92, *supra* note 1000, para. 13, UN Doc. E/CN.4/1998/87, *supra* note 11, para. 59.

2376 UN Doc. E/CN.4/2001/91, *supra* note 2370, para. 4.

tions of the project in defining fundamental standards of humanity was that of why lower standards of protection for individuals should be accepted in internal disturbances as opposed to those of armed conflicts or peace.[2377] Reviewing the work on fundamental standards is useful, since it further confirms the interplay between the two regimes and also strengthens the protection of the individual against sexual violence.

In order to bridge the void a declaration was promulgated in 1990, affirming a set of non-derogable regulations inspired both by humanitarian and human rights law, also known as the Turku Declaration.[2378] The project has since changed names. The standards in the Declaration would be applicable regardless of the designation of a conflict, and non-derogable. It identified humanitarian and human rights norms that must be respected by all states at all times, and also related to situations occurring between war and peace, such as domestic turmoil, which may not reach the level of an armed conflict. The rules were to apply to all parties, such as states and non-state actors, including private individuals. The Declaration noted that international law has failed to provide adequate levels of protection in situations of internal violence, disturbance, tension and public emergency.[2379] The standards therefore constitute an amalgam of both law regimes, yet again pointing towards an increased convergence.

Without 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.[2380] 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 circumstances that currently appear to be unregulated. Arguably, this better reflects the lack of clarity as to the scope of existing regulations as well as, at times, the 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 dis-

2377 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.

2378 Declaration of Turku, 2 December 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.

2379 Introduction, the Turku Declaration.

2380 UN Doc. E/CN.4/2006/87, *supra* note 2359, p. 2. The document has been criticised, particularly by certain human rights NGOs, 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, *supra* note 1954, p. 60 and 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.

tinctions between human rights law and international humanitarian law, as in practice these two regimes are "closely related and interactive".[2381] The UN Secretary-General importantly notes the following on the issue of finding common ground between the two areas of law:

> [T]he 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.[2382]

The formulation of the standards is therefore seen as a new venture in finding counterpoints in both regimes that centre on the common objective 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 that of a binding treaty, possibly in the form of a "statement of principles".[2383] This originates in part from the desire to avoid lowering the threshold of rights that are already a component of binding treaties. Furthermore, there is disquiet 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.[2384] The terminology has 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 been transformed into a document entitled "*Fundamental Standards of Humanity*",

2381 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 link human rights abuses and violence with state and armed groups or among such groups. UN Doc. E/CN.4/1998/87, *supra* note 11, para. 8, UN Doc. E/CN.4/2004/90, *supra* note 2370, 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 human rights abuses are among the root causes of conflicts. UN Doc. E/CN.4/1998/87, *supra* note 11, para. 14.

2382 UN Doc. E/CN.4/1998/87, *supra* note 11, para. 99.

2383 UN Doc. E/CN.4/2001/91, *supra* note 2370, para. 4.

2384 *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 49th session. Commission on Human Rights, 54th session, 1 April 1998. Statement by the International Committee of the Red Cross.

humanity being the unifying factor between the two regimes. The standards govern "the behaviour of all persons, groups and public authorities".[2385]

The report does in fact 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".[2386] The selection of which rules should be considered to be fundamental standards will be exacted through reviewing treaties, declarations and customary international law. Several sources are cited, including the Rome Statute, Article 4 of the ICCPR listing non-derogable rights, and the ICRC Study on Customary Law.[2387] The report by the UN Secretary-General on the standards mentions specifically that the crimes in the Rome Statute of the International Criminal Court (ICC) are of particular importance in evincing the nature of the standards, specifically mentioning rape, sexual slavery and torture.[2388]

No definitions of the standards have been provided as of yet. However, the UN Secretary-General holds that the rules should at a minimum include "torture and cruel, inhuman or degrading treatment […,] women's human rights […] and protection of the civilian population".[2389] Rape is also particularly mentioned as a minimum standard in the Turku Declaration.[2390] 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. It is thereby binding on states at all times. The specific definition of rape is not mentioned. Since the 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 accommodate 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 to represent an important step in the promotion of fundamental standards of humanity,[2391] thereby indicating that the international crimes and the value of such documents as the Rome Statute form the codification of certain fundamental standards. This is not

2385 Res. 1999/65. UN Doc. E/CN.4/1998/87, *supra* note 11, 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 should also apply to non-state actors. Though suggestions were made 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.

2386 UN Doc. E/CN.4/1998/87, *supra* note 11, para. 98.

2387 UN Doc. E/CN.4/1999/92, *supra* note 1000, paras. 6-24.

2388 *Ibid.*, para. 9(g).

2389 UN Doc. E/CN.4/1998/87, *supra* note 11, para. 98.

2390 Article 3.

2391 UN Doc. E/CN.4/2000/145, 4 April 2000, Appendix, para. 46.

a surprising conclusion considering the 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 maintains, the ICTY and ICTR have further developed the normative framework, as has the domestic application of universal jurisdiction.[2392] 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, in addition to the judgments of the Special Court for Sierra Leone. For example, the definition of rape and torture in the *Kunarac* decision is discussed.[2393] In turn, the ICTY has referred to the Turku Declaration in its case law, for example, in the *Tadic* case, in order to support its argumentation on warfare methods in both international and internal conflicts.[2394] Furthermore, the case law of regional human rights courts has been adduced as a source of fundamental standards.[2395]

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 with regard 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 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 harmonised application of that prohibition. The standards do not indicate whether or not definitions of the crimes will be provided, which would raise the question of how to fuse the distinct approaches to the offence under 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 on occasion a fusion of the two regimes. 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, how-

2392 *Ibid.*, para. 47. The universal jurisdiction approach would therefore be an avenue to enforce fundamental standards of humanity.

2393 UN Doc. E/CN.4/2004/90, *supra* note 2370, paras. 23-24, UN Doc. A/HRC/8/14, *supra* note 2370, para. 29.

2394 *Prosecutor* v. *Dusko Tadic*, *supra* note 76, para. 119.

2395 UN Doc. A/HRC/8/14, *supra* note 2370, para. 3.

ever, are broader descriptions of the separate systems of international law and a means for solving inconsistencies. Humanisation instead refers specifically to the increased interpretation of IHL in the 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 the most prominent change in the international legal system.[2396] It is generally understood that IHL has been undergoing a transformation, from its strictly utilitarian purpose to that of being considered to be as allied to the regime of international human rights law.[2397] 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".[2398] 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 gap in protection.[2399] The humanisation of IHL has in general led to a more intense focus on the autonomy of the person, which is often reiterated as one of the main aims of human rights law. This is, for instance, 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 under the influence of human rights, with language discussing rape as a form of torture and a violation of sexual autonomy, particularly by the ICRC, the ICTY and the ICTR.[2400]

The term "humanisation process" implies a stronger protection for the individual under the influence of human rights law. This is valid in relation to many norms. However, Cordelia Drouge 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 a balancing against the rights of others, unlike the case with human rights law.[2401] IHL has also had an effect on human rights law, particularly on the scope of derogation and the list of non-derogable

2396 R. Teitel, 'Humanity's Law: Rule of Law for the New Global Politics', 35 *Cornell International Law Journal* 355 (2002), p. 358.

2397 Gardam, *supra* note 1764, p. 120.

2398 UN Doc. E/CN.4/sub.2/2005/14, *supra* note 2365, para. 3.

2399 *Ibid.*, paras. 3-4.

2400 *See e.g. The ICRC Study on Customary International Humanitarian Law*, *supra* note 21, which holds rape to constitute a violation of the prohibition of torture and a grave breach. *See also Prosecutor* v. *Kunarac*, *supra* note 409, and *Prosecutor* v. *Akayesu*, *supra* note 30.

2401 Droege, *supra* note 2300, p. 350.

rights.[2402] Thus, as the ICRC concludes, IHL and human rights law reinforce each other.[2403]

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 another. As we have concluded, both bodies of law share, at least partially, the same intention of protecting human dignity. The sharp distinction between international humanitarian law and human rights law is in fact judged to be 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 outmoded. 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 in international law eroding the law of war/peace distinction.[2404] 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, such as the Lieber Code, contain several provisions that would later be considered human rights concerns, as in the prohibition of rape.[2405] This is found 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 1977 Additional Protocols, 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".[2406] The course of humanisation has continued to develop after the intro-

2402 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.

2403 *The ICRC Study on Customary International Humanitarian Law*, *supra* note 21, p. 302.

2404 S. Ratner, 'The Schizophrenias of International Criminal Law', 33 *Texas International Law Journal* (1998), p. 250.

2405 *See* discussion on the Lieber Code in chapter 8.

2406 Geneva Convention I Article 63, Geneva Convention II Article 62, Geneva Convention III Article 142, Geneva Convention IV Article 158, Additional Protocol I Article 1(2), Additional Protocol II Preamble. This provision of IHL has been deemed to be of great significance, not least 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". As more human rights norms expand in scope, the broader the application of the Martens

duction of the 1949 Geneva Conventions and the 1977 Additional Protocols, causing the two separate regimes to converge on occasion and closing gaps in either body of law.[2407] The creation of the first universal human rights documents, the recognition of human rights as a fundamental principle of the UN, together with the inception of individual criminal responsibility brought about what can best be described as an "intolerance for human suffering", which can also be said to be true of humanitarian law.[2408] The human rights programme has consequently caused the humanitarian restraints on military strategy to receive a more prominent role in the laws of war and IHL.[2409]

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.[2410] For example, Article 75 in Additional Protocol I contains such human rights principles as those of non-discrimination, the prohibition of arbitrary detention, and the upholding of certain due process guarantees.[2411] Regulations on the prohibition of torture and those of discrimination on grounds such 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, in

Clause and our interpretation of humanity. *See* UN Doc. E/CN.4/sub.2/2005/14, *supra* note 2365, paras. 16 and 18. However, the ICTY in *Prosecutor* v. *Kupreskic*, *supra* note 97, 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 […]".

2407 Jinks, *supra* note 1699, p. 1494.

2408 Meron, *supra* note 1954, p. 6. To some extent, humanitarian law and human rights law are derived from the same context. Human rights law in its universal form was created in the aftermath of the Second World War and the Nuremberg 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 the Second World War, 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.

2409 Meron, *supra* note 1954, p. 1. This entails 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 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. Sassolí and Bouvier, *supra* note 40, p. 264.

2410 Doswald-Beck and Vité, *supra* note 1708.

2411 *See also* Additional Protocol II, Article 4, which prohibits violence to the life, health of persons, collective punishment, outrages upon personal dignity, slavery, pillage and so forth.

situations concerning such matters as internal armed conflicts.[2412] The grave breaches doctrine of the 1949 Geneva Conventions as well as the establishment of universal jurisdiction further speaks of a humanisation procedure in that it extends the protection of the individual through increased possibilities for prosecution.[2413] The list of rights in Common Article 3 also broadly converges with the non-derogable human rights set out 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 is further evident in the enlargement of state responsibility, progressing from a former relationship of bilaterism to duties owed to the international community as a whole, such as *erga omnes* obligations.[2414] In this sense, the traditional state-centric interests in public international law are diminishing and now centring on the individual, as is the case within the field of human rights.

A further result of the humanisation of IHL, and international law in general, has in part been the creation of the area of international criminal law.[2415] With its foundation on individual criminal responsibility rather than the traditional state-centred focus of international law, the humanising aspect lies in the enlarged possibility for prosecution of violations within the field of IHL.[2416] Accountability for the commission of atrocities is more encompassing, thereby resulting in greater protection. In essence, international criminal law is a fusion of IHL and international human rights law.[2417] 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", thus officially encouraging cross-fertilisation between the two bodies of law. It therefore obliges the Court to apply its regulations and definitions of crimes through the perspective of human rights law.

2412 *See e.g.* Wagner, *supra* note 42.

2413 In *Prosecutor* v. *Kupreskic*, *supra* note 97, para. 518, the ICTY noted: "[T]he 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."

2414 Meron, *supra* note 1954, p. 247.

2415 *Ibid.*, p. 242.

2416 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, *supra* note 2396, p. 373.

2417 While the earliest example of international criminal law in the form of the Nuremberg 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.

Commentators claim that this may introduce an unfortunate hierarchy in favour of human rights, which to date has been rejected by international criminal law judges.[2418] Though human rights law has been applied by the *ad hoc* tribunals in order to distil, for instance, general principles of law, human rights law has never been accorded such prominence in the adjudication of international criminal law as in the Rome Statute. As Janet Halley indicates, it is an open-ended requirement, and could range from such documents as the Beijing Declaration to Convention on the Elimination of All Forms of Discrimination against Women (CEDAW).[2419] It certainly opens the possibilities for cross-referencing between these areas of law.

Furthermore, certain international crimes directly overlap with international human rights law. Antonio Cassese acknowledges, for instance, that many concepts underlying crimes against humanity imitate rights laid down in international human rights documents, such as the right to life and the prohibition of torture.[2420] 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 equate 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 either war or peace. War crimes, however, plainly require linkage to an armed conflict. Antonio Cassese in fact observes 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".[2421] However, as the case law of the *ad hoc* tribunals and the ICC develops it is likely that there will be less need for international criminal tribunals to use human rights law as a source.[2422]

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 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."[2423] As previously mentioned, in the *Furundzija* case the ICTY again stated that respect for human dignity was the basis of both humanitarian and human rights law and that the essence of these domains is in the protection of the dignity of each individual.[2424] Similarly, in the *Tadic* case, the ICTY stated that "[i]f international law,

2418 M. Delmas-Marty, 'Interactions Between National and International Criminal Law in the Preliminary Phase of Trial at the ICC', 4 *Journal of International Criminal Justice* 2 (March 2006), p. 3.

2419 Halley, *supra* note 1954, p. 112.

2420 Cassese, *supra* note 362, pp. 721 and 738, Evans, *supra* note 2156, p. 741.

2421 Cassese, *supra* note 362, p.18.

2422 Cryer, *supra* note 92, p. 11.

2423 *Prosecutor* v. *Mucic, Delic, Zenga, Delalic*, *supra* note 2313, para. 149.

2424 *See* chapter 9.2.2.1.

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".[2425] The *Tadic* case also promoted an increased "human being-oriented" approach to international law.[2426] Accordingly, the two bodies of law share the same philosophy of human dignity.

Human rights law, moreover, has significantly affected the development of customary norms of IHL. This is apparent in both the reasoning of the jurisprudence of the *ad hoc* tribunals and in the ICRC study of customary rules of IHL.[2427] The ICRC finds substantial support for the use of human rights law during armed conflict. In the introduction to the work, the role of human rights law in the study is explained: "[H]uman 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 […]."[2428] The ICRC emphasises that human rights law continues to apply during armed conflicts, which it acknowledges has been confirmed by both treaty bodies and the ICJ.[2429] Scholars writing for the ICRC are consistently noting the diminishing divergence between human rights and humanitarian law.[2430]

## 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 is also a practical consequence. There have tradition-

2425 *Prosecutor* v. *Tadic*, *supra* note 76, para. 97.

2426 *Ibid*., para. 97.

2427 *See* chapters 6, 8 and 9.

2428 *The ICRC Study on Customary International Humanitarian Law*, *supra* note 21, pp. x and 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 and 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".

2429 *Ibid*., 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. *The ICRC Study on Customary International Humanitarian Law*, *supra* note 21, section 9, p. 304.

2430 Doswald-Beck and Vité, *supra* note 1708.

ally been few national and international judicial bodies given the role of applying and interpreting humanitarian law, whereas human rights law continues to evolve through domestic courts, regional courts, and 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 bridge occasional substantive divides.[2431] It is therefore no surprise that academics have also gravitated towards using the UN human rights systems and regional human rights courts as monitoring mechanisms for enforcing IHL regulations.

UN treaty bodies and regional human rights courts have therefore frequently been forced to analyse human rights violations against the setting of armed hostilities.[2432] Such bodies have in general been established pursuant to a treaty and their mandate is in most cases limited to monitoring the obligations of States Parties with regards to such treaty. Though they might possess territorial jurisdiction with which to evaluate the matter in question, the courts and treaty bodies tend to find 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.[2433] The various human rights bodies established within the UN system do not have the same treaty restrictions and frequently comment on both divisions of law according to their mandate. As indicated, special human rights rapporteurs are regularly mandated to investigate human rights violations as well as those of humanitarian law. An explicit mandate for humanitarian law might be lacking though the context of an armed conflict would still warrant such an investigation.[2434]

On the application of IHL by regional human rights courts, the willingness and the 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

2431 Meron, *supra* note 1954, 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". H.-J. Heintze 'On the Relationship Between Human Rights Protection and International Humanitarian Law', 86:856 *International Review of the Red Cross* (4 December 2004), p. 798.

2432 Meron, *supra* note 1954, p. 50.

2433 For example, the Convention on the Rights of the Child is a clear example of this increased convergence. The human rights treaty in Article 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.

2434 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.

have been compelled to respond to a growing numbers of applications from individuals enmeshed in armed conflicts.[2435] The European Court of Human Rights (ECtHR) has examined violations of human rights law in the context of both international and internal armed struggles, analysing the European Convention on Human Rights (ECHR) in the context of humanitarian law.[2436] Despite examining cases against the backdrop of such conflicts, the ECtHR has been reluctant to apply 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 somewhat inconsistent.[2437]

2435 Byron, *supra* note 2309, p. 893.

2436 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*, 8 June 1976, ECtHR, Nos. 5100/71; 5101/71; 5102/71; 5354/72; 5370/72,<cmiskp.echr.coe.int/tkp197/view.asp?item=3&portal=hbkm&action=html&highlight=Engel%20%7C%20v.%20%7C%20The%20%7C%20Netherlands&sessionid=61867803&skin=hudoc-en>, visited on 9 November 2010, 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, supra* note 1375. More recently the Court examined the atrocities in Chechnya by Russian troops, a situation that would traditionally fall within the realm of humanitarian law. The case concerned the attack by Russian aircrafts on a convoy of vehicles, killing civilians, a situation consistently referred to as a "conflict". The Court, however, made no reference to IHL, but rather interpreted 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*, 24 February 2005, ECtHR, Nos. 57974/00, 57948/00 and 57949/00, <cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=Isayeva%2C%20%7C%20Yusupova%20%7C%20Bazayeva&sessionid=61867803&skin=hudoc-en>, visited on 9 November 2010.

2437 *See e.g. Arturo Ribón Avila* v. *Colombia*, 30 September 1997, Inter-American Commission on Human Rights, Case 11.142, Report No. 26/97, <www1.umn.edu/humanrts/cases/1997/colombia26-97a.html>, visited on 9 November. *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 arising 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 State), or disadvantages its armed forces vis-à-vis dissident groups." *Juan Carlos Abella* v. *Argentina*, 18 November 1997, Inter-American Commission on Human Rights, Case 11.137, Report No. 55/97, <www1.umn.edu/humanrts/cases/1997/argentina55-97a.html>, visited on 9 November 2010, para. 158, fn. 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

This trend of human rights bodies in 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 raises the question of how to reconcile diverse definitions in the two bodies of law. Noam Lubell thus poses the current dilemma: "[T]he 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."[2438] 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 con-

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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, *supra* note 2309, p.857, Moir, *supra* note 42, p. 194.

Two cases from 2000 demonstrate a rather more inconsistent approach to the standing of IHL in the judgments of the Inter-American Court. In the *Las Palmeras Case* the Court stated that while it was "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*, 4 February 2000, Inter-American Court of Human Rights, Series C No. 67, <www1.umn.edu/humanrts/iachr/C/67-ing.html>, visited on 9 November 2010, paras. 32-33. It thereby emphasised that any analysis of facts in an armed conflict would 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*, 25 November 2000, Inter-American Court of Human Rights, Series C No. 70, <www1.umn.edu/humanrts/iachr/C/70-ing.html>, visited on 9 November 2010, paras. 207-209. *See also* Detainees in Guantanamo Bay, Cuba, 13 March 2002, Inter-American Commission on Human Rights, Request for Precautionary Measures, <www1.umn.edu/humanrts/cases/guantanamo-2003.html>, visited on 9 November 2010.

2438 N. Lubell, 'Challengers in Applying Human Rights Law to Armed Conflict', 87:860 *International Review of the Red Cross* (December 2005), p. 738. Emphasis added.

clusions that humanitarian law experts find problematic".[2439] 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".[2440] 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.[2441] 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".[2442]

In conclusion, a trend of increased harmonisation between the examined areas of law in this book can be noted, as well as a general movement towards the humanisation of international law, with an expanding interest in the concept of human dignity and the protection of individual autonomy. This is evident in several regards. For example, in the acceptance of a complementary approach, in the simultaneous application by UN treaty bodies and of IHL by human rights courts, as well as the Fundamental Standards of Humanity. The question, therefore, is whether or not this has had, or will have, an impact on the approach to both the prohibition of rape and its definition 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, for instance, 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 have long been equally non-specific in all these regions of law. However, the topic is increasingly regulated in international law, and whereas a certain harmonisation can be detected between human rights bodies and *ad hoc* tribunals, we are far from arriving at a coherent approach to the subject.

The idea that the separate regimes are mutually supportive finds substantial support among certain scholars who assert that there is "considerable scope for reference to

2439 Meron, *supra* note 1954, p. 247. It should be noted that in general states have not been opposed to the interpretation of the application of human rights law in armed conflicts, with the exception of a few.

2440 L. Zegveld, 'The Inter-American Commission on Human Rights and Humanitarian Law: A Comment on the Tablada Case', 324 *International Review of the Red Cross* 505 (1998), p. 508.

2441 Byron, *supra* note 2309, p. 887.

2442 D. O´Donnell, 'Trends in the Application of International Humanitarian Law by United Nations Human Rights Mechanisms', 324 *International Review of the Red Cross* 481 (1998), p. 485.

human rights law as a supplement to the provisions of the laws of war"[2443] 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".[2444] The convergence of IHL and human rights law is viewed by certain leading experts as being something of a necessity. Specific norms, either in humanitarian law or human rights law, are being increasingly analysed with reference to the corresponding regulation in the adjacent area.[2445] Hans-Joachim Heintze, writing for the ICRC, states that a cumulative application of both domains of law must necessarily lead to interpretations of rights that refer to both.[2446]

This gives rise to 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 […] [I]t may occasionally create conflicts between rules and regimes in a way that might undermine their effective implementation."[2447] Harmonisation is therefore a proposed objective regarding similar norms in separate legal disciplines. The ILC discerned 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".[2448] 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 organisations, but also to different legal guarantees regarding, for example, 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 in fact 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.[2449]

The progression of humanisation has not been universally heralded in the international community, since the specificity of IHL and its military functionality might to a certain degree be lost.[2450] Most of the arguments focus on the historical differences of the two regimes, their different aims and the process of development. Arguably, hu-

2443 C. Greenwood, 'Rights at the Frontier: Protecting the Individual in Time of War', in B. Rider (ed.), *Law at the Centre, the 50th Anniversary Lectures of the Institute for Advanced Legal Studies* (Kluwer Law International, Bedfordshire, 1999), pp. 277-293.

2444 I. Detter, *The Law of War* (Cambridge University Press, Cambridge, 2000), p. 161. *See also* Meron, *supra* note 1954, Viseur Sellers, *supra* note 867. *See also* UN Doc. E/CN.4/sub.2/2005/14, *supra* note 2365, paras. 3-4 and the reports on the Fundamental Standards of Humanity.

2445 *See e.g.* the argumentation below of the European and Inter-American Courts of Human Rights, as well as the *ad hoc* tribunals.

2446 Heintze, *supra* note 2431, p. 795.

2447 ILC Fragmentation Study, UN Doc. A/CN.4/L.702, para. 8.

2448 *Ibid.*, para. 14(4).

2449 *Ibid.*, para. 11.

2450 Jinks, *supra* note 1699, p. 1494.

man 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.[2451] Some human rights scholars have a tendency to consider humanitarian law as a subset of human rights law, thus diminishing the importance of IHL.[2452] The fact that the rules are more specific does not necessarily mean that they are compatible.[2453] 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 killing of civilians, in addition to limitations on such derogable rights as freedom of assembly, as well as regulations on arrest and fair trial. Human rights law, on the other hand, seeks to achieve a respectful coexistence between the individual and the state.[2454]

Scholars such as Gerald Draper have emphasised that "the two regimes are not only distinct but are diametrically opposed […] [and] 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".[2455] Where current international law regards peace as the norm and war the exception, the convergence of IHL and human rights law in a sense represents a fusion of the norm and the exception. The difficulty then arises of whether the exception becomes the standard.[2456] Judith Gardam further argues: "The 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."[2457] 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".[2458] In other words,

2451 Meron, *supra* note 1954, p. 8.

2452 Provost, *supra* note 772, p. 9

2453 D. Koller, 'The Moral Imperative: Toward a Human Rights-Based Law of War', 46 *Harvard International Law Journal* 231 (Winter 2005), p. 260.

2454 *See e.g.* Greenwood, *supra* note 2330, 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."

2455 G. Draper, 'Humanitarian Law and Human Rights', *Acta Juridica* 193 (1979), p. 205.

2456 Gross, *supra* note 2352, p. 3.

2457 Gardam, *supra* note 1764, p. 121. A lack of *practical* value is noted concerning the complementarity approach. Best, *supra* note 1699, p. 248, who argues: "[T]he 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."

2458 Meron, *supra* note 21, p. 241.

too strong a humanisation of IHL may dilute the appropriateness of the rules in relation to the particular situation of armed conflict. René Provost, however, points to the fact that certain experts in humanitarian law are excessively rigid in differentiating between the two provinces of law out of fear that humanitarian law will be "watered down" and laced with human rights concerns.[2459] The nature of each area of law may often be simplified, disregarding human rights law as "idealistic and inappropriate" for conflict situations.[2460]

Maintaining the legal independence of the two orders may in fact be more beneficial to the individual and provide greater protection, at least according to certain scholars. Raúl Vinuesa asserts 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 opening up different avenues to accomplish similar objectives.[2461] 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 results in a progressive development of international law.[2462] With too considerable a 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.[2463] Accordingly, the argument is that by not singling out the most vulnerable groups of people for protection, and by providing the same standard of rights to all, the precarious nature of their situation is ignored.[2464] Concern has also been expressed that such merging may cause a threat to the existence of an independent human rights discourse.[2465] Greater convergence between the two areas could be to the detriment of human rights law, since IHL appears to be the preferred course in normative conflicts owing to its apparent specificity, and the fact that human rights law will be more easily discarded.[2466] It could thereby lower the standards of human rights law. A careful study

2459 Provost, *supra* note 772, p. 9. *See also* Cryer, *supra* note 92, p. 10, who argues 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.

2460 Droege, *supra* note 2300, p. 324.

2461 R. E. Vinuesa, 'Interface, Correspondence and Convergence of Human Rights and International Humanitarian Law', 1 *Yearbook of International Humanitarian Law* (1998), p. 108.

2462 G. Hafner, 'Pros and Cons Ensuing From Fragmentation of International Law', 25 *Michigan Journal of International Law* 849 (2004), pp. 850 and 863.

2463 Gross, *supra* note 2352, p. 35.

2464 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*, *supra* note 2437, para. 159.

2465 Teitel, *supra* note 2396, p. 375, Bennoune, *supra* note 719, p. 181.

2466 L. Mendez, 'International Human Rights Law, International Humanitarian Law, and International Criminal Law and Procedure: New Relationships', in D. Shelton (ed.), *Inter-*

must therefore be undertaken concerning the particular right and the specific context before borrowing concepts across the two regimes. It must, however, be borne in mind that no proponents suggest a complete merger, but rather complementarity where it is considered suitable.

To summarise, concern has been expressed both from the perspective of IHL and human rights law regarding the harmonisation of the two systems. Either the specificity and functionality of IHL would be lost or the level of protection offered by the human rights regime would diminish in strength. Proponents on the other hand hold that harmonisation, for example, through the process of humanisation, will only strengthen protection for the individual and bring further coherence to the field of public international law. A static attitude towards law may cause an impediment to progress in the field of public international law, while 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 within the purview 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 concerning the prohibition of sexual violence may be strengthened by 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 armed conflict, internal conflict and 'normal' conditions".[2467] 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 maintains 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."[2468] From a feminist perspective, the barriers that the different regimes have created are an impediment to the full realisation of women's rights and

*national Crimes, Peace, and Human Rights: The Role of the International Criminal Court* (Transnational Publishers, Ardsley, NY, 2000), p. 69.

2467 Charlesworth and Chinkin, *supra* note 33, 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, *supra* note 131, p. 389.

2468 Charlesworth and Chinkin, *supra* note 33, p. 334. *See also* Copelon, *supra* note 263, 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.

are of an unnatural construction. According to such arguments, distinguishing the prohibition of sexual violence depending on the context is haphazard.[2469] 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 while the jurisdiction of the ICC should not be over-inclusive, it nevertheless creates a hierarchy among incidents of rape that is "difficult to reconcile morally".[2470] However, while the underlying gendered social structure and the act of rape itself may be similar in both sets of circumstances, the difference in attitude to sexual violence has not developed by chance. Rather, the particular conditions 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 with such 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 significant overlap between the three areas means that the different bodies of law may prohibit the same sort of conduct. However, 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 individual autonomy, 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 clear focus has been directed at the principle of human dignity, which is seen as the unifying standard of these regimes. This in turn has brought about a redefinition of the harm of rape, for example, from being treated as a violation of a woman's honour in the 1949 Geneva Conventions, to the harm being viewed as a transgression against the person's sexual autonomy. As noted by the ICTY, this indicates a development towards a "human being-oriented" approach. Patricia Viseur Sellers remarks that the condemnation of sexual violence in, for instance, humanitarian law has always been parallel to contemporary social values and that political and social mores have permeated the growing illegality of sexual violence in armed conflicts. Greater concentration on personal integrity has led to a shift of balance from military necessity to the extensive protection of individuals.[2471] This is also due to the influence of human rights law. Similarly, increased obligations on states in human rights law have advanced in parallel with social developments in the area of sexual integrity and the autonomy of the individual.

2469 *See e.g.* Copelon, *supra* note 263, p. 214.

2470 Condon, *supra* note 763, p. 24.

2471 Viseur Sellers, *supra* note 1710, p. 314.

In general, it can also be noted that several human rights that pertain to sexual violence fully operate during armed conflicts. As earlier 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".[2472] One of the most fundamental principles of human rights, non-discrimination, including such on the basis of sex, is stipulated in numerous human rights conventions and applies during armed conflicts as a non-derogable right.[2473] Human rights instruments explicitly regarding the rights of women are applicable in armed conflicts. CEDAW prohibits discrimination against women on the basis of sex, which incorporates violence against them.[2474] 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 committed by a state official or private actor.[2475] 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."[2476] 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.[2477] Most of these acts are also simultaneously prohibited in international criminal law. Cross-fertilisation is thus a natural consequence.

The protection of the individual has certainly been strengthened by the humanising effect on, and the development of, public international law. The duties of states and individuals have expanded to encompass the prevention of rape, by, for instance, qualifying it as torture. Both international criminal law and international human rights law have sought to achieve an internationally applicable definition of rape. Its definition does, however, differ between the *ad hoc* tribunals, the Elements of Crimes of the ICC and the case law of regional and UN human rights bodies as regards to, for instance, the use of non-consent as an element, but also in respect of its *actus reus*. The definition of torture has also been given two separate definitions in the application of the element of a "state nexus" and "purpose" in the two regimes. Can these norms be

2472 UN Convention against Torture, Article 2.

2473 *See* chapter 7.4.

2474 As interpreted by the Committee on the Elimination of Discrimination against Women.

2475 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.

2476 Vienna Declaration and Programme of Action, UN Doc. A/CONF.157/23, 12 July 1993.

2477 *See* chapter 7.6.

fully harmonised or are we to accept that each area of law regulates various aspects of the same norm, and that a certain distinction must exist – that is, to recognise parallel prohibitions of torture and rape, but with differences as to their content?

### 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 in relation to 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.[2478]

However, the Trial Chamber did warn against directly and uncritically applying human rights concepts in the field of humanitarian law, observing:

> 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.[2479]

The ICTY has expounded on the distinction that must be drawn 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 of 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 status. While human rights norms are almost exclusively of the first sort, humanitarian provisions can be both or sometimes of mixed nature.[2480]

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2478 *Prosecutor* v. *Kunarac, Kovac and Vukovic*, *supra* note 409, para. 467.

2479 *Ibid.*, para. 471.

2480 *Ibid.*, paras. 489-490.

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 in 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 and IHL, due to the "general spirit of humanitarian law", as opposed to that of human rights law. Considering the different subjects of the various areas of law, the exclusion of the state nexus is logical. The ICC, however, went even further in its modification of the torture definition in the Rome Statute. Neither torture as a war crime nor as a crime against humanity requires a state nexus, albeit the 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 act of rape, as torture, must thus be carried out with intent, but not for an express 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 those that are deemed by the international community to result in 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 distinguish 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, within the context of a widespread or systematic attack, is thus sufficient to classify it as an international offence. The purpose element would unduly restrict prosecutions of acts committed in such circumstances. Thus the "general spirit" of IHL/international criminal law would again 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 international humanitarian law and was further developed in the case law of regional human rights in the 1980s and onward. It has now been firmly recognised as existing in both treaty law and in the customary norms of all three areas. The definition of rape, however, has not been attended to with similar coherence.

A definition of rape did not exist in the international arena until the *Akayesu* judgment of the ICTR in 1998. Though the qualification of rape as a human rights violation was already tentatively seen in the case law of regional human rights courts in the 1980s, an attempt to internationally define the offence was first conducted by an *ad hoc* tribunal applying international criminal law. Since then, the *ad hoc* tribunals and human rights courts have generously lent and borrowed concepts and legal arguments from one another, sometimes with different results. The European Court of Human

Rights has shown a growing 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 in respect of 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 […]."[2481] 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 drawn between rape in IHL/international criminal law and human rights law has mainly 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 centring on the non-consent of the victim constitutes a human rights obligation on the part of states, since only a non-consent-based standard fully protects the individual's sexual autonomy.[2482] In the early case law of the *ad hoc* tribunals it was argued that the issue of non-consent was not applicable in circumstances of armed conflict because such situations were inherently coercive. Rather, the use of force or the 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 of both the ICTY and the ICTR. Even so, the Tribunal indicates that non-consent is more readily ascribed to the victim in an armed conflict owing to the intrinsically 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 such settings is inappropriate and irrelevant. The approaches have thus 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*, however, has been thoroughly examined by the *ad hoc* tribunals and incorporat-

2481 *McElhinney* v. *Ireland*, 21 November 2001, ECtHR, No. 31253/96, <cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=McElhinney%20%7C%20v.%20%7C%20Ireland&sessionid=61867803&skin=hudoc-en>, visited on 9 November 2010, para. 36, *Al-Adsani* v. *The United Kingdom*, *supra* note 1652, para. 55. As mentioned above, the ECtHR, however, has been rather conservative in applying IHL directly in the case law.

2482 *M.C.* v. *Bulgaria*, *supra* note 240, *Case of the Miguel Castro-Castro Prison*, *supra* note 411. *See also* chapters 6.4.6 and 7 on the UN treaty bodies and sexual violence.

ed in the Elements of Crimes, indicating a similar approach, albeit with certain technical differences. Here it is clear that the nature of the rapes committed in the Rwandan and Yugoslavian conflicts clearly influenced the construction of the elements, opting for a wide approach to what constitutes acts of a sexual nature.

While it may be logical to find a difference between systems concerning the role of the state in the definition of torture, does the nature of these divisions of law necessarily inform the elements of rape? This is not as apparent. To determine when a cross-fertilisation can be made, it helps to examine the different premises of the regimes. Naturally, IHL and international human rights law will most fundamentally diverge where the premises conflict, such as regarding the deprivation of life, where IHL allows for the killing of combatants and human rights law in placing substantial restrictions.[2483] Do the premises of the two orders then differ with respect to 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 is evident in the case law of the *ad hoc* tribunals, certain sources point to the common nature of rape in all circumstances, as being a form of oppression of women, thereby necessitating a harmonised approach. Others emphasise the distinct use of rape as a military tactic in armed conflicts. Accordingly, this distinctive function may indicate "force" as being a 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 chiefly based their reasoning upon the source of general principles of law, arising from domestic penal codes of rape that do not particularly concern the crime against the background of armed conflict. This is an indication that there is a common basis for a definition of the offence regardless of the prevailing conditions. Furthermore, the definition of a crime should emanate from the perceived *harm* of an act. As continually emphasised in relation to rape, the harm primarily constitutes a violation of an individual's sexual autonomy. This is similar whether under international criminal law or in 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, for instance, torture. It can also be questioned whether the coercive circumstances of an armed conflict or a widespread attack simply represent *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 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 previously mentioned, harmonisation in general leads to consistency and advances legal certainty for the individual. This is an especially valid point in cases where the concept is still under development. The striving for coherence can be discerned in the work of the ICJ, of regional human rights courts, UN human rights treaty bodies, and special rapporteurs in their progressively examining situations from the viewpoint of both IHL and human rights law. If we presume that the protective in-

2483 Koller, *supra* note 2453, p. 260.

terest of penal provisions on rape is the sexual autonomy of the individual, harmonisation would be beneficial in providing full protection regardless of whether the offence of rape happens to occur in peacetime, during an armed conflict, or is perpetrated by a state official or a private actor. This would avoid situations where the protection of women is haphazard, depending on which area of law is applicable, and would allow for 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 circumstance, such as 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".[2484] 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 conclusion, one must not be too eager in discovering convergences between IHL and human rights law, considering the fact that IHL combines humanitarian concerns with military necessity, and human rights law solely focuses on the protection of the person. One must not treat humanitarian law as the human rights law of armed conflict, as this does not reflect the true nature of either of the legal regimes. However, interaction has, and must, continue to occur, in order to fertilise both fields of law and improve the coherence of international law. At the present time, the discussion on convergence is particularly prominent within the context of internal disturbances and conflicts – for instance, through the work of promulgating Fundamental Standards of Humanity. However, as noted, interaction is also possible and fruitful beyond this scope. This has been evident in the case law and literature on the prohibition of torture and rape. Finally, the extent and substance of the interplay between IHL and human rights law is therefore still developing case by case, and it is likely that this will grow in the area of sexual violence, since regional and universal systems are increasingly called upon to examine this subject.

2484 Vinuesa, *supra* note 2461, p. 70.

# Part VI:

## A Cultural Perspective

# 11 Cultural Relativism and Obstacles to a Uniform International Definition of Rape

Previous chapters in this book have examined the possibilities of adopting a definition of rape within the international human rights regime, international humanitarian law (IHL) and international criminal law respectively, or a coherent, harmonised definition applicable to all areas. Fundamental differences in the separate systems may, however, place obstacles in the way of achieving such conformity. An additional concern, albeit a dilemma of a general nature that relates particularly to international human rights law, is the issue of cultural relativism and of certain cultural objections to acknowledging rights and freedoms concerning sexual autonomy as being universal values with their corresponding international obligations. The rejection of the universality of such rights is not only a cause for concern as to the theoretical validity of the existence of universal human rights, but can lead to practical difficulties 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 those in the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), is that the regulations need to be translated into a wide variety of cultures and social realities, extending from societies that deny a full range of women's most fundamental rights to the exercise of more subtle means of discrimination. In this chapter I shall 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.[2485]

2485 K. Annan, Foreword, in Y. Danieli *et al.* (eds.), *The Universal Declaration of Human Rights: Fifty Years and Beyond* (Baywood Publishing Company, Inc., Amityville, New York, 1999), p. v.

Culture can be defined as collective identities, from its social organisation to beliefs.[2486] It has been described as the totality of values, institutions and forms of behaviour within a society.[2487] United Nations (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 […] [C]ulture is intimately connected with the diverse ways in which social groups produce their daily existence economically, socially and politically."[2488] Culture can therefore be defining for the individual member of a group and inform a person's moral values as well as gender patterns. It should not be viewed as a static fact that applies to all, but rather as an evolving process which changes over the course of time. The meaning of a particular right can have varying implications for different people, depending on their political, religious, social and cultural identities.[2489] Certain circumstances may in fact reinforce cultural ideologies, such as an armed conflict, military occupation, or in the conditions found in failed states where group cohesion may rest on the role of women, such as their honour.[2490]

Law is naturally imbued with cultural influences. It is evident in legal formulations, in the severity of punishments but also in "legal silences", that is to say which acts society considers to be crimes and which of them it condones.[2491] The varying beliefs and values related to different cultures directly affect the substantive definition of crimes and the legal system at large. In fact, when regarding many criminalised acts that people view as harmful, it is difficult to prove that an 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, especially its

2486 F. Raday, 'Culture, Religion, and Gender', 1 *International Journal of Constitutional Law* (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* G. Binder, 'Meaning and Motive in the Law of Homicide: Samuel H. Pillsbury's Judging Evil: Rethinking the Law of Murder and Manslaughter', 3 *Buffalo Criminal Law Review* 755 (2000), p. 220.

2487 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* A. A. An Na'im, 'Introduction', in A. An Na'im (ed.), *Human Rights in Cross-Cultural Perspectives: A Quest for Consensus* (University of Pennsylvania Press, Philadelphia, 1992), p. 23.

2488 UN Doc. A/HRC/4/34, *supra* note 1521, p. 8.

2489 D. L. Donoho, 'Autonomy, Self-Governance, and the Margin of Appreciation: Developing a Jurisprudence of Diversity within Universal Human Rights', 15 *Emory International Law Review* 391 (Fall 2001), p. 392.

2490 UN Doc. A/HRC/4/34, *supra* note 1521, p. 24, paras. 63-64.

2491 *See e.g.* F. Shaheed, 'Violence against Women Legitimised by Arguments of "Culture" – Thoughts from a Pakistani Perspective', in C. Benninger-Budel (ed.), *Due Diligence and its Application to Protect Women from Violence (*Martinus Nijhoff, Leiden, 2008), p. 242.

view on gender and sexuality and which boundaries it creates in respect of 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.[2492] The Universal Declaration of Human Rights proclaims that it constitutes "a common standard of achievement for all peoples and all nations". Similar wording is to be found in all major human rights treaties. Universality is a normative rather than a descriptive concept, *i.e.* it refers to the intention of norm-makers.[2493] Universalists insist that human rights law concerns itself with individuals and should not be circumvented by states or ideologies.[2494] While recognising that cultures may possess unique traits, universalists maintain that individual similarity should prevail over such differences.[2495] 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".[2496] The historical context of the creation of human rights law arguably reflects Western ideals and morals, imitating the political cultures of these societies, which contradict the universal applicability of the rights to all cultures.[2497]

The rejection of the universality of rules varies in degree. Cultural relativism with regard to human rights law can be described as a continuum. [2498] 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 considered to be a form of cultural expression not readily transplantable from one culture to another.[2499] At the other end of the spectrum we find the radical universalists suggesting that culture is entirely irrelevant to the application of rights. The radical approach to

2492 Brems, *supra* note 1027, p. 5.

2493 *Ibid.*, p. 4.

2494 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.

2495 L. Bell and N. Andrew *et al.*, *Negotiating Culture and Human Rights* (Columbia University Press, New York, 2001), p. 5.

2496 *Ibid.*, p. 5. *See also* J. Donnelly, *Universal Human Rights in Theory and Practice*, 2nd ed. (Cornell University Press, Ithaca, 2003), p. 99. Rights are accordingly a historical construct, with a distinctive European point of view.

2497 A. A. An-Na'im, 'Culture and Human Rights', in J. Bauer and D. Bell (eds.), *The East Asian Challenge For Human Rights* (Cambridge University Press, Cambridge, 1999), p. 153, Donnelly, *supra* note 2496, p. 99.

2498 J. Donnelly, *Universal Human Rights in Theory & Practice*, pp. 90-91. *See also* An Na'im, *supra* note 2487, p. 4.

2499 UN Doc. E/CN.4/2003/75, *supra* note 859, 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 on-

relativism aims at the exclusion of all non-Western cultures from the international human rights system. The more moderate approaches are rather claims of inclusion, conditional on the system accommodating cultural differences.[2500] 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 the state. As Dinah Shelton correctly maintains, 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.[2501] 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.[2502] In fact, the radical relativist argument is not advanced as frequently 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 the internal affairs of states, 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, and that human rights are in fact increasingly challenged by the "cultural discourse".[2503] 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.[2504] The Sudanese official, for example, emphasised the principle of non-interference in the internal affairs of states 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.[2505]

The UN World Conference on Human Rights in Vienna in 1993 represents 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 histori-

slaught. 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.

2500 Brems, *supra* note 147, p. 144.

2501 Shelton, *supra* note 1655, p. 152. It should also be born in mind that customary norms are established through reference to existing state practices and policies.

2502 Donnelly, *supra* note 2496, p. 90.

2503 UN Doc. A/HRC/4/34, *supra* note 1521, p. 8.

2504 *See e.g.* Bahrain, Iran, Sudan and the United Arab Emirates.

2505 Statement of the Delegation of the Republic of the Sudan at The Fourth World Conference on Women, Beijing, China, 4-15 September 1995, Presented By H.E. Mrs. Mariam Osman Sir El Khatim, State Minister for Social Planning, Head of Delegation.

cal, cultural and religious backgrounds".[2506] In 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."[2507] 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 universal in nature, can we also simultaneously accommodate regional or national diversity? The challenge lies in finding a balance to ensure that human rights are sufficiently universal to make them appropriate subjects for meaningful international regulation, yet are consistent with the diversity that exists globally.[2508] Proponents of a wide flexibility in the domestic implementation of international standards affirm that while human rights are universal in nature, they must be considered in the light of a dynamic process of establishing international norms, and that one must bear in mind the significance of historical, cultural and religious differences at the national level.[2509] As such, it is held that rights only gain value when applied contextually. This notion is largely founded on the empirical understanding that moral values depend on the particulars of each society.[2510] Abdullahi An Na'im recognises that it is neither possible nor desirable for an international system of human rights to be culturally neutral.[2511] Many states seem to share the idea that local variations are not in opposition to universalism, as expressed in the agreement on the Vienna Declaration. In fact, many academics insist that the issue of cultural relativism raises an important matter in that the implementation and interpretation of rights may vary culturally without undermining their basic universal nature.[2512] A certain level of margin of appreciation is, for instance, given to states when implementing human rights norms. This, in fact, allows a subsidiarity aspect to universality. That is to say, culture and context can affect the substance of standards.[2513]

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2506 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).

2507 Vienna Declaration, para. 5.

2508 Donoho, *supra* note 2489, p. 394.

2509 F. Banda, 'Global Standards: Local Values', 17:1 *International Journal of Law Policy and the Family* (April 2003), p. 1.

2510 Donoho, *supra* note 2489, p. 401.

2511 A. A. An-Na'im, 'State Responsibility under International Human Rights Law to Change Religious and Customary Laws, in International Human Rights Law', in R. Cook (ed.), *Human Rights of Women* (University of Pennsylvania Press, Philadelphia, 1994), p. 173. An Na'im sees the relationship between local culture and international law as "a genuinely reciprocal global collaborative effort".

2512 Donoho, *supra* note 2489, p. 405.

2513 Brems, *supra* note 1027, p. 15.

Feminist scholars are now speaking of a "culturally sensitive universalism", acknowledging the criticism of their third world counterparts.[2514] Others talk of an "inclusive universality", implying the need to accommodate contextual particularities.[2515] There are, however, risks with inclusive universality, as with relativism in general, in that it can be invoked to justify exclusion of certain groups, such as women.[2516] The increasing need to acknowledge contextual elements in human rights can similarly be seen, for example, in the feminist discourse and the contextual approach to sexual violence, as in armed conflicts. Feminist and cultural relativist critiques of international law are in fact similar in certain respects.[2517] Eva Brems argues that the "human" in human rights is often 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.[2518] 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.[2519] According to Eva Brems, feminism – largely arising from Western countries – is not considered to be as threatening as cultural relativism, the latter arguably being raised as a justification for human rights violations.[2520]

### *11.1.1 Relativity of Women's Rights*

The UN Special Rapporteur on Violence against Women recorded that cultural relativism was often used as an excuse to permit discriminatory practices against women.[2521] 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.[2522] 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 was noted that oppressive practices

2514 Engle, *supra* note 851, p. 50.

2515 Brems, *supra* note 1027, p. 308.

2516 *Ibid.*, p. 322.

2517 An-Naím, *supra* note 2511, p. 157.

2518 Brems, *supra* note 1027, p. 316.

2519 Charlesworth and Chinkin, *supra* note 33, p. 225.

2520 Brems, *supra* note 147, p. 149.

2521 UN Doc. E/CN.4/2002/83, *supra* note 935, para. 1. *See also* Fried, *supra* note 1291, 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.

2522 CCPR General Comment 28, Equality of Rights Between Men and Women (Article 3). *See also* Bunch, *supra* note 340, p. 41. As Raday asserts, "religion is derived from culture, and gender is, in turn, derived from both culture and religion". Raday, *supra* note 2486, 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, *supra* note 857, p. 173.

are perpetuated principally owing to the underlying ideology in various cultures that insists on curtailing the sexual identity of the woman. The protection of female sexuality is responsible for the restrictive laws found in many countries, where women who transgress the bounds of appropriate sexual behaviour are often subject to violence.[2523] It is hardly surprising that such 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 those of women, had not yet reached a level of global urgency.[2524] One problem in eradicating such cultural norms and practices is that violence against women frequently occurs in private, a realm into which international and domestic legal systems have been reluctant to delve.

Rhadika Coomaraswamy acknowledges that all cultures to a certain extent retain practices that deny women their rights and that there is a risk that cultural practices that discriminate against women are ascribed solely to developing countries or immigrant communities.[2525] The discord between culture and women's rights is most frequently raised with regard to traditional harmful practices that form a part of historical custom, such as female genital mutilation or sati. Discriminatory laws based upon gender stereotypes and prejudices are also included.[2526] Yakin Ertürk advises against the making of any distinction between so-called harmful traditional practices and "non-traditional practices, such as rape and domestic violence", as previously upheld by the UN.[2527] Such a division fails to recognise the impact of culture on the existence of sexual violence and the predominantly female victim. It also falls short of acknowledging that no society is devoid of culture and that its most dominant form is influenced by patriarchal attributes that induce high levels of violence against women.[2528] Intimate violence is therefore a "cultural practice" in most societies. Culture in most states therefore creates the basis for the violence that is suffered by women and is not solely restricted to specific regions of the world.

Noting the high levels of rape in the West, despite sufficient legal and institutional measures in place in such countries to deal adequately with sexual assaults, Ertürk concludes: "[I]t is hard not to perceive these violations as harmful social traditions rather than merely as the crimes of individual, deviant perpetrators."[2529] Because the root causes of "traditional" practices and sexual violence arise from similar ideologies, it is unhelpful to divide gender-based violence in such a manner, which only serves to

2523 UN Doc. E/CN.4/2002/83, *supra* note 935, para. 99.

2524 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, *supra* note 2486, p. 3.

2525 UN Doc. A/HRC/4/34, *supra* note 1521, p. 2. Gender-based violence can still be culture-specific. *See* Fried, *supra* note 1291, p. 259.

2526 UN Doc. E/CN.4/2002/83, *supra* note 935, para. 65-69.

2527 UN Doc. A/HRC/4/34, *supra* note 1521, para. 33. *See* Harmful Traditional Practices Affecting the Health of Women and Children, Human Rights Fact Sheet No. 23, 1995.

2528 Shaheed, *supra* note 2491, p. 241, Copelon, *supra* note 851, p. 871.

2529 UN Doc. A/HRC/4/34, *supra* note 1521, para. 33.

attribute the problems to cultures in certain regions of the world. Owing to its universality, rape may not be viewed by all as a cultural phenomenon. 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 being tied to cultural norms. Accordingly, dating is a "culturally specific form of social relations between women and men, with culturally constructed expectations".[2530] Annan makes clear that while violence against women is all-pervasive, the manner in which it is expressed depends on the particular culture. Charlesworth and Chinkin furthermore contend that all social values and hierarchies can be described as forms of culture.[2531] Accommodating culture in the international system then becomes a difficult exercise, since by giving culture a "special" status one is precluded from assessing any culture in relation to gender-discriminatory practices.

Additionally, 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 conceived 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."[2532]

Sexuality and culture are intricately entwined. As asserted by Jeffrie Murphy, "[t]he importance of sex is essentially cultural" and the particular wrong of penetration of the sexual organs derives from our culture surrounding "sexuality with complex symbolic and moral baggage".[2533] Research has demonstrated that cultural differences, in terms of public misconceptions of rape and the acceptance of rape myths, are significantly related to restrictive beliefs of the social roles and rights of women.[2534] Independence on the part of the individual in decisions regarding his or her sexual life challenges the social power structure in a given society. A general survey conducted by the UN Commission on Human Rights of municipal legal systems revealed worldwide gender-discrimination codified in criminal laws regarding sexual violence. This included societies where rape was defined as a crime against the community and not the person; rape defined as acts committed by a man against a woman who is not his wife; evidentiary laws that accord less weight to evidence if presented by a woman; evidentiary laws requiring women to provide corroborating testimony by men; and substantive laws which provide that a married woman, who fails to prove that she has been raped, can then herself be charged with adultery.[2535] The legality of marital rape is an expression of the cultural impact on the understanding of the nature of rape,

2530 UN Doc. A/61/122/Add.1, *supra* note 2, para. 83.

2531 Charlesworth and Chinkin, *supra* note 33, p. 224.

2532 "Rape must never be minimized as part of cultural traditions, UN envoy [Margot Wallström] says", UN News, *supra* note 5.

2533 Murphy, *supra* note 254, p. 214.

2534 N. Shalhoub-Kevorkian, 'Towards a Cultural Definition of Rape – Rape and Public Attitudes', 22:2 *Women's Studies International Forum* (March 1999), p. 158.

2535 UN Doc. E/CN.4/Sub.2/1998/13, *supra* note 10, para. 96.

as it affirms cultural notions of conjugal obligations. This may be expressed through legislation either expressly requiring a wife to engage in sexual intercourse or to generally obey her husband, or a criminal code where rape is explicitly excluded in cases of forceful sexual relations between spouses. In 1997 the Mexican Supreme Court 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.[2536] The 1992 Yemen Personal Status Act No. 20 states that a wife must obey her husband and permit him licit sexual intercourse.[2537]

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 seek to curtail women's sexuality or display preconceived notions of the appropriate behaviour of either gender. This might include conclusions as to consent based upon the victim's clothes or behaviour, as to whether or not either or both were provocative, 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, male rape must not be overlooked. As mentioned previously, many domestic jurisdictions have restricted the offence to the female victim because of cultural presumptions on gender relations. Male rape therefore often goes unacknowledged as a possibility – culturally and legally. The associated shame is considered particularly grave as a reflection of society's view of 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 those who transgress appropriate female behaviour are not considered potential victims of rape because they are said not to experience the *harm* of rape.

### *11.1.2 Conflicts of Rights*

What happens when cultural norms conflict with the protection of women's rights? Cultural diversity is discerned as a fundamental value to be protected by the inter-

2536 UN Doc. E/CN.4/2002/83, *supra* note 935, para. 101.

2537 Article 40. Rape has been one of the forms of violence in the home that has received the least attention, and the extent of the problem is unknown. This is coupled with the reluctance of the state to interfere in the highly intimate relations of the married couple. A committee on the reform of rape legislation in England *e.g.* held that it did not see marital rape as a serious social problem. *See* 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 by Professor Shorter in arguing: "In our own time, a married woman who dislike's her husband's advances can leave the marriage." E. Shorter, *Women's Bodies: A Social History of Women's Encounter with Health, Ill-Health and Medicine* (Transaction Publishers, New Brusnwick, New Jersey, 1997), p. 3.

national human rights system.[2538] This includes the right of all to take part in cultural life.[2539] However, it cannot restrict the rights of others. Article 4 of the Universal Declaration on Cultural Diversity by the United Nations Educational, Social and Cultural Organization (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. 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".[2540] 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".[2541] 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".[2542] 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 in order to avoid their responsibilities with respect to the elimination of discrimination against women.[2543] In the Vienna Declaration, women's rights and culture are addressed in broad terms, calling for "the eradication of any con-

2538 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.

2539 *See e.g.* Article 15 of the ICESCR.

2540 CCPR General Comment No. 28, Equality of Rights Between Men and Women, with regard to Articles 3 and 27, guaranteeing minority culture rights.

2541 UN Doc. A/RES/S-23/3, 16 November 2000, para. 3.

2542 UN Doc. A/HRC/4/34, *supra* note 1521, para. 30.

2543 The 1995 Beijing Platform for Action, para. 125 a.

flicts which may arise between the rights of women and the harmful effects of certain traditional or customary practices, cultural prejudices and religious extremism".[2544]

It is thereby generally accepted within the international human rights regime that while a right to culture and religion exists, such claims cannot be relied upon to restrict women's human rights. While cultural norms and morals should be taken into account, such values must not discriminate against women and ought to be consistent with human rights standards.[2545] As such, the theoretical foundation for cultural relativism is at its core clearly rejected. However, issues of culture still arise beyond the general discussion of the universal application of human rights. This occurs by way of the national implementation of states' human rights obligations and *e.g.* through the use of a cultural defence in criminal proceedings at the national level. One may therefore conclude that the debate has moved from the general acceptance of universal human rights to the national interpretation of those 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 their application they demonstrate major cultural differences.

## 11.2 Cultural Relativism and International Criminal Law

The matter of cultural relativism is most frequently raised as a consideration regarding international human rights law and its universal application. It has been claimed that the cultural relativist critique has been largely absent from the debate on international criminal law.[2546] However, the same concerns are prevalent in the development of international criminal law and the determination of its scope, since in part it draws inspiration from human rights norms.[2547] The argument is advanced that since culture informs which acts are to be criminalised in a specific 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.[2548]

Is there a risk that the body of international criminal law will have its roots in subjective notions of justice, or that the work of the International Criminal Court (ICC)

2544 The Vienna Declaration, para. 38.

2545 Banda, *supra* note 2509, 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.

2546 McGoldrick *et al.*, *supra* note 403, p. 462.

2547 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 owing to its exceptional nature. It also does not regulate the relationship between the state and its citizens, which may be particularly sensitive. *See* Provost, *supra* note 2315, p. 628.

2548 Bagaric and Morss, *supra* note 299, p. 160.

will be informed by such considerations? The list of crimes in the Rome Statute primarily derives from the Nuremberg trials, with their closer definitions arising 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 broad international agreement. They are seen as setting back the vital interests of the victim and there is a high degree of consensus as to which crimes require condemnation and prosecution at the international level. Many states contributed 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 extent.[2549] 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 question 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, with the possibility open to consider forms of justice other than the retributive, for example, 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 definitions that are too restrictive. It should also be noted that no reservations to the Rome Statute are permitted, in order to ensure a uniform system of obligations.[2550]

The idea that an international definition of rape is developing may, on the face of it, seem impossible. As Boon concludes, "[o] ne 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."[2551] 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.[2552] Several Arab states, as well as a few Catholic countries, attempted to restrict the scope of the elements of gender crimes.[2553] The opposition included the criminalisation of enforced pregnancy, since it arguably could result in an international challenge of anti-abortion laws in certain countries.[2554] The issue of non-

2549 McGoldrick *et al.*, *supra* note 403, p. 464.

2550 Article 120 of the Rome Statute.

2551 Boon, *supra* note 417, p. 637.

2552 McGoldrick *et al.*, *supra* note 403, p. 462.

2553 S. Roach, 'Arab States and the Role of Islam in the International Criminal Court', 53:1 *Political Studies: 205* (March 2005), p. 143,von Hebel and Kelt, *supra* note 579, p. 275.

2554 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

consent in connection with sexual violence caused the most serious controversies, owing to the various cultural and legal assumptions on women's sexuality. For example, a number of delegates from the Middle East insisted that by definition all sex during marriage 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.[2555] Compromises were therefore made during the drafting of the Statute because of the varying legal and religious traditions of participating countries.

Will the implementation process cause particular problems for certain states? Certain scholars propose that the Court's complementary approach will result in the opposite of encouraging repressive states to change their policies.[2556] The question of whether Islamic values can be reconciled with the international criminal justice system has been raised by several authors.[2557] It is unlikely that the Islamic approach in relation 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 for instance, non-consent or force in international jurisdiction, is that it arguably requires an understanding of human relations within a particular culture.[2558] According to such an argument, the elements of a definition of rape must always be interpreted in light of the culture in which the particular situation occurs. This would become more difficult in an international court, such as the ICC, which has jurisdiction over crimes occurring in more than 100 member states, and additionally retains the ability to prosecute offenders in non-member states, as opposed to the *ad hoc* tribunals, which dealt only with assaults occurring in particular settings and cultures. This occasions the question not only of whether the definition of rape can be applied in a universal context, but also as to how familiar concepts such as non-consent would be applied.[2559] Because concepts such as "force" or "non-consent" are capable of being interpreted in a liberal or conservative manner, and may in fact even be given similar interpretations, this must also be clarified.

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November – 17 December 1999). *See also* discussion by Nill, *supra* note 2023, p. 139, Arsanjani, *supra* note 1800, p. 40.

2555 Boon, *supra* note 417, p. 639.

2556 Roach, *supra* note 2553, p. 144.

2557 *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.

2558 Fitzgerald, *supra* note 407, p. 644.

2559 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 type of behaviour constitutes consent. Fitzgerald, *supra* note 407, p. 644, Asp, *supra* note 432, p. 210.

An interesting point is that in several cases heard by the *ad hoc* tribunals, general principles of law have been applied through a review of domestic law and jurisprudence in attempting the definition of rape. The application of this source of law must not look to civil and common law systems alone but also to the Islamic world, as well as Asian and African contexts, which in practice are frequently overlooked.[2560] In *Furundzija*, the International Criminal Tribunal for the former Yugoslavia (ICTY) was careful to include a variety of systems and emphasised their equal 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.[2561]

A similar procedure was undertaken in *Akayesu* and *Kunarac*, albeit in the first mentioned case not as transparently as that of the ICTY. The International Criminal Tribunal for Rwanda (ICTR) and ICTY accordingly found 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.

## 11.3 Culture and *Mens Rea* – A Criminal Defence

An additional hurdle to the effective prosecution of sexual violence and the implementation of international rules is the possibility of a cultural defence in domestic criminal law in various states. Culture may affect several steps in the justice system – from the definition of rape to decisions on arrest and prosecution, cultural evidence at trial and the evaluation of defence, such as insanity or provocation.[2562] A review of recent case law of national courts indicates that cultural concerns are used as a consideration in criminal law cases, especially on the evaluation of *mens rea* and in the sentencing phase.[2563] This chiefly concerns cases of violence against women, such as honour killings and rape, and has been applied in jurisdictions in various countries as a "cultural defence", though not usually as a formalised tool of defence. That line of argumentation allows judges and attorneys to consider the cultural and religious background in determining the responsibility of the defendant when assessing his mental state, *mens rea*. The fact that the accused did not know that his actions were wrong or that he could not control his behaviour because of his background could affect the finding of

2560 Cassese, *supra* note 362, p. 23.

2561 *Prosecutor* v. *Furundzija*, *supra* note 28, para. 178.

2562 A. Dundes Renteln, *The Cultural Defense* (Oxford University Press, Oxford, 2004), p. 7.

2563 A. Phillips, 'When Culture Means Gender: Issues of Cultural Defence in the English Courts', 66:4 *Modern Law Review* 510-531 (17 July 2003), p. 526.

*culpa*, or affect sentencing.[2564] Criminal behaviour is thus interpreted according to the cultural parameters of the perpetrator and is partially mitigated because the person concerned 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.[2565] The offence must 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 first surfaced in law journals in the United States in the 1980s following several cases in national courts where defendants invoked tradition as mitigating circumstances for their crimes.[2566] The principle objection to a cultural defence is the assimilation argument – that everyone should be held to the same standard, otherwise it would breach the principle of equality.[2567] Furthermore, it may promote stereotypes of certain cultures. Feminist experts have heavily criticised the notion as legitimising violence against women simply because of tradition and that such modes of defence serve to enforce patriarchal practices and ideals. Because women are considered to be subordinate in most societies, many cases applying the cultural defence have concerned harmful practices inflicted on women and children.[2568] However, certain authors maintain that ignoring the effect of culture results in a failure to provide equal protection under the law, since the aim of criminal law is to ensure the just punishment for the defendant by determining *mens rea*.[2569]

Various countries have authorised such considerations in criminal proceedings, thus 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, creates a great obstacle to the notion of universally applied standards of women's human rights because different cultural approaches to the social standing of women are transposed into the justice system. The rights of women in the same country could thereby vary according to the culture that she, or the defendant, represents. This could bring about 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 prompts the larger question of the purpose of criminal law – whether its primary function is to punish morally unacceptable behaviour, or to deter harmful conduct. If a person is morally unaware of the wrongs of his actions as a result of a different cultural framework, is the desired goal achieved in punishing the individual? A general theorem in criminal law is to punish morally wrongful acts, as made evident through an intent to injure. The element of *mens*

2564 N. Kim, 'Blameworthiness, Intent, and Cultural Dissonance: The Unequal Treatment of Cultural Defense Defendants', 17 *University of Florida Journal of Law & Public Policy* 199 (August 2006), p. 203.

2565 Phillips, *supra* note 2563, p. 512.

2566 *Ibid*., p. 510.

2567 Dundes Renteln, *supra* note 2562, p. 193.

2568 Kim, *supra* note 2564, p. 211.

2569 Dundes Renteln, *supra* note 2562, p. 196.

*rea* attached to crimes such as rape is an indication of the wish of societies to punish perpetrators who are aware of the consequences of their actions. However, as indicated in the chapter on *mens rea*, ignorance of the law is no excuse and the standard tends to be accompanied by a general appraisal, such as the conduct of "the reasonable man". Should culture then be a standard against which to assess a person's guilt? Piers Beirne's opinion is that "criminal behaviour cannot ultimately be understood apart from the cultural context in which it occurs. Second, generalizations about criminal behaviour must refer to the cultural and subjective values of those who engage in it."[2570]

Examples are to be found in a handful of countries, mostly relating to violence inflicted on women. *People* v. *Chen*, heard by the New York Supreme Court, concerned a woman who had been murdered by her husband after learning of her extramarital affair. The charge was reduced by the judge from second degree murder to second degree manslaughter, owing to the cultural background of the defendant and bearing in mind the particular gravity and condemnation of adultery in Chinese culture.[2571] An expert witness testified that such adultery in China caused tremendous dishonour for the husband and that violence against adulterous women was commonplace in China. The defence did not rest on the premise that it was acceptable behaviour to take a person's life in China, but rather that the cultural background of the accused caused severe emotional strain and affected his 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 Aborigine to just one month in prison after beating and raping a 14-year-old girl who had been promised as his bride. The judge found that the man, subscribing to traditional Aboriginal beliefs, was not aware that his behaviour was illegal.[2572] A county court case in the United States concerned the rape of a Korean woman by two Korean youths. The Court, in examining the surrounding circumstances to determine the existence of non-consent, found that since the woman had frequented bars and dressed

2570 P. Beirne, 'Cultural Relativism and Comparative Criminology', 7:4 *Crime, Law and Social Change* (October 1983), p. 372. Nancy Kim argues that all actions do not carry the same cultural significance. Kim, *supra* note 2564, 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, *supra* note 2486, p. 764.

2571 *People* v. *Chen No 87-7774* (Supreme Court, NY County, 2 December 1988). *See* discussion *e.g.* in Beirne, *supra* note 2570, S. Song, 'Majority Norms, Multiculturalism, and Gender Equality', 99 *American Political Science Review* 473-489 (Cambridge University Press, Cambridge, 2005).

2572 *The Queen and GJ*, SCCC 20418849, The Supreme Court of the Northern Territory, Australia, Transcripts of proceedings at Yarralin on Thursday 11 August 2005 (Australia), <www.smh.com.au/news/national/chief-justice-brian-martins-sentencing-remarks/2005/09/27/1127804478319.html>, visited on 10 November 2010.

provocatively, which was arguably unacceptable in her culture, the men were reasonable in their beliefs that she had consented.[2573]

Similarly, in *People* v. *Moua*, the defendant forced a woman of Laotian descent to engage in sexual intercourse while claiming that he had simply engaged in the Laotian ritual of "marriage-by-capture", *zij poj niam*.[2574] This tradition entailed that in order for a woman to be wed, the man must display signs of virility and strength and the woman to protest the sexual advances and in so doing establish her virtue. The sole evidence presented by the defence was a 22-page pamphlet on the subject. 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 dismissed the charges of 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 upon a "mistake of fact" in relation to consent and it was considered that the prosecution would not be able to challenge successfully his lack of intention

In the Canadian case of *R.* v. *Lucien*, two men originally from Haiti were jointly convicted of sexual assault yet received only light sentences of community service, despite the standard tariff for gang rape being four to 14 years imprisonment.[2575] The judge noted that the evident lack of remorse on the part of the defendants arose "more

2573 *See* discussion in Oliver, 'Immigrant Crimes: Cultural Defense – A Legal Tactic', *L.A. Times*, 15 July 1988, at A13, col. 4.

2574 *People* v. *Moua,* No. 315972-0, Cal. Super. Ct. Fresno County, 7 February 1985, discussed in Song, *supra* note 2571, p. 479. *See also State* v. *Her*, 510 N.W.2d 218 (Minn. Ct. App. 1994), <international.westlaw.com.db.ub.oru.se/find/default.wl?rs=WLIN10.10&fn=_top&sv=Split&findjuris=00001&mt=WLILawSchool&cite=510+N.W.2d+218&utid=5&vr=2.0&rp=%2ffind%2fdefault.wl&sp=intorebo-000>, visited on 10 November 2010.
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 the *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 the 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 to 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 rape and the appropriate behaviour of rape victims is viewed can influence the adjudication of rape cases even in countries with, what can be considered, a progressive definition and understanding of rape. *See State* v. *Lee*, 494 N.W.2d 475 (Minn. 1993), <international.westlaw.com.db.ub.oru.se/find/default.wl?rs=WLIN10.10&fn=_top&sv=Split&findjuris=00001&mt=WLILawSchool&cite=494+N.W.2D+475+&utid=5&vr=2.0&rp=%2ffind%2fdefault.wl&sp=intorebo-000>, visited on 10 November 2010.

2575 *R.* v. *Lucien*, 63. (1998), AQ no 8. (Cour du Quebec), discussed in P. Fournier, 'The Ghettoisation of Difference in Canada: "Rape by Culture" and the Danger of a "Cultural Defence" in Criminal Law Trials', 29:1 *Manitoba Law Journal (*2002), pp. 4 *et seq*.

from a particular cultural context with regard to relations with women than to a real problem of a sexual nature".[2576] Furthermore. "they behaved like two young roosters craving for sexual pleasures", thus reinforcing even more the stereotypes based upon the cultural background of the men.[2577] 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 at the national level, since culture is seen as a determinative factor in judging rape cases.

The bone of contention 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 – that is, 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 or not an offence or violation has occurred.[2578] Similar to the issue of cultural relativism at the international level, the question of a defence founded on culture in national courts chiefly concerns the sexuality of women, and whether or not a woman has comported herself 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, confirms 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 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 this chapter has demonstrated, 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 aims to curb women's sexuality while failing to acknowledge 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 barriers to national implementation of the international obligations of states, whether 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, for example, through a margin of appreciation, but culture can never constitute a sufficient excuse for failure to meet state obligations. Though the international law system aims to provide a legal remedy to a problem that arises from culture and gender aspects, that is the role of law.

## 11.4 Relativism Inherent in the International Law System

A way of accommodating variations in the domestic implementation of human rights norms has been developed by the European Court of Human Rights (ECtHR), which

2576 *Ibid.*, para. 15. *See* translation in Fournier, *supra* note 2575.

2577 *Ibid.*, para. 7.

2578 Phillips, *supra* note 2536, p. 513.

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 its national justice system. The extent of margin of appreciation for a state depends on the specific right and the level of coherence among members of the Council of Europe.[2579] 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."[2580] 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 inasmuch as "absolute uniformity of national rules is not the goal".[2581] 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, as the domestic implementation of the treaty obligations of states 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 fashion in order to attract ratifications. The international set-up is therefore structured to provide diversity of implementation, a flexibility which was intended in the negotiations of the earliest treaties to allow for the preservation of sovereignty.[2582] Though certain national differences may be accommodated by means of this framework, the substance of certain rights is still challenged with reference to culture. The scope with which national authorities interpret the right in question is determined by the right. For example, there is little flexibility concerning the prohibition of torture owing to a virtual universal acceptance of its general scope. Freedom of speech is provided as an example over which a larger margin of appreciation is accorded because of its sensitivity to domestic values.[2583] The variations pertaining to each right are therefore conducted case by case.

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, from a technical standpoint it would be difficult to enforce such norms.[2584] The European Court of Human Rights has gone to the extent

2579 *See* chapter 6.5.

2580 *M.C.* v. *Bulgaria*, *supra* note 240, para. 154.

2581 Brems, *supra* note 1027, p. 360.

2582 Donoho, *supra* note 2489, p. 427.

2583 *Ibid.*, p. 427.

2584 The Arab Charter, which came into force on 30 January 2008, does not refer to cultural relativism but rather to such international documents as the UN Charter, the UDHR and the two Covenants. However, it also makes references to the 1990 Cairo Declaration on Human Rights in Islam, 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 the major universal treaties and is therefore an example of the ac-

of categorically stating that Sharia, the sacred law of Islam, 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.[2585]

The diversity of human rights mechanisms can be viewed as detrimental to the universality of rights. Melissa Robbins argues thus: "[B]y 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."[2586] So 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 granted 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 influences and effects of culture on definitions of rape are therefore expected to diminish as the elements of the crime are progressively regulated under international law.

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ceptance 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 Conference, 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.

2585 *Refah Partisi* v. *Turkey*, 13 February 2003, ECtHR, Nos. 41340/98, 41342/98, 41343/98 and 41344/98, <cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=Refah%20%7C%20Partisi%20%7C%20v.%20%7C%20Turkey&sessionid=61867803&skin=hudoc-en>, visited on 9 November 2010, para. 123, concerning the prohibition of a political party aiming to introduce Sharia in secular Turkey.

2586 M. Robbins, 'Comment: Powerful States, Customary Law and the Erosion of Human Rights through Regional Enforcement', 35 *California Western International Law Journal* 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, for example, an ethnic group in particular. International reaction to the pervasiveness of sexual violence has exhibited itself in various ways. This book 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 (IHL) 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 book 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 oblige 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 United Nations (UN) Security Council Resolutions. This is affirmed by the International Committee of the Red Cross (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 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 evinc-

ing state practice, a 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, for example, 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 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 (ECtHR), the Council of Europe, the UN Special Rapporteur on the Elimination of Violence against Women, the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) Committee, the International Criminal Tribunal for the former Yugoslavia (ICTY) and International Criminal Tribunal for Rwanda (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 International Criminal Court (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".[2587] 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".[2588]

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 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

2587 Draft Convention on Preventing and Combating Violence against Women and Domestic Violence, 15 October 2009, Article 27.

2588 *Case of the Miguel Castro-Castro Prison* v. *Peru*, *supra* note 411, para. 310.

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 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.[2589] 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, for instance, 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 ele-

2589 Asp, *supra* note 432, p. 210.

ments 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 book. 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 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."[2590] 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 a growing *harmonisation* creating new endeavours, such as 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.

2590 *Prosecutor* v. *Furundzija*, *supra* note 28, para. 183.

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 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 of 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, for example, 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 been 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 book 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, for instance, 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 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, for example, 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, such as 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, for instance, 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.[2591] 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.[2592] 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.

This book 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 implementation 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

2591 Ratner, *supra* note 2404, p. 240.

2592 Charlesworth, *supra* note 131, p. 390.

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.[2593] 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".[2594] 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 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.

2593 UN Doc. E/CN.4/2001/73, *supra* note 651, para. 66.

2594 Human Rights Watch: Shattered Lives: Sexual Violence During the Rwandan Genocide and its Aftermath , 1996, p. 28

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 non-governmental organisations, 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, mainly 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 book, 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, 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.[2595] 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

2595 UN Doc. E/CN.4/2004/66, *supra* note 935, para. 71.

violence".[2596] 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 conflict. The acknowledgment of the gender dimension of rape as, for instance, 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 victims 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.[2597] 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 book, perspectives that have been essential in the development of the theories on the prohibition of rape at the international level. Both feminist scholars and cultural relativists

2596 Copelon, *supra* note 263, p. 213.

2597 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.

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.[2598] 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, for example, 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 non-governmental organisations, and the jurisprudence on rape by the ICTR was greatly influenced by a female judge.[2599] 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 in 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 in general has been implied in the scope of other

2598 Charlesworth, *supra* note 131, p. 380.

2599 Judge Pillay.

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 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".[2600] 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 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, for instance, 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, for example, 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.

2600 Charlesworth, *supra* note 131, p. 387, Dixon, *supra* note 345, pp. 703 *et seq.*

## 12.6 The Legal Basis for Defining Rape

The subject of this book 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: "[U]nmistakably, there is a general norm of international law derived from municipal law regarding the illegality of rape."[2601] 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 international law.[2602] Though "general principles" is an elusive 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.[2603] 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.[2604] 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.

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2601 Viseur Sellers, *supra* note 148, p. 302.

2602 Article 38 Statute of the International Court of Justice.

2603 Ewing, *supra* note 1067, p. 787.

2604 *Prosecutor* v. *Kunarac, Kovac and Vukovic*, *supra* note 409, paras. 440 *et seq*.

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 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 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 European Convention on Human Rights.

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 are 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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## *V*



## *W*