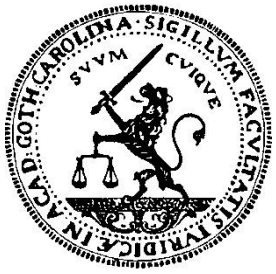

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Treating the Symptoms and Ignoring the Cause

Why Existing International Standards cannot provide an End to Sexual Violence in Armed Conflict

LAGM01 Master Thesis

International Human Rights Law
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Contents

Summary

Sexual violence is a frequent problem in armed conflict. For twenty years, multiple measure have been adopted to stop this conduct but it is showing very little result. At the same time, there is a lively debate on several areas concerning sexual violence in armed conflict. This thesis analyses two of these areas of debate in order to find what the Community of States is doing wrong.

Before entering the discussion on the main issues, I present the context of sexual violence and an overview of the international standards that are adopted to fight the conduct. The context include definitions, history and an attempted picture of how and where sexual violence is employed in armed conflict at the moment. The overview of international standards covers many different documents, both on the field of hard law and of soft law. I present international humanitarian law, international criminal law and international human rights law. Besides this, I describe the United Nations Security Council resolutions on women in armed conflict and a few other important soft law documents.

The first area of debate that I am discussing concerns the reasons behind sexual violence in armed conflict. The purpose is to find out if the adopted standards are the most suitable to address the reasons why sexual violence is employed in armed conflict. I conclude that feminist theory is best fit to give us an answer to why. It requires that measures are focused on gender equality. This approach is not used by the Community of States, whose main focus is criminalisation.

The second area of debate that I am looking at concerns how sexual violence is addressed within international criminal law. Many scholars are concerned that the rights of the victims are not sufficiently recognised. Since the victims are mostly female, this attitude counteracts gender equality. This thesis thereby recognises that every area of measures must strive for the same goal, which is not taken into consideration by the Community of States.

Sammanfattning

Sexuellt våld är ett återkommande problem i väpnade konflikter. I tjugo år har flertalet åtgärder vidtagits för att få ett slut på beteendet men dessa åtgärder visar lite resultat. Samtidigt är debatten livlig på flera områden som berör sexuellt våld i väpnade konflikter. Denna uppsats analyserar två av debattområdena i ett försök att finna vad det är som Statssamfundet gör fel.

Innan jag inleder diskussionen kring huvudfrågorna sätter jag sexuellt våld i väpnade konflikter i sitt sammanhang, samt ger en överblick över de internationella standarder som har vidtagits för att bekämpa beteendet. Sammanhanget berör definitioner, historia och ett försök till en beskrivning av hur och var sexuellt våld förekommer för tillfället. Överblicken av internationella standarder omfattar många olika dokument, både på områdena *hard law* och *soft law*. Jag presenterar internationell humanitär rätt, internationell straffrätt och internationella mänskliga rättigheter. Utöver detta så beskriver jag Förenta Nationernas Säkerhetsrådsresolutioner på kvinnor i väpnad konflikt, och en del andra viktiga *soft law* dokument.

Det första debattområdet som jag diskuterar berör anledningarna bakom sexuellt våld i väpnade konflikter. Syftet är att ta reda på om de åtgärder som vidtagits är de som är mest lämpade för att hantera förklaringarna till varför sexuellt våld används i väpnade konflikter. Jag kommer fram till att feministisk teori är mest lämpad för att svara på frågan varför. Denna teori kräver att åtgärder fokuserar på jämställdhet. Ett sådant förhållningssätt används inte av Statssamfundet, vars huvudsakliga fokus ligger på kriminalisering.

Det andra debattområdet som jag tittar på handlar om hur sexuellt våld behandlas i internationell straffrätt. Många akademiker är bekymrade över att offrens rättigheter inte blir uppmärksammade i tillräcklig grad. Eftersom offren oftast är kvinnor så är detta en attityd som motarbetar jämställdhet. På så sätt uppmärksammar denna uppsats att varje åtgärdsområde måste sträva I samma riktning, något som inte beaktas av Statssamfundet.

Preface

I feel deeply for the suffering of civilians in armed conflict. This has been part of me since I was old enough to start noticing what is going on in the world. Not long after, I became aware of the horrors of sexual abuse and exploitation and felt a commitment to fight it. Because of this, I came to question the society that we live in and the roles of men and women. Even though Sweden is far from a perfect country, my focus is not so much on the situation at home as in other countries, countries were women have it worse. During my law studies, when I was introduced to the area of international criminal law, I knew that this is something that I could see myself working with.

For this thesis, I wished to combine these interests of mine. I started with the intention to write about human trafficking and the International Criminal Court. My objective was to find out if it could be possible to prosecute trafficking as an organised, transnational crime within the Court. Realising soon that it would be difficult to build such an argument, as well as the time and work it would take and how hypothetical it would be, I decided to change my direction. With the help of my supervisor, my focus was instead put on sexual violence as a weapon of armed conflict, meaning my thesis would still be about sexual abuse, women's rights and international criminal law. To this, the element of civilians in armed conflict was included as well. The international criminal law on sexual violence is hampered because impunity is the rule. Despite that efforts has been made to stop this conduct since the 90's, there is little change to women's reality in armed conflict. The question then arises, what is the Community of States doing wrong? I am hoping that I have found some possible explanations in my work.

I would like to thank my supervisor Göran Melander for his support and enthusiasm about the subject as well as his proofreading of the text, my friends Chloe Powell and Katarzyna Zbrowska for checking my language, all the great people camping out at the RWI library and keeping my mood up, and finally my lovely family which has coped with my anxiousness.

Abbreviations

API	Additional Protocol I
APII	Additional Protocol II
CA	Common Article
CAR	Central African Republic
CAT	Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
DRC	Democratic Republic of the Congo
ECtHR	European Court of Human Rights
GCIV	Geneva Convention IV Relative to the Protection of Civilian Persons in Time of War
I-ACHR	Inter-American Court of Human Rights
ICC	International Criminal Court
ICL	International criminal law
ICRC	International Committee of the Red Cross
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the former Yugoslavia
IHL	International humanitarian law
IHRL	International human rights law
SC	Security Council
SG	Secretary-General
UNGA	United Nations General Assembly
UNSCR	United Nations Security Council resolution

1 Introduction

1.1 Purpose

Sexual violence has been a part of armed conflict throughout the last three centuries and is horrifyingly common in today's ongoing conflicts and postconflict situations (this will be developed in further in Ch. 2.2). The crime has received varying attention during the centuries but it was not until the 1990's, when the international community learned about the atrocities occurring in the former Yugoslavia, that it was agreed that serious action needed to be taken to put an end to sexual violence in armed conflict. Ever since, the issue has been addressed at different meetings and conferences. The international criminal tribunals have brought perpetrators of sexual violence in armed conflict to justice for the first time in international law. The biggest achievement of all is the Rome Statute of the International Criminal Court[1] ('Rome Statute' or 'ICC Statute'), which includes several types of sexual violence within the jurisdiction of the International Criminal Court ('ICC').

Despite this change in attitude within the Community of States nearly 25 years ago, the achievements in practice are scarce. Sexual violence continues to be widespread and impunity is still the rule. The debate on sexual violence is vibrant, especially in the perspective of women's rights. At the same time, the Community of States seem to be repeating themselves and not finding new ways. The purpose of this thesis is to review the international standards through the lens of some parts of that debate. Two different, but related, questions will be in focus. First, the question on why soldiers resort to sexual violence. The reason why is of great importance in answering the question how to end it. I want to address if the Community of States has sufficiently considered this aspect. International criminal law ('ICL') is a very protruding part of the international standards. The second debate in focus is asking if the ICL on sexual violence in armed conflict is constructed in an adequate way. Important for this issue is to consider whom the rules are for, what their

[1] Rome Statute of the International Criminal Court of 7 July 1998 (A/CONF.183/9)

purposes are and what other consequences they can have, outside the scope of ICL.

My thesis should be read as an encouragement to all states to consider if their way of addressing sexual violence in armed conflict is good enough. However, I am aware that cultural diversities makes it difficult for the Community of States to agree on measures in the areas that I am suggesting. This is a very critical text, but it is full of hope for the future. The main message is that we need to stay open for new ways, that we should aim for the impossible so that we might reach halfway. I believe that ambitious states inspires others, as well as individuals to do better. I do not expect that my suggestion is reachable in the nearby future, if ever at all, but I do believe that it is time that we started pushing for more so that we could eventually have some sort of change.

1.2 Research Question

What are the concerns regarding the Community of States' standards to combat sexual violence in armed conflict? Why are these concerns in risk of undermining the goal of ending sexual violence in armed conflict? What changes can be suggested?

1.3 Delimitations

In my research, I have encountered several debates in the scholarly literature that concerns sexual violence in armed conflict. I have chosen to focus on two problems, which I find are not sufficiently addressed by the Community of States: the psychological explanations why sexual violence is employed in armed conflict, and how sexual violence is addressed by ICL. Areas of debate that I have disregarded are, inter alia, the debate regarding the elements of force, coercion or consent, the debate on criminal responsibility and the debate on crimes committed by UN Peacekeepers. My limits are due to the restricted space and time for my research. I have chosen the two abovementioned areas because of the considerable level of discrepancy that I believe exists between the scholarly opinions and the current standards.

Criminal acts through conspiracy, incitement, attempt or complicity will be left outside the scope of the thesis. Further, the text will only concern the rules applying in the context of civilians, not those who are combatants. One final thing to be noted is that the text is written from a survivor perspective.

1.4 Structure

The thesis will commence with a chapter introducing the phenomenon of sexual violence in armed conflict. It will include a suggested definition where sexual violence in armed conflict is put it into relation with other concepts such as gender-based violence, rape and conflict-related sexual violence. Next, I will present the history, statistics, forms and current occurrences of sexual violence. This will be followed by a chapter containing an overview of the Community of States' standards to combat sexual violence in armed conflict, in hard law and soft law respectively. The subchapter on hard law will consider international humanitarian law ('IHL'), ICL and international human rights law ('IHRL'). The subchapter on soft law will be focusing on a few non-binding documents such as United Nations Security Council Resolutions ('UNSCR') pursuant to Ch. 6 of the UN Charter as well as United Nations General Assembly ('UNGA') resolutions and declarations.

It is not possible to fully separate IHL from ICL and both will therefore be treated in the same subchapter. In the section on ICL, I will refer to the statutes and case law of the *ad hoc* tribunals: the International Criminal Tribunal for the former Yugoslavia ('ICTY') and the International Criminal Tribunal for Rwanda ('ICTR'). The main focus will however be on the ICC and its Statute. The international human rights law, on the other hand, is standing on its own, not disconnected from the IHL and ICL, but not in any way depending on it either.

The forth chapter will discuss the debate concerning the psychology behind sexual violence in armed conflict. I will analyse how the previously identified standards correlates with this. Next, I will scrutinize the debate concerning the way sexual violence is addressed in ICL. I will focus on the criminal labelling, the role of human rights to catch what does not fall within this

labelling, and the attitude and work within the ICL and the tribunals in general. The main objective is to find out how all this affects women's rights.

1.5 Methodology

I am employing a combination of different methods in this text. It is overall a critical method built up by theory-driven analytical method, where feminist theory is the main theory, and interdisciplinary method, especially socio-legal method, which concerns the relationship between the law and society.[2] These methods are all applied from a *de lege ferenda* perspective, with the aim to see the law as it ought to be.

The question overarching my thesis is: How can the fight against sexual violence in international law get better? The first step in my work was to put sexual violence in a context with a definition, some historic background, and the conduct as it is used today. I continued by identifying problematic areas. Many issues are debated in the scholarly literature but I chose to focus on the explanations behind the sexual violence in armed conflict and the critique against how ICL addresses the conduct. As the next step, I found it important to know what the fight against sexual violence is. Since I was interested in the work within international law, efforts made on a domestic level as well as by non-governmental organisations are left out. I decided that I wanted to concentrate on the parts of international law that is directed at states since they are responsible for their nationals, in the role of victim or perpetrator. This will also keep the structure more clear.

When moving on to my chosen problems I started by identifying the most used explanations for sexual violence in armed conflict so that I could reach a conclusion on what I believe is the root cause of the conduct. I further considered which the best measures would be to address this root cause and compared my ideas with the work that is performed in international law. For my second issue I analysed the critique against ICL. Unfortunately, I could

[2] Håkan Hydén, 'Rättssociologi: Om att Undersöka Relationen mellan Rätt och Samhälle' in Fredric Korling & Mauro Zamboni (eds), *Juridisk Metodlära* (Studentlitteratur 2013) 207, 207

not find a satisfying number of scholars arguing in favour of ICL as it is today, which is why the presented opinions are somewhat one-sided.

Some aspects of my work need further comments:

The thesis is mainly concerned with the hardships of women and their risk and experience of sexual violence in armed conflict. This is in no way intended to downplay the fact that men are subjected to sexual violence as well and suffer immensely from such actions. It does however not influence the everyday life of men as it does of women. They do not have to live with the fear of sexual violence in the same way as all women do. Further, if we manage to combat sexual violence on women, I believe it will have the same impact on sexual violence on men.

In the chapter on international standards, I have chosen those that I believe are most influential. My purpose for including soft law is to see how the Community of States addresses the sexual violence when they are not legally bound by what they are agreeing upon. The amount of soft law on the issue of sexual violence in armed conflict is vast. For the purpose of this thesis, I believe that it is only important to consider those standards upon which at least a considerable amount of states have agreed. Therefore, statements and reports by different UN officials as well as documents agreed upon by only a handful countries, such as the Declaration on Preventing Sexual Violence in Conflict[3] adopted by G8 foreign ministers, will be left outside the scope of the following text.

1.6 Theory

A few different theories has influenced the work in this thesis. The main theories are institutional theory, where the law is considered in its social and cultural context[4], and feminist legal theory. The latter focuses on how women

[3] Declaration on Preventing Sexual Violence in Conflict, adopted in London on 11 April 2013 by the G8 foreign ministers

[4] Antonina Bakardjieva Engelbrekt, 'Institutionell Teori och Metod' in Fredric Korling & Mauro Zamboni (eds), *Juridisk Metodlära* (Studentlitteratur 2013) 239, 240

are affected by legal systems.[5] I have also used the theory of natural law that underpins human rights.[6]

1.7 Material

In my research, I have to some extent used primary legal sources to give an overview of the standards adopted by the Community of States. On the area of IHL these include the Hague Conventions II (1899) and IV (1907) with Respect to the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land (Hague Regulations), the Geneva Convention IV Relative to the Protection of Civilian Persons in Time of War (GCIV), Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (API) and Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (APII). In relation to ICL, I have used the Statute of the International Criminal Tribunal of the Former Yugoslavia, the Statute of the International Criminal Tribunal for Rwanda and the Rome Statute of the International Criminal Court with its Elements of Crimes, as well as case law from the ICTY, the ICTR and the ICC.

Within the context of IHRL the documents touched upon are the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, the Convention on the Prevention and Punishment of the Crime of Genocide, the European Convention for the Protection of Human Rights and Fundamental Freedoms, the American Convention on Human Rights, the Convention on the Elimination of All Forms of Discrimination against Women with its Optional Protocol as well as the Committee's General Recommendation No. 19, the Convention against Torture and Other Cruel,

[5] D. Kelly Weisberg, 'Introduction' in D. Kelly Weisberg (ed), *Feminist Legal Theory: Foundations* (Temple Univ. Press 1993) xv, xv
[6] Mårten Schultz, 'Naturrätt' in Fredric Korling & Mauro Zamboni (eds), *Juridisk Metodlära* (Studentlitteratur 2013) 79, 106-107

Inhuman or Degrading Treatment and the Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence.

I have to a large extent used secondary legal sources, more specifically comments on the law by legal scholars. Since the law, both hard and soft, is not very developed, I need to rely on the scholarly opinions. To find the answer to why combatants engage in sexual violence I have used anthropologic and sociologic scholarly literature. Moreover, for the critique on ICL I am not basing my analysis on the law itself but on the scholarly opinion of the law. The chapter concerning the debate on ICL will contain material by legal scholars or other scholars focusing on law.

1.8 Previous Research

A very large amount of research has been done on the question of why combatants commit sexual violence in armed conflict. There are many different theories presented by scholars and they all consider them to have different levels of importance. The way sexual violence is addressed within the ICL is not as debated, but it should be noted that this is a newer area. The debate that I have been able to find is rather one-sided where many scholars criticises the structure as it is and only a few is defending it. Even though a considerable amount of research has been done on the two areas separately, I have not found much recognising its connection in the way that I intend to present in this thesis.

2 Sexual Violence in Armed Conflict

2.1 Sexual Violence – A Definition

Within the field of violence against women, there are many different terms, which are important to keep separate. It is for example good to understand the difference between gender-based violence and sexual violence. The first is defined by the Inter-Agency Standing Committee[7] as:

> [A]n umbrella term for any harmful act that is perpetrated against a person's will, and that is based on socially ascribed (gender) differences between males and females.[8]

Not all types of gender-based violence is considered criminal acts.[9] Sexual violence is defined by the World Health Organisation as:

> [A]ny sexual act, attempt to obtain a sexual act, unwanted sexual comments or advances, or acts to traffic, or otherwise directed, against a person's sexuality using coercion, by any person regardless of their relationship to the victim, in any setting, including but not limited to home and work.[10]

Gender-based violence thus covers sexual violence. It is however important to note that these definitions are not treaty based. In Art. 7 (1) (g)-6 and Art. 8 (2) (b) (xxii)-6 of the Elements of Crimes relevant to the Rome Statute of the International Criminal Court[11] a somewhat different, but treaty based, definition is to be found. Sexual violence is an act of sexual nature committed

[7] 'The Inter-Agency Standing Committee (IASC) is the primary mechanism for inter-agency coordination of humanitarian assistance. It is a unique forum involving the key UN and non-UN humanitarian partners. The IASC was established in June 1992 in response to United Nations General Assembly Resolution 46/182 on the strengthening of humanitarian assistance', < https://interagencystandingcommittee.org/> accessed 26 May 2016
[8] 'Guidelines for Gender-based Violence Interventions in Humanitarian Settings: Focusing on Prevention of and Response to Sexual Violence in Emergencies' (The Inter-Agency Standing Committee 2005)
[9] Ibid
[10] Etienne G. Krug et al (eds), *World Report on Violence and Health* (World Health Organization 2002) 149 <http://apps.who.int/iris/bitstream/10665/42495/1/9241545615_eng.pdf> accessed 21 May
[11] Elements of Crimes of 5 May 2000 (PCNICC/2000/L.1/Rev.1/Add.2)

through force or coercion, or when the victim is not in a state to give a genuine consent. A person can commit the crime either by employing the acts of sexual violence themselves or by forcing another person, such as a family member to the victim, to do it.[12] Included forms of sexual violence are, inter alia, rape, sexual slavery, enforced prostitution, forced pregnancy, and enforced sterilization.[13]

Sexual violence is also divided in sub-categories that has not to do with form, but with context. There is for instance conflict-related sexual violence and sexual violence in armed conflict, the latter being a part of the first. 'In armed conflict' sets up two criteria: there must be an ongoing, armed conflict at the time of the crime and the crime must be associated with that armed conflict.[14] This will be presented more thoroughly in Ch. 3.1.1. The Secretary-General of the UN ('SG') uses the following definition of conflict-related sexual violence:

> [R]ape, sexual slavery, forced prostitution, forced pregnancy, enforced sterilization and other forms of sexual violence of comparable gravity perpetrated against women, men, girls or boys that is linked, directly or indirectly (temporally, geographically or causally) to a conflict.[15]

The profile of the perpetrator or the victim can differ this from sexual violence in armed conflict. When the conduct occurs in a country not part of the conflict, when it occurs during a ceasefire, or when there is a state of impunity or State collapse it only falls under the wider scope of conflict-related sexual violence.[16]

2.2 Sexual Violence – Then and Now

Even though not very much is known about sexual violence in armed conflict throughout history, some examples that prove its existence can be found. For

[12] Elements of Crimes art 7 (1) (g)-6 and art 8 (2) (b) (xxii)-6
[13] Rome Statute of the International Criminal Court art 7 (1) (g) and art 8 (2) (b) (xxii)
[14] Elements of Crimes art 8 (2) (b) (xxii)-6 and (e) (vi)-6
[15] 'Conflict-Related Sexual Violence: Report of the Secretary-General' S/2016/361 20 April 2016, 1 <www.un.org/ga/search/view_doc.asp?symbol=S/2016/361> accessed 18 May 2016
[16] Ibid

instance, the abduction and rape of Helen of Troy is depicted in Homer's *Iliad* and Romans did allegedly rape Sabine women in the 8th century BC. [17] Rape in war is documented in the Bible, in Anglo-Saxon and Chinese chronicles, and in documents about the crusades.[18] In the 18th century, English forces are believed to have employed systematic rape in the Scottish Highlands. During the 20th century, sexual violence is known to have been conducted in many armed conflicts. There was what has been known as 'the rape of Belgium' during WWI. 20 years later, in WWII, women were being sexually violated in occupied areas, in concentration camps and in military brothels.[19] Some sources estimate that more than a million women were raped by Americans, Germans and Russians.[20] Other scholars estimate that the Red Army on its own, and only in Berlin during 1945, raped 2 million women. The sexual violence committed by the Allied forces is not very well documented.[21]

The motivation for the Nazis to commit sexual violence was 'to conquer, humiliate and destroy "inferior peoples"'. Except for rape, they also conducted forced sterilisation and other experiments on the women's reproductive organs.[22] On Slavic women, the Nazis cut of breasts, hands and feet, they ripped open their stomachs and gouged out their eyes.[23] On the other side of the continent occurred what has been known as 'the rape of Nanking'. It is found that around 20,000 women were raped by Japanese soldiers during the first month of the Japanese occupation of the Chinese region. Occurrences of rape with foreign objects such as sticks, excessive violence, and forced incest were documented.[24]

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[17] Nicola Henry, *War and Rape: Law, Memory and Justice* (Routledge 2011) 4
[18] Jonathan Gottschall, 'Explaining Wartime Rape' (2004) 41(2) The J of Sex Research, 130 <www.jstor.org/stable/3813647> accessed 18 May 2016
[19] Henry (n 17) 2-4
[20] Caterine Arrabal Ward, 'Significance of Wartime Rape' in Marcia Texler Segal & Vasilikie Demos (ed), *Gendered Perspectives on Conflict and Violence: Part A (Advances in Gender Research, Volume 18A)* (published online, Emerald Group Publishing Limited) 189, 192 <http://dx.doi.org/10.1108/S1529-2126(2013)000018A012> accessed 18 May 2016
[21] Henry (n 17) 28
[22] Ibid
[23] Ibid 32
[24] Ibid 38

There has been prohibitions of sexual violence by military personnel since long before modern times. Early examples are found under the reign of Richard II (1385) and Henry V (1419) of England. The laws of war were however primarily custom up until the mid-1800s. At that time, the Lieber Code was created as domestic legislation to regulate the U.S. army. It was the first codification of humanitarian law to demand punishment for rape during war. It has been argued that the first international treaty to prohibit sexual violence in armed conflict was the 1899 Hague Regulations Concerning the Laws and Customs of War on Land[25]. Its Art. 46 proscribes that:

> Family honours and rights, individual lives and private property, as well as religious convictions and liberty, must be respected[26]

The Hague Regulations were amended in 1907 without any change to the relevant provision.[27] Despite this claimed prohibition of sexual violence in IHL, the crimes of sexual violence committed during WWII were not prosecuted at the Nuremberg Trials.[28] The Tokyo Tribunal adopted a slightly different approach and included indictments of allegations of sexual violence as inter alia inhuman treatment and 'failure to respect family honor and rights'.[29]

After WWII the Geneva Conventions ('GCs') were rewritten with the creation of Geneva Convention IV Relative to the Protection of Civilian Persons in Time of War[30] ('GCIV' or 'Convention'). It contains a provision on rape in its Art. 27. Nevertheless, it is reported that the conduct of sexual violence in armed conflict has been immense after WWII. More than 200,000 women are estimated to have been victims of rape by Pakistani soldiers in the Bangladesh armed conflict of 1971. There were multiple reports of sexual

[25] Ward (n 20) 191
[26] Convention (II) with Respect to the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land, The Hague 29 July 1899
[27] Art. 46 Convention (IV) respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land, The Hague 18 October 1907
[28] Henry (n 17) 30
[29] Ward (n 20) 193-194
[30] Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War of 12 August 1949

violence directed at indigenous women by American and South Vietnamese soldiers during the Vietnam War. Sexual violence was also widespread in the civil wars in El Salvador, Guatemala and Peru.[31] In Cambodia, under order of the Khmer Rouge, 250,000 women were forced into marriage between 1975 and 1979.[32] Sexual violence has been widespread in Afghanistan, Uganda, Argentina, Kuwait, Somalia, and in many more conflicts. [33]

It was first during the mass rapes and systematic enslavement in Bosnia Herzegovina in the 90's that a debate started on the topic whether sexual violence in armed conflict is prohibited in IHL, especially in the GCIV. The conflict included a campaign on ethnic cleansing in which sexual violence was 'an integral component'. [34] The estimated number of women subjected to sexual violence in Croatia and Bosnia-Herzegovina during 1992 -1995 is uncertain, stretching from 10,000 to 60,000. [35] The indictment against *Gagovic* in the ICTY 1996 was 'the first large-scale international criminal indictment for crime of sexual violence against women'. Bosnian Serbs were charged with sexual violence on more than 60 accounts. The charges where based on Art. 2(b) torture as a grave breach of GCIV, Art. 3(1)(a) torture as a violation of the laws or customs of war, Art. 5(f) torture as crimes against humanity and Art. 5(g) rape as crimes against humanity, all in the ICTY Statute.[36]

The genocide in Rwanda in 1994 was given similar attention. It is reported that 'thousands of women were individually raped, gang-raped, raped with objects such as sharpened sticks or gun barrels, held in sexual slavery (either collectively or "through forced marriage") or sexually mutilated'. [37] The testified numbers from Rwanda vary very much. From 250,000 to 500,000 persons are believed to have survived rape, leaving the number of persons

[31] Ward (n 20) 192
[32] Kathryn Farr, 'Armed Conflict, War Rape, and the Commercial Trade in Women and Children's Labour' (2009) 16(1) Pakistan J of Women's Studies: Alam-e-Niswan 1, 9
[33] Gottschall (n 18) 130
[34] Henry (n 17) 3
[35] Ward (n 20)192
[36] Ibid 201 and *The Prosecutor of the Tribunal Against Dragan Gagovic et al*, indictment (Case no.: IT-96-23)
[37] Henry (n 17) 3

who died from such an act unidentified.[38] Despite the international attention and the prosecutions in the *ad hoc* tribunals, sexual violence was continually committed in the armed conflict in Kosovo. During the late 20th century, it is also known to have occurred on a big scale in Sierra Leone, Timor, Liberia, Haiti and Iraq.[39]

The conduct of sexual violence in armed conflict varies widely. In some contexts, the victims are both male and female. Some armed organisations base their targeting on ethnicity while others do not. Sometimes the sexual violence is committed individually and other times in group, such as gang rape. In some conflicts, there are female perpetrators. It also varies *how* the sexual violence is conducted. Some characteristics that differ are the amount of torture and mutilation, whether there is any forced pregnancy or abortion, and if there are forced marriages or prostitution. Elisabeth Jean Wood emphasises that the most important thing to keep in mind when trying to find an end to sexual violence is that the conduct is not employed by all armed organisation.[40]

Our world is covered in ongoing conflicts and sexual violence is an immense problem in many of them. Whether the perpetrators belong to the government forces, other armed groups, or no group at all differs. The following examples, provided by the SG in his report on conflict related sexual violence from 2016, are not exhaustive, nor are they fully accurate since it is very hard to gather information. I have divided the organised armed groups in to three categories: (1) State actors and armed actors associated with the state, (2) religious extremist groups, and (3) other actors. (1) Are known to engage in the conduct in Sudan, Somalia, the Central African Republic ('CAR'), Côte d'Ivoire, South Sudan, the Syrian Arabic Republic and in the Democratic Republic of the Congo ('DRC'). (2) Includes several groups, employing sexual violence

[38] Ward (n 20) 192
[39] Henry (n 17) 4
[40] Elisabeth Jean Wood, 'Conflict-Related Sexual Violence and the Policy Implications of Recent Research' (2015) 96(894) *International Review of the Red Cross* 457, 458 <http://journals.cambridge.org/action/displayFulltext?type=1&fid=9912112&jid=IRC&volumeId=96&issueId=894&aid=9912067&bodyId=&membershipNumber=&societyETOCSession=> accessed 18 May 2016

in different countries: Daesh in Iraq and Syria, Ansar Dine in Mali, Al-Qaida in Libya, Al-Shabaab in Somalia, Al Nusra Front in Syria, as well as Boko Haram in Nigeria and other countries in the Lake Chad basin. (3) Commit sexual violence in Sudan, CAR, Côte d'Ivoire, South Sudan, Mali and DRC.[41] A short orientation in numbers, conduct and motives concerning sexual violence in these ongoing conflicts will follow. I have chosen not to refer to the SG report from 2016 since it is my opinion that it focuses more on the surrounding circumstances, the measures that has been taken or not taken and why. The report from 2015 gives a clearer picture of the employed conduct.

In CAR, there was a documentation of 2527 cases of conflict-related sexual violence during 2014. There has been cases of male victims, but it is women and girls who have been strategically targeted. The motive for all contributing parties has been, according to the SG, to humiliate and subjugate their opponents.[42] In DRC exceptional steps has been taken by the Government to prosecute high-ranking army officers for conflict-related sexual violence. Despite this, there was an increase in violence during 2014. From January to September almost 4600 cases of conflict-related sexual and gender-based violence was recorded in the most conflict torn regions. 31% of these concerned perpetrators connected to the government and the conduct was mostly used as punishment. The remaining 69% were connected to different armed groups who wanted to spread fear and humiliation based on ethnic differences.[43]

In Syria and Iraq Daesh uses sexual violence as a 'strategy of spreading terror, persecuting ethnic and religious minorities and supressing communities that oppose its ideology'. The promise of 'sexual access to women and girls' is also used in the recruitment propaganda. Daesh has adopted different kinds of sexual violence, including rape, slavery, abduction and human

[41] 'Conflict-Related Sexual Violence' 2016 (n 13) 32-34.
[42] 'Conflict-Related Sexual Violence: Report of the Secretary-General' S/2015/203 23 March 2015 para 14 <www.un.org/ga/search/view_doc.asp?symbol=S/2015/203> accessed 18 May 2016
[43] Ibid para 23-24

trafficking.[44] From the start of the Syrian conflict, sexual violence against people of all ages and gender has been dominant. Many women choose to flee the country because of their fear of sexual violence. Due to insecurity, stigma, fear of reprisals and other reasons it is extremely hard to get consistent data. The amount of cases where the perpetrators are allegedly belonging to extremist groups has increased since mid-2014. The most prominent group in these reports is Daesh. There are also multiple reports where the perpetrators are alleged to belong to the Government or proGovernment forces.[45]

In Mali the reporting is limited due to the extreme insecurity in the north. There were 69 rapes recorded by the UN during 2014 but that is believed to be a greatly underestimated number because of the situation in the country. There is a lack of protection for survivors, witnesses, and the supporting organisations.[46] When it comes to Somalia, in the short time between January and August 2014 more than 800 cases of rape were reported in Mogadishu alone. Similar to Mali this is considered a much-underestimated number since many survivors fear stigma and reprisals.[47] In South Sudan, sexual violence is also widespread. Since the current conflict broke out on 15 December 2013 the scale and the severity of the sexual violence is believed to have increased. According to the SG, sexual violence is used in South Sudan for ethically motivated revenge by all parties to the conflict.[48] Sexual violence is equally common in the Darfur region in Sudan. Reports ranges the ages of the victims from 4 to 70 years. There are serious allegations that a mass rape of around 200 women was committed by government soldiers on the 30 October 2014.[49]

As is evident from the previous text, it is hard to get reliable statistics on the amount of sexual violence in armed conflict. Some explanations are that the opposing sides report the other in a bias way and that many survivors are

[44] Ibid paras 28-29
[45] Ibid paras 60-62
[46] Ibid paras 35-36
[47] Ibid para 44
[48] Ibid paras 48-49
[49] Ibid paras 52-53

reluctant to come forward [50] or is not given the opportunity to do so. Consequently, it is hard to draw any conclusions from reports on numbers.[51]

[50] Gottschall (n 18) 129

[51] Elisabeth Jean Wood, 'Sexual Violence During War: Explaining Variation' (2004) Conference paper for American Political Science Associations annual meeting 11 <http://eds.b.ebscohost.com/eds/pdfviewer/pdfviewer?sid=9f4cab03-52fd-4b08-b5d713d5a6fa0c5d%40sessionmgr106&vid=20&hid=104> accessed 18 May 2016

3 The International Standards

3.1 Hard Law

3.1.1 International Humanitarian Law and International Criminal Law

Sexual violence can be prosecuted as a war crime, as crimes against humanity and as genocide. Each area have different requirements where war crimes, in my opinion, is the one needing most explanation. For the purpose of this text it is necessary to first look at the IHL in relation to war crimes before moving on to the different international criminal tribunals.

The first multilateral treaty that is held to regulate sexual violence is the previously mentioned Hague Regulations. They are largely a copy of the Brussels Declaration of 1874, which was based on the domestic American legal document, the Lieber Code. Unlike the Lieber Code, the Brussel Declaration did however ignore to mention sexual violence as such with the result that it is equally absent in the Hague Regulations. Art. 46 of the Hague Regulations prescribes respect for family honours and rights. What this means in practice is not dwelled upon by the drafters.[52] Some scholars argue that at the time when the treaty was adopted, sexual violence was considered an act disrespectful to family honour and rights and Art. 46 should therefore be considered to encompass such conduct.[53] However, as stated by Tuba Inal, the term 'respect' requires a very low level of commitment. She claims that it is thus unlikely that someone could ever be prosecuted for a violation of Art. 46 based on an act of sexual violence.[54] According to Michael Cottier and Sabine Mzee it is however recognised since the end of the 20th century that

[52] Tuba Inal, *Looting and Rape in Wartime: Law and Change in International Relations* (University of Pennsylvania Press 2013) 61
[53] Ward (n 20) 191
[54] Inal (n 52) 61

Art. 46 includes a prohibition on sexual violence.[55] Nevertheless, this has not really been used in practice.[56]

After WWII, the GCIV was adopted to protect civilians in armed conflict. Art. 27, para. 1-2 proscribes that:

> Protected persons are entitled, in all circumstances, to respect for their persons, their honour, their family rights, their religious convictions and practices, and their manners and customs. They shall at all times be humanely treated, and shall be protected especially against all acts of violence or threats thereof and against insults and public curiosity
>
> Women shall be especially protected against any attack on their honour, in particular against rape, enforced prostitution, or any form of indecent assault

I argue that indecent assault must include many different types of sexual violence. It is, however, still with the wording 'protection from', not 'prohibition of' which, according to Inal, makes it more of a 'moral declaration'.[57] She further argues that it is easy to make the interpretation that the provision does not make states legally obliged to prevent attacks. Inal claims that all the terms used in GCIV are chosen very carefully after thorough debate, except for the wording in Art. 27 para. 2. She says that it is evident from the preparatory work that different words are used to mean different things and the use of the word 'protection' instead of 'prohibition' cannot be seen as a mistake.[58] State Parties are explicitly obliged to legislate, investigate, and prosecute grave breaches of the provisions in the Convention.[59] What constitutes a grave breach is covered by Art. 147 and sexual violence is not included. Inal claims that it cannot be interpreted that any of the acts in the provision is supposed to include rape.[60]

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[55] Michael Cottier & Sabine Mzee, Article 8 War Crimes: paras 652-742 in Otto Triffterer & Kai Ambos (eds), *Rome Statute of the International Criminal Court: A Commentary* (3rd edn, C.H. Beck 2016) para 656
[56] Theodore Meron, 'Rape as a Crime Under International Humanitarian Law' (1993) 86(3) AJIL 424, 425
[57] Inal (n 52) 93-94
[58] Ibid 98-99
[59] IV Geneva Convention Relative to the Protection of Civilian Persons in Time of War of 12 August 1949 Art. 146
[60] Inal (n 52) 104

Noëlle N.R. Quénivet contends that GCIV includes a prohibition of sexual violence if interpreted in the light of its object and purpose. She considers prohibition to be a less demanding term than protection. The unconditional protection, which is the purpose of the Convention, includes prohibition, but also other precautionary measures.[61] Ludovica Poli argues that even though sexual violence was previously regarded as a minor offence the view has changed so that it is considered a grave breach of the GCIV. She bases her argument on the commentary by the International Committee of the Red Cross ('ICRC'). [62] According to the ICRC, the grave breaches include sexual violence. Since Art. 27 para. 1 requires human treatment; all acts that the Article proscribes should be understood as falling outside of human treatment. Thus, if the protection from rape is not absolute, it amounts to inhuman treatment, which activates Art. 147.[63] Sexual violence is also considered a grave breach of the GCIV by customary international law. This was argued by the Commission of Experts established in 1992 by the SG on request by the SC (UNSCR S/RES/780), tasked to examine alleged violations of the GCs in former Yugoslavia. The negotiations on the Rome Statute and its Elements of Crime show that many states are of the same opinion.[64] On the word of the ICRC, sexual violence is also prohibited in customary international law in relation to non-international armed conflicts.[65]

Art. 27 of GCIV only applies to 'civilians in the hands of a party to the conflict or under an occupying power of which they are not nationals'. The Additional Protocol I of 1977[66] (API), on the other hand, applies to the relationship between a party and its own population as well as the enemy population,

[61] Noëlle N.R. Quénivet, *Sexual Offenses in Armed Conflict & International Law* (Transnational Publishers 2005) 93 and 91
[62] Ludovica Poli, 'Criminalizing Rape and Sexual Violence as Methods of Warfare' in Fausto Pocar et al. (eds), *War Crimes and the Conduct of Hostilities: Challenges to Adjudication and Investigation* (Edward Elgar Pub Ltd 2013) 136, 139-140
[63] Jean S Pictet (ed), *The Geneva Conventions of 12 August 1949: Commentary. 4, Geneva Convention Relative to the Protection of Civilian Persons in Time of War* (International Committee of the Red Cross 1958) 598
[64] Poli (n 62) 141
[65] Jean-Marie Henckaerts & Louise Doswald-Beck (eds), *Customary International Humanitarian Law Vol. 1, Rules* (CUP 2005) 323
[66] Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), of 8 June 1977

according to Art. 51(1).[67] API's Art. 76(1) does however still speak of protection, while Art. 4(2)(e) of the Additional Protocol II of 1977[68] (APII) includes the term prohibition. Since neither of the APs contain sexual violence among the grave breaches, Inal claims that they do not include the obligations, which such an inclusion would carry with it.[69] APII is not accepted by all states as customary international law. However, Common Article (CA) 3 of the GCs, concerning armed conflict not of an international character, has been rewarded this status. Art. 4 of APII is considered an outgrowth of CA 3, and because of this Patricia Viseur Sellers, special advisor for prosecution strategies to the prosecutor of the International Criminal Court, argues that the former Article should also be considered customary international law.[70]

Poli states that sexual violence was not considered a crime until the ICTY and the ICTR. In the tribunals it was prosecuted as a crime against humanity, a grave breach of the GCs, an act of genocide, and a war crime. Both the ICTY and the ICTR Statutes lists rape as a crime against humanity, in Art. 5(g) and Art. 3(g) respectively.[71] These Articles did not expressly include other crimes of sexual violence. The ICTR Statute also listed rape, as well as indecent assault, as a violation of CA 3. The latter is interpreted to cover other types of sexual violence. The ICTY Statute on the other hand did not include any type of sexual violence within war crimes. Nevertheless, both other types of sexual violence within the scope of crimes against humanity and rape as well as other sexual violence as a war crime has been added through case law.[72] It might however be of some importance to keep in mind that the ICC Statute

[67] Poli (n 62) 138
[68] Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), of 8 June 1977
[69] Inal (n 52) 112
[70] Patricia Viseur Sellers, 'The Prosecution of Sexual Violence in conflict: The Importance of Human Rights as Means of Interpretation' (2008) OHCHR 10 <www.ohchr.org/Documents/Issues/Women/WRGS/Paper_Prosecution_of_Sexual_Violence.pdf> accessed 18 May 2016
[71] Inal (n 52) 143
[72] Cottier & Mzee (n 55) para 661

was already adopted when the cases handling sexual violence in the *ad hoc* tribunals were tried. The judgments even refer to the ICC Statute.[73]

Art. 3 of the ICTY Statute addresses 'violations of the laws and customs of war'. According to Quénivet, this will catch all acts that are prohibited but do not fall within the grave breaches. This along with the grave breaches makes it possible to prosecute even individual occurrences of sexual violence. The majority of the cases in the ICTY and the ICTR did however not concern single act occurrences since the aim of the tribunals was to prosecute mass violations.[74]

According to Poli, before the creation of the ICC Statute, sexual violence was not considered as a detached act but as 'outrages upon personal dignity'. Art. 7(1)(g), Art. 8(2)(b)(xxii) and Art. 8(2)(e)(vi) all prohibit rape as well as sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization or any other form of sexual violence. Poli states that some of the latter acts has never previously been considered in a treaty.[75] It is declared in the ICC Statute that all the mentioned forms of sexual violence constitute grave breaches of the GCs. Despite previous, what Inal calls half-hearted, futile tries, the Rome Statute is the first prohibition regime against sexual violence in armed conflict.[76]

Art. 8(b)(xxii) of the Rome Statute concerns sexual violence as a serious violation of the laws and customs in international armed conflict. The provision ends with 'or any other form of sexual violence also constituting a grave breach of the Geneva Conventions'. According to both the ICC Preparatory Commission[77] and the Assembly of States[78], this includes every

[73] Inal (n 52) 133
[74] Quénivet (n 61) 106 and 109
[75] Poli (n 62) 149
[76] Inal (n 52) 134
[77] Established by the UNGA on request by the Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court. It was tasked with, among other things, drafting the Elements of Crimes (William Schabas, *An Introduction to the International Criminal Court* (4th edn, CUP 2011) 21
[78] A group consisting of one representative of each state party, responsible for amending the ICC Statute and to take certain administrative decisions (Schabas, '*An Introduction…*' [n 77] 389)

type of sexual violence that is of comparable gravity to the crimes included in Art. 147 of the GCs. Cottier and Mzee writes that it is unclear whether those acts that are explicitly mentioned does not have to amount to the same level of gravity or if they are *per se* grave breaches, irrespective of gravity.[79] This can be compared to (e)(vi) of the same Article, concerning serious violations of the laws and customs of non-international armed conflict. It has the wording 'and any other form of sexual violence also constituting a serious violation of article 3 common to the four Geneva Conventions'. The word 'also' means, according to Andreas Zimmermann and Robin Geiß, that the forms of sexual violence explicitly mentioned in that subparagraph constitute serious violations of CA 3 *per se*.[80]

Art. 147 of GC IV and its grave breaches does only apply to international armed conflict. Michael Cottier explains that when 'a state uses armed force against another state or its territory' there is an international armed conflict. The actors can be either governmental or private armed forces. According to Art. 2 of the Convention, the law applicable to international armed conflict also covers partial or total occupation. This is irrespective of the existence of resistance. When it comes to non-international armed conflict, three different thresholds apply depending on which type of prohibitions it concerns. One for violations of CA 3, one for violations of the AP II and one for violations of Art. 8(f) of the Rome Statute. APII Art. 1 para.1 requires that the armed groups that are parties to the conflict, have a responsible command and exercise a certain degree of territorial control. Moreover, the governmental armed forces must be party to the conflict. Nevertheless, the author suggests that these requirements has been slightly altered by customary international law.[81]

[79] Cottier & Mzee (n 55) paras 738-741
[80] Andreas Zimmermann & Robin Geiß, 'Article 8 War crimes: paras 823-972 and 9881009' in Otto Triffterer & Kai Ambos (eds), *Rome Statute of the International Criminal Court: A Commentary* (3rd edn, C.H. Beck 2016) para 941
[81] Michael Cottier 'Article 8 War crimes: paras 1-55' in Otto Triffterer & Kai Ambos (eds), *Rome Statute of the International Criminal Court: A Commentary* (3rd edn, CH Beck 2016) para 30-33

The alteration is likely due to the decisions in the *ad hoc* tribunals where an armed conflict was required to have: (i) opposing, organised armed groups; (ii) a certain intensity of fighting; and (iii) a certain duration of the conflict. This threshold was used for both CA 3 violations and other war crimes.[82] It is further stated by APII Art. 1 para. 2 that 'situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature' are not armed conflicts. The wording in this paragraph is according to Cottier used for the threshold that applies to CA 3. This latter threshold is low, but it only applies to the violations mentioned in the Article. The author does however claim that *opinion juris* add a certain level of armament and organisation within groups taking part in the conflict as requirements for applying CA3.[83]

Except for the mentioned threshold for CA 3 violations, which is included in Art. 8(d), the Rome Statute contains a specific threshold for other war crimes in (f). This includes the negative definition already mentioned but also a requirement for protraction, meant to differ the armed conflict from shorter episodes of civil unrest.[84] To some extent the chambers of the ICC has however implemented the criterions in APII requiring a responsible command as well as territorial control.[85] According to Zimmermann and Geiß, there has been much debate on whether the different wording in (d) and (f) are meant to mean different things or if it is only the result of a complicated drafting process. In the *Bemba* case, the Pre-Trial Chamber considered these questions. It concluded that the need for opposing parties requested in (f) exist under (d) as well but that it was not necessary for that specific case to decide if the requirement for protraction should also apply under (d).[86]

Additional to there being an actual armed conflict, the criminal act in question must also have a nexus to that armed conflict to constitute a war crime.[87] The

[82] Claire De Than & Edwin Shorts, *International Criminal Law and Human Rights* (Sweet & Maxwell 2003) 162
[83] Cottier (n 81) paras 31-35
[84] Ibid
[85] Zimmermann & Geiß (80) para 994-995
[86] Ibid
[87] Cottier (n 81) para 37

existence of an armed conflict must have a vast impact on the conduct. Either by influencing the ability or the decision to, the how, and for what purpose the crime is committed.[88] However, Cottier states that the nexus is somewhat different depending on the type of war crime. The essence and the teleological purpose of each rule can give an indication.[89]

Originally, sexual violence was not deemed such human rights violations that fall within the scope of crimes against humanity. However, the definition has developed through the ICTY, the ICTR and the ICC. In the *ad hoc* tribunals, rape was explicitly included in the list of crimes against humanity, while the ICC Statute includes many other forms of sexual violence additional to rape.[90] Genocide is defined in Art. 2 in the Genocide Convention.

> In the present Convention, genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethical, racial or religious group, as such:
> (a) Killing members of the group;
> (b) Causing serious bodily or mental harm to members of the group;
> (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
> (d) Imposing measures intended to prevent births within the group;
> (e) Forcibly transferring children of the group to another group

Sexual violence is not specifically mentioned but in the *Akayesu* case the ICTR interpreted section (b) of the Article as including such acts. If the contextual elements are fulfilled, a perpetrator of sexual violence can be convicted for genocide.[91] It has to be shown that the purpose of the act is genocide. In the Elements of Crimes, sexual violence is considered to be able to cause the level of bodily or mental harm required under Art. 6(b) of the Rome Statute. This is the same as Art. 2(b) of the Genocide convention found above. The bodily or mental harm does not have to be permanent or

[88] Ibid para 39
[89] Ibid para 41
[90] Kas Wachala, 'The Tools to Combat the War on Women's Bodies: Rape and Sexual Violence Against Women in Armed Conflict' (2012) 16(3) The Intl J of Human Rights 533, 540-541 and 543 < http://dx.doi.org/10.1080/13642987.2011.603952> accessed 18 May 2016
[91] *The Prosecutor versus Jean-Paul Akayesu* Trial Chamber judgement 2 September 1998 Case No ICTR-96-4-T para 731

irremediable.[92] William Schabas states that sexual violence can also result in prevention of births and constitute genocide under Art. 6(d).[93]

3.1.2 International Human Rights Law

According to Melanie Randall and Vasanthi Venkatesh, it is well recognised that violence against women is a violation of their fundamental human rights. Sexual violence is not only considered to violate several rights in itself, but it is also believed to interfere with the enjoyment of all other rights. States have an obligation to exercise 'due diligence' to ensure the protection of legally guaranteed rights. It requires prevention and adequate response.[94] The authors argue that the principle of due diligence has become an accepted norm within customary international law.[95]

Sexual violence is often considered to fall under the provisions of torture or other inhuman treatment. This has been established by the European Court of Human Rights ('ECtHR')[96], the Inter-American Court of Human Rights ('IACHR')[97] and the Committee for the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment ('CAT')[98]. Additional to treaty law, torture is prohibited through an absolute and nonderogable *jus cogens* norm.[99] For a case of torture to be at hand, three requirements must be fulfilled: a certain level of severity, a specific purpose for the act, and that the act is conducted by someone who is at least acting in an official capacity. It is enough that the purpose is to punish the victim personally or intimidate them. Quénivet states that according to the CAT Committee, the 'public official' does not have to be connected to the

[92] William A. Schabas 'Article 6 Gencide' in Otto Triffterer & Kai Ambos (eds), *Rome Statute of the International Criminal Court: A Commentary* (3rd edn, CH Beck 2016) 127, paras 23-24
[93] Ibid para 26
[94] Melanie Randall & Vasanthi Venkatesh, 'The Right to No: The Crime of Marital Rape, Women's Human Rights, and International Law' (2015) 41(1) Brooklyn J Intl L 153, 164-166
[95] Ibid 168
[96] Ivana Radačić, 'The European Court of Human Rights as a Mechanism of Justice for Rape Victims' in Anastasia Powell et al (eds), *Rape Justice: Beyond Criminal Law* (Palgrave Macmillan 2015) 127, 134
[97] Henckaerts & Doswald-Beck (n 65) 2222-2223
[98] Randall & Venkatesh (n 94) 179
[99] Ibid 182

legitimate government if there is an extreme situation, such as a failed state. Both the ECtHR and the I-ACHR has however held on to the requirement of 'official capacity'.[100] Quénivet is nevertheless of the opinion that the ECtHR is moving towards the same approach as the CAT Committee.[101] Both the I-ACHR and the ECtHR have referred to the *ad hoc* tribunals assessments when considering sexual violence under the scope of torture.[102]

The ECtHR has stressed that member states have an obligation under Art. 3 and 8 of the European Convention on Human Rights[103] to investigate and punish rape committed by individuals.[104] It is established that 'all forms of non-consensual sex' must be prosecuted, but it is not clarified which acts that are included in this wording.[105] Sexual violence is recognised as gender discrimination in the CEDAW Committee's General Recommendation 19 on violence against women[106] the UNGA Declaration on Elimination of Violence against Women[107], and the Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence[108].[109] The ECtHR has ruled that non-sexual domestic violence is gender discrimination.[110] Despite the approach in the mentioned documents, there is not yet any judgement on sexual violence as gender discrimination. However, it can be argued as highly unlikely that this line will not be followed if the ECtHR receives an application claiming a violation of Art. 14, prohibition of discrimination, together with Art. 3, prohibition of torture or inhumane or degrading treatment, based on acts of sexual violence.

[100] Quénivet (n 61) 47-50
[101] Ibid 56
[102] Sellers (n 70) 33
[103] European Convention for the Protection of Human Rights and Fundamental Freedoms, 4 November 1950
[104] Radačić (n 96) 134
[105] Ibid 138-139
[106] General recommendation No. 19: Violence against women, adopted by the Committee on the Elimination of Discrimination Against Women on its Eleventh session (1992)
[107] Declaration on the Elimination of Violence against Women, A/RES/48/104, 20 December 1993 <www.un-documents.net/a48r104.htm> accessed 21 May 2016
[108] Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence, opened for signature 11 May 2011 (CETS No.210)
[109] Radačić (n 96) 134
[110] *Case of Opuz v Turkey* Application no. 33401/02, 9 June 2009 para 202

The right to freedom of discrimination is part of every major human rights treaty and, according to Randall and Venkatesh, a *jus cogens* rule in customary international law. It is considered the essence of human rights. They argue that sexual violence should not be differed from other types of violence. Such an approach would mean discrimination of women since women are the most common victim of sexual violence. Neither should there be any difference between sexual violence in the public or the private sphere. As stated by the Special Rapporteur on Violence against Women, states have the same obligations of due diligence when it comes to prohibition of discrimination as for other human rights violations.[111]

Violence against women and, according to Randall and Vankatesh, thereby sexual violence, has been recognised by the Human Rights Committee as a threat to the right to life.[112] Randall and Vankatesh explains that this right is included in all human rights treaties and is part of customary international law.[113] They further argue that it is considered a violation of the right to liberty and security of person, which is found in the International Covenant on Civil and Political Rights[114], Art. 9.[115] Finally, it is also a violation of the right to health, protected in the International Covenant on Economic, Social and Cultural Rights[116].[117] Nevertheless, according to Sellers, there is no legally binding international human rights instrument that focuses on gender-based violence.[118] She also argues that the most effective institutions to enforce human rights, the regional courts, lack in assessing sexual violence as a human rights violation in itself when they consider it under prohibitions on torture, violation of privacy or other human rights.[119]

[111] Randall & Venkatesh (n 94) 189
[112] U.N. Human Rights Comm., Concluding Observations on Colombia, UN Doc A/52/40, para. 287 (1997) in Randall & Venkatesh (n 94) 184
[113] Randall & Venkatesh (n 94) 184
[114] International Covenant on Civil and Political Rights through UNGA Resolution 2200A (XXI), 16 December 1966
[115] Randall & Venkatesh (n 94) 186
[116] International Covenant on Economic, Social and Cultural Rights through UNGA Resolution 2200A (XXI), 16 December 1966
[117] Randall & Venkatesh (n 94) 194
[118] Sellers (n 70) 30
[119] Ibid 33

3.2 Soft law

3.2.1 Security Council Resolutions

This refers to those UNSCRs that are adopted under Ch. 6 of the UN Charter, meaning they are general, not directed at any specific state, and not binding. The first UNSCR addressing sexual violence in armed conflict is UNSCR 1325 on women, peace and security from 31 October 2000. Since then there has been UNSCR 1820 (2008), 1888 (2009), 1889 (2009), 1960 (2010), 2106 (2013), 2122 (2013) and 2242 (2015). Most of the content is directed toward the SG or UN Entities. Some concerns peacekeeping and other operative work, while some concerns the work within the UN. There are requests for the creation of organs, such as a Team of Experts to assist national authorities to strengthen the rule of law[120], or a Special Representative of the Secretary-General on Sexual Violence in Conflict[121]. The Security Council ('SC') also makes commitments concerning their own work. These parts of the resolutions are however not within the scope of this thesis so they will not be described further. The following text will instead focus on those parts of the resolutions that are directed towards states.

In every resolution, the SC recalls the international obligations and commitments of the member states, even though the explicitly mentioned documents varies. The Convention on the Elimination of All Forms of Discrimination against Women of 1979 (CEDAW) and its Optional Protocol of 1999, as well as the Rome Statute are two treaties that are mentioned often. The Beijing Declaration and Platform for Action is a commitment that is much highlighted. The content of this will be discussed in the following section. The responsibility of states to respect international law and ensure human rights is emphasised many times in each resolution. It is also stressed that non-state parties to a conflict have a responsibility to adhere to international law.[122]

[120] UNSCR 1888 para 8
[121] Ibid para 4
[122] UNSCR 1889 para 2 and UNSCR 1960

The SC has time after time condemned the act of sexual violence in armed conflict, as well as the use of it as a tactic or a tool of warfare. It also expresses concerns that the resolutions on sexual violence in armed conflict are not sufficiently implemented. Further, emphasise is put on the impact that sexual violence and the lack of female empowerment has on the durability of peace. The resolutions all have two main focus areas when it comes to the obligations of states: peace-building and post-conflict work, as well as prosecution of perpetrators. The SC stresses that women must be enabled to take part in every step and on all levels of the conflict resolution and peace-building work. In this instance, it also notes that such work is often hindered by discrimination, intimidation and violence. These obstacles erode the legitimacy of female participation.[123] Issues of cultural stigmatisation and extremist or fanatic ideas of women are considered the reason behind this. The lack of education makes it even more difficult to get women to take part.[124]

For sustainable peace there must be 'political security, development, human rights, including gender equality, and rule of law and justice activities'.[125] Member states are encouraged to address the needs of women in post-conflict situations through specific means. They should assure them physical security and give them better opportunities when it comes to education, possibilities to earn money through employment or property rights, basic services and access to justice. The latter two should include sexual health care and reproductive rights, as well as a gender-responsive law enforcement. Women should also be enabled to take part in decision making on all levels.

As mentioned, the SC also requests that states prosecute the perpetrators of sexual violence. These crimes should be excluded from amnesty provisions since there should be no impunity for them. It is recalled that sexual violence in armed conflict can be prosecuted as a war crime, as a crime against humanity or as a tool of genocide. States are urged to reform their judicial systems so that it conforms to international law and assures the justice of the

[123] UNSCR 1820 and 1889
[124] UNSCR 1889
[125] UNSCR 2122

survivors. This is important to be able to prosecute the mentioned crimes in domestic courts. The SC stresses the significance of treating the survivors with dignity during the whole process, as well as protecting them and making sure that they 'receive redress for their suffering'[126]. For this reason, thorough investigations should be conducted by all parties to a conflict, regarding every report of sexual violence in armed conflict.

The SC further recognises the influence that sexual violence in armed conflict has on women's role in society. To address this it puts obligations on states to provide protection of women and support to victims. After the two focus areas mentioned earlier this area gets most attention. It is however shortly noted in one resolution that it is important to focus less on women as victims and instead work for their empowerment.[127] All parties to armed conflict are requested to protect women from sexual violence by immediately taking appropriate measures. Such measures are that militaries should adopt rules on disciplinary actions and command responsibility, troops should be properly trained regarding the prohibitions and educated to see past myths that encourage sexual violence, and that women are evacuated if there is threat of sexual violence. Women must also be protected in refugee camps or camps for internally displaced persons. It is endorsed by the SC that states has a duty to offer specific services to victims of sexual violence. It should include 'health care, psychosocial support, legal assistance, and socio-economic reintegration services'[128]. States are encouraged to support programmes directed towards victims of sexual violence, either national or international.

Measures that should be adopted by states before the outbreak of armed conflict are addresses on a very small scale. Judging from the most recent resolutions, there seems to be a trend towards focusing more on this. It is emphasised that women should be included in the work to prevent armed conflict. They should participate fully, even in decision-making at all levels, in regional, national and international institutions and mechanisms. It is

[126] UNSCR 1888 para 6
[127] UNSCR 1889
[128] UNSCR 1960

recognised that the obstacles to women's involvement in post-conflict situations apply pre-conflict as well. It is stressed that human rights, gender equality and rule of law, among other things, is important for prevention of conflict. Member states are encouraged to support promotion and empowerment of women. Women should be able to participate fully on an equal basis. All different kinds of leaders: national, traditional or religious, are encouraged to take active part in the work to minimize stigmatisation and to combat impunity.[129] The SC emphasises that the only way to fully implement the resolutions is by empowering women, let them participate and respect their human rights. It requires a dedicated leadership that is prepared to work hard[130] as well as the commitment of men and boys to combat violence against women[131]. It is recognised by the SC that in order to prevent it, it is important that states address the root cause to sexual violence in armed conflict.[132] It is central to get rid of the view that it is a lesser crime, something inevitable in war or some sort of cultural phenomenon. The political will is important for all of the mentioned steps in combatting sexual violence in armed conflict.[133]

3.2.2 Other Documents

The Declaration on the Elimination of Violence Against Women [134] (DEVAW) was proclaimed by the UNGA 20 December 1993. It recognises that we must let the universality of human rights apply to women. The explicitly mentioned rights are those regarding 'equality, security, liberty, integrity and dignity'; all part of the major international human rights instruments. Women's possibility to enjoy these rights is held back by genderbased violence. The UNGA acknowledged that in the work to eliminate violence against women it is important to combat discrimination by effectively implementing CEDAW. It conceded that violence against women

[129] UNSCR 1888 para 15
[130] UNSCR 2122
[131] UNSCR 2106 and UNSCR 2242
[132] UNSCR 2106
[133] UNSCR 1888 and UNSCR 1960
[134] Declaration on the Elimination of Violence against Women A/RES/48/104 20 December 1993 <www.un-documents.net/a48r104.htm> accessed 21 May 2016

'is a manifestation of historically unequal power relations between men and women'. The result is that women are dominated and discriminated by men, leaving them in a subordinate position in society.

DEVAW addresses, according to Art. 1, all gender-based violence that 'result in, physical, sexual or psychological harm or suffering'. The use of force is not necessary. In Art. 4 states are urged not to claim custom, tradition or religion as an excuse for not working to eliminate violence against women. The Article contains a list of measures and considerations concerning how to combat violence against women. Most suggestions focus on work specific to the violence in itself: legal reform, training of personnel in the justice system, victim's support, and so on. In paragraph (j) the UNGA requests that states focus on education to change the relation between men and women by addressing prejudice and customary practices. Women and femininity should be granted the same status as men and masculinity, and stereotypes should be eradicated. Despite not being legally binding, Randall and Venkatesh claim that DEVAW has a 'high persuasive value'. It constitutes evidence that there is a consensus on the view of gender violence as a fundamental human rights violation, and that states must combat this.[135]

On the Fourth World Conference on Women in 1995 the Beijing Declaration and Platform for Action[136] was adopted by the participating governments. This initiative is considered a positive step and because of its publicity, it has spread awareness of the issue.[137] It can be read from para. 4 that the Declaration is created to fight for the goals of equality, development and peace for all women. Para. 7 states that reaching female empowerment will require determination, cooperation and solidarity. The Declaration emphasises the importance that women's rights are accepted as human rights and that they should never be seen as subordinate to men. They should be in power of their lives and of their body. It is acknowledged in para. 25 that men

[135] Randall & Venkatesh (n 94) 166-167
[136] The Beijing Declaration and Platform for Action, Fourth World Conference on Women 15 September 1995 <www.un.org/womenwatch/daw/beijing/pdf/BDPfA%20E.pdf> accessed 21 May 2016
[137] De Than & Shorts (n 82) 350

should be encouraged to participate fully in the work for equality. The Platform has one section, D, dealing with violence against women and one, E, dealing with women and armed conflict.

Para. 118 in section D consolidates that the foundation for violence against women are the cultural patterns propagating the subordination of women in society, in the family and so forth. Violence against women, and thereby sexual violence, was recognised as 'a manifestation of the historically unequal power relations between men and women'. For this reason, the conference urges states in para. 124(k) to change the opinion on how men and women are supposed to be. The idea of superiority and inferiority, as well as stereotypes, should be abolished. This should be achieved through different measures, especially education. In para. 131, in section E, the Conference stresses that peace is crucial for female empowerment. The section focuses a lot on recognising the important role women play in a society during armed conflict and all the hardship that they have to endure. When describing measures to be adopted, attention is mostly given to the protection of women during conflict and their participation on all levels of the peacebuilding work.

A Declaration of Commitment to End Sexual Violence in Conflict[138] was endorsed by 122 UN member states as of 2 Oct. 2013.[139] It stresses how depending the elimination of sexual violence in conflict is on women's full human rights. This requires that women are able to participate fully on the political, social and economic arena on equal grounds as men. The member states pledge to do more to prevent sexual violence in armed conflict. The Declaration was part of the preparations for the Global Summit to End Sexual Violence in Conflict that was held in London 2014. The Summit resulted in

[138] A Declaration of Commitment to End Sexual Violence in Conflict (Foreign & Commonwealth Office and The Rt Hon William Hague, 24 September 2013), <www.gov.uk/government/uploads/system/uploads/attachment_data/file/244849/A_DECLARATION_OF_COMMITMENT_TO_END_SEXUAL_VIOLENCE_IN_CONFLICT__TO_PRINT....pdf> accessed 21 May 2016

[139] '122 countries endorse historic "Declaration of Commitment to End Sexual Violence in Conflict"' (Press release by the Office of the Special Representative of the SecretaryGeneral for Sexual Violence in conflict 2 October 2013) <www.un.org/sexualviolenceinconflict/press-release/122-countries-endorse-historicdeclaration-of-commitment-to-end-sexual-violence-in-conflict/> accessed 21 May 2016

the launching of the International Protocol on the Documentation and Investigation of Sexual Violence in Conflict[140], containing 'basic standards of best practice'.

In the Protocol, it is recognised that the sexual violence in armed conflict is connected to discrimination of women and the 'historical and structural inequalities between men and women'. The response to sexual violence and the importance of protection of survivors, health services, psychosocial support, as well as the access to justice is emphasised. The Protocol stresses that it is vital that everyone involved in the work of responding to sexual violence are aware that it might not be the survivor's personal feeling of shame that keeps them from reporting the crime. The problem is rather the lack of a safe context that is supportive enough to file a report. The standards in the Protocol relates to documentation and concerns areas such as how to identify survivors and witnesses, interviews, other forms of information, training of people in the response work and more. It is not necessary for the purpose of this thesis to go into the details of the standards.

The various soft law documents that I have studied have much in common with the UNSCRs discussed in 3.2.1. Focus is mainly directed at the protection of women during conflict, the training of officials, the support offered to survivors, and the importance of women's role in peacebuilding.

[140] 'International Protocol on the Documentation and Investigation of Sexual Violence in Conflict: Basic Standards of Best Practice on the Documentation of Sexual Violence as a Crime under International Law' (Global Summit to End Sexual Violence in Conflict 11 June 2014, updated 19 April 2016) <www.gov.uk/government/uploads/system/uploads/attachment_data/file/319054/PSVI_protocol_web.pdf> accessed 21 May 2016

4 The Right Kind of Action

4.1 Sexual Violence in Armed Conflict – Explanatory Theories

To find the most effective way to combat sexual violence in armed conflict it is important to understand the problem as far as possible. We need to find the reasons why sexual violence is committed in armed conflict.. The theories why soldiers commit sexual violence are many. Jonathan Gottschall has, in his article *Explaining Wartime Rape*, decided to place them in four different categories: the biosocial theory, the feminist theory; the cultural pathology theory; and the strategic rape theory. The latter three are together called the sociocultural theories and since they are hard to separate, they will be discussed in the same section.[141]

4.1.1 The Biosocial Theory

The biosocial theory is based on the biological theory, which Gottschall calls biological determinism. The latter theory was strongly supported in the first half of the 20th century. It cannot explain sexual violence that do not include intercourse so irrespective of its relevance it is only applicable to rape. The proponents of biological determinism hold that sociocultural factors are insignificant. The conduct of rape is all due to genetics, which makes rape in armed conflict 'an inevitable, genetically determined reflex'. According to the biological determinism, the rates of rape should rise everywhere hostile soldiers get in contact with enemy civilians. Gottschall claims that it is also almost always the case. That most victims of rape are young women is held by him as evidence that sexual desire is often the prime motivator to rape.[142] It can however be suggested that the choice of a young woman can be explained by other factors than sexual desire. Two examples are that they are

[141] Gottschall (n 18) 133-135
[142] Ibid 133-134

seen as easier to ruin and that they give the perpetrator a higher 'raise' in their manhood.

Gottschall continues by pointing out that the biological determinist theory cannot explain the variation in conduct between conflicts. Nor does it explain sexual violence, which has nothing to do with passing on genes, a vital part of determinist theory. Most contemporary researchers have however moved away from the view of rape as purely biological. They acknowledges how much behaviour is influenced by environment, recognising the change in human behaviour during the last 4-5 decades. This is the biosocial theory, where equal emphasis is put on the analysation of the sociocultural factors as on biology. Genetic and sociocultural explanations can, according to Gottschall, not be considered independently where one rule out the other. They complete each other.[143] The sociocultural factors will be explored in the next section.

Ruth Seifert stated in her report written for Women's International League for Peace and Freedom that 'rape is not an aggressive expression of sexuality, but a sexual expression of aggression.'[144] In her view, all studies of sexual violence tells us that perpetrators do not see the sexual violence as something satisfying sexual needs. There is pleasure involved but it comes from the feeling of power and dominance. This concept of connecting sex with power is likely to be a product of society. Something that is built up by the social conditions and the prevailing 'construction of sexuality'. Seifert claims that sexual behaviour seems to have been less violent in early modern history than it is today, which supports the consideration of the violence as a social construction.[145] Catherine MacKinnon provides an example of how Serbian men were taught to find sexual pleasure in raping and all the actions

[143] Ibid 133-134
[144] Ruth Seifert, 'War and Rape: Analytical Approaches' (1993) Women's International League for Peace and Freedom (WILPF) <http://genderandsecurity.org/projectsresources/research/war-and-rape-analytical-approaches> accessed 21 May 2016
[145] Ruth Seifert, 'The Second Front: The Logic of Sexual Violence in Wars' (1996) 19(1) Women's Studies Intl Q 35, 36

surrounding it. Aggression was thereby turned into sex. This is a very radical social construction.[146]

Wood writes that the biological theorists are convinced that there is a link between the aggression necessary for combat and male sex drive. This link is supposed to be testosterone. She continues by explaining that this link is both complex and strongly contested. It has been shown that aggression is not increased by testosterone. It is rather the other way around since competition increases testosterone. What is considered competition depends on culture, and aggression is a big part in many competitions in modern societies.[147] Even though this critique is not expressly directed toward the biosocial theory, it is still of importance.

4.1.2 The Sociocultural Theories

The theories that will follow are what Gottschall call sociocultural theories and all have some factors in common. They see sexual violence as something serving some kind of function, not as an incidental occurrence. Any sexual desire, existing because of biology, is ignored or payed utmost little attention. The sociocultural theories contain feminist theory, cultural pathology theory and strategic rape theory. Many scholars who propose the sociocultural theories argue them together, each one responsible for different aspects.[148] For this reason, it may be unclear to which theory a certain argument belong or if it can at all be categorised under merely one theory.

Gottschall explains that the feminist theory is based on the assumption that sexual violence is committed because a man wants to take power over a woman. They argue that in a patriarchal society men are taught not to respect women. This lack of respect is built on distrust, despise and domination. When sexual violence is committed in armed conflict, it is the soldiers' way

[146] Catherine A MacKinnon, 'Rape, Genocide and Women's Human Rights' (1994) 17 Harv Women's L J 5, 12
[147] Wood, 'Sexual Violence During War: Explaining Variation' (n 51) 14
[148] Gottschall (n 18) 133

of keeping up the patriarchy and to vent the disdain they feel towards women in general.[149]

Susan Brownmiller describes sexual violence as an act against a person, but at the same time an act against property. It is physical damage of a person, which is motivated by the hostility against the victim. At the same time, it is an act similar to robbery, to acquire possession, motivated by the will to 'take' the victim against their will.[150] MacKinnon writes about rape in armed conflict in her article *Rape, Genocide and Women's Human Rights*:

> 'These rapes are to everyday rape what the Holocaust was to everyday anti-Semitism. Without everyday anti-Semitism a Holocaust is impossible […].'[151]

The hatred against women in general can, according to the feminists, not be ignored when debating sexual violence in armed conflict. This is supported by the facts that sexual violence is mostly directed towards women and towards their femininity. There is a pattern of violence directed at the breasts, the stomach and the vagina.[152] Seifert argues that the social construction of the feminine does not only create hatred, it creates a general view that women are vulnerable to assault.[153] Women are generally physically weaker than men are, but the social construction lies in how women are defined by this physical weakness. It is done to such an extent that they are presumed mentally weaker as well.

Gottschall claims that, according to the feminist theory, sexual violence should only occur in societies that have certain practices in common. He bases his statement on the conclusion of a study by Peggy Reeves Sanday, *The Socio-Cultural Study of Rape: A Cross-Cultural Study*.[154] Sanday's conclusion is that those societies, which are largely rapefree, have some common denominators. It is not possible to find an equivalent pattern in the

[149] Ibid 130
[150] Susan Brownmiller, *Against Our Will: Men Women and Rape* (Penguin Books 1976) 185
[151] MacKinnon (n 146) 8
[152] Seifert, 'The Second Front' (n 145) 37-38
[153] Ibid 40
[154] Gottschall (n 18) 131 and Seifert, 'The Second Front' (n 145) 36

rape-prone societies. In other words, the facts point at quite the opposite off Gottschall's claim. Patriarchal societies and societies that have lost connection with nature, including all Western societies, fall outside the common denominators for rape-free societies. [155] This is not the same as his conclusion that all rape-prone societies are patriarchal and disconnected from nature.

Sanday studied the traditions different 'band and tribal societies' had before they collided with modern societies in any considerable way. Sexual violence was considered frequent in one fifth of the societies, all which engaged in war and interpersonal violence, and followed ideologies of male dominance.[156] A full 47 % of the societies in the study were considered rape-free. Despite a wide diversity among the societies, the rape-free societies had a few things in common: women were fully respected and the feminine was given a high status; the members of the societies rarely resorted to violence; and the nature was not exploited but venerated. [157] It was not necessarily that men and women had the same rights or duties, but the two sides were seen as complementing each other and both had equal status.[158] Sanday argues that the socio-cultural situation is the reason why sexual violence is committed. Where the personhood of a man is expressed through violence and toughness, sexual violence will occur on a frequent basis. She suggests that sexual intercourse is an expression of one's emotions in the ultimate way. If men are expected to express themselves aggressively then the sexuality will also be aggressive.[159]

The state and other institutions usually take part in sustaining the low social status of women in a patriarchal society. When the state loses control, like in time of armed conflict, the enforcement of gender relations stops, which lead to men using sexual violence as a way to uphold the system. Wood compares it to the increase in lynching in the south of the U.S. after the Civil War. The

[155] Peggy Reeves Sanday, 'The Socio-Cultural Context of Rape: A Cross-Cultural Study' (1981) 37(4) Journal of Social Issues 5, 16
[156] Wood, 'Sexual Violence During War: Explaining Variation' (n 51) 14
[157] Sanday (n 155) 15-16
[158] Ibid 18
[159] Ibid 24

violence against African Americans increased since the federal government no longer supported slavery.[160] She continues by arguing that the consequence of this theory would be that sexual violence is part of every armed conflict where there is a noticeable disruption of traditional gender norms. In reality that would mean every armed conflict, which is simply not corresponding with the facts.[161]

Some argue that since the gender relations in society are the same irrespective of armed conflict or not, the sexual violence is always of the same kind, but of different degree. Wood agrees that there is a violence continuum and that gender relations have an impact on sexual violence. Nevertheless, she claims that a correlation between patriarchal institutions and sexual violence in armed conflict has not been found. Additionally she states that the theory fails to explain the targeting of men, as well as the most brutal forms of sexual violence in armed conflict, including rape with foreign objects and gang rape. This violence is not precedent enough in peacetime simply to be considered the same kind.[162][158]

That there would not be any correlation between patriarchal societies and sexual violence in armed conflict can be considered a very strong statement. Especially as Sanday has shown that there is a correlation between patriarchal societies and violence in general. When reading Wood's arguments one wonders what is meant by 'degree' if not the level of violence used. To use a gun to rape a woman is a higher degree of violence than to use a penis. To use ten penises to rape a woman is a higher degree of violence than to use one. Rape is by definition a certain act that can vary in degree but it can never be another kind of act. There is, however, other types of sexual violence that are more or less unique to armed conflict or situations with crimes against humanity or genocide, e.g. forced sterilisation. The idea that gender-relations cannot explain situations where men and boys are sexually violated is equally amiss. Sexual violence is regarded as something that lesser beings, namely

[160] Wood, 'Sexual Violence During War: Explaining Variation' (n 51) 16
[161] Elisabeth Jean Wood, 'Sexual Violence During War: Toward an Understanding of Variation' in Ian Shapiro et al. (eds), *Order, Conflict and Violence* (CUP 2008) 321, 338
[162] Wood, 'Conflict-Related Sexual Violence…' (n 40) 463

women, are subjected to. When men fall victim to sexual violence the perpetrators want to humiliate them by making them feel like women.

MacKinnon claims that by using the feminist line of reasoning that sexual violence in armed conflict is a more severe version of sexual violence in peacetime, those reluctant to act against it are given arguments. Some might claim that it is impossible to pick a side in a specific case if sexual violence occurs in all armed conflicts. Similarly, it can be seen as futile to do anything about it in one case if sexual violence occurs all the time.[163] I concur with the observation of these risks. Nevertheless, I believe that by ignoring the connection that actually exist, the fight against sexual violence in peacetime is not recognised as a step in the fight against sexual violence in armed conflict.

Gottschall compares the cultural pathology theory to a cultural psychoanalysis. The objective is to find the factors in history that has made society what it is today. A military culture is argued to create hostile attitudes, especially against women, which then culminates in sexual violence. Gottschall asserts that it is often hard to establish if the data really fits the theory. There is seldom evidence that an historic factor can be connected to the conduct of sexual violence. He concludes that the theory may be used on a case-by-case basis but not on the phenomenon as a whole.

The next theory that Gottschall discusses is the strategic rape theory. This theory has had a lot of influence on the Community of States' work to combat sexual violence in armed conflict. He states that, since the 70's there is almost a consensus that sexual violence in armed conflict can be seen as a mean to reach a strategic gain, similar to bombs, bullets and propaganda. Gottschall claims that the result of the crime is what makes some scholars believe that the strategic theory is best equipped to explain why sexual violence is committed in armed conflict. The strategic rape theorists consider that sexual violence spreads terror and demoralisation so that civilians are less likely to resist. At the same time, it humiliates enemy soldiers and damage their sense

[163] MacKinnon (n 146) 11

of masculinity when they cannot protect their people. Additionally, it is claimed to destroy the culture at its roots because of its impact on reproduction and cohesiveness.[164]

Seifert follows this line when acknowledging that the primary goal of an armed conflict does not have to be to defeat the enemy army. Another common goal is to destroy or deconstruct the culture of the enemy. She refers to a study performed by Elaine Scarry, which shows the impact that sexual violence against women has on the culture of a community. The women are described to be responsible for holding the family and the community together when there is an armed conflict. It is common that the female body represent cultures and nations, such as the French Marianne or the Bavarian national statue 'Bavaria'. Violence against women is therefore violence against the group to which she belongs. The rape of a woman equals the rape of her community.[165]

Gottschall claims that the proponents of the strategic rape theory are mistaken motives with outcomes. The outcome of an action cannot be used as evidence for the intended results. He also argues that there is too little documentation of sexual violence being adopted as a strategy to find any proof of coordination and logic. There is, on the other hand, a lot of evidence that military planners *prohibit* sexual violence. Gottschall is of the opinion that sexual violence is not effective in the long run and that it is more likely to threaten the larger strategy. During their occupation of Chinese territory during the 30's and 40's Japan found sexual violence to be counterproductive to their goal. Instead of intimidating and breaking the civilians, it enraged them and stirred up resistance. He writes that similar examples can be found in the civil war in Zaire during the 90's.[166]

In his argumentation, Gottschall seems unconcerned with certain aspects. If militaries were to use sexual violence as a strategy of armed conflict, they are likely to keep it out of official documents. They are fully aware that it is a

[164] Gottschall (n 18) 131
[165] Seifert, 'The Second Front' (n 145) 38-39
[166] Gottschall (n 18) 12

prohibited conduct and they know that the international community keeps track on their every move. Additionally, that militaries officially denounce sexual violence in armed conflict could just as well be a strategy to get the community off their backs. Further, the effects of widespread sexual violence is not the same in every situation. It must be dependent on the conflict itself, the purpose of the attack, the size and the cohesiveness of the attacked community, as well as other aspects. Therefore, it cannot be said that it always counteracts the purpose of the armed conflict.

As mentioned, the three theories just described are intertwined and many scholars use explanations that are so mixed that it is impossible to separate which argument belongs to which theory. For this reason a description of some theorists' approaches will be examined separately in the following text.

Wood explains the variations of sexual violence in armed conflicts with social factors. Different armed forces are likely to promote masculinity in various ranges and ways. If military and masculinity are considered to be stoutly connected, the masculine is likely to be seen as the dominant gender and strongly associated with violence. Wood asserts that this increases the risk for sexual violence.[167] To be able to say this with certainty would require a comparison of military training, which is hard to carry out. There are also differences in how much the regulation of sexual violence breaks down, and if mechanisms that promote sexual violence are adopted. Moreover, sexual violence is viewed differently in different societies. It differs who is considered the victim, the violated woman or her male relatives. It also differs who is stigmatised or considered polluted, the perpetrator or the victim. Last, another explanation can be found in the military strategy where aspects such as dependency on the civilian cooperation and concerns about criticism from the international community are important.[168]

Seifert presents five explanations for the function and variation of sexual violence in armed conflict. First, armed conflict follows a ritualised pattern

[167] Wood, 'Sexual Violence During War: Explaining Variation' (n 51) 15-16
[168] Ibid 19-22

and violence against women is part of that pattern. This has not been contested until the last few decades. Second, men violate women sexually to communicate with their enemy. The violence tells the enemy that he is incapable of keeping 'his' woman safe. This is considered the ultimate humiliation. The third explanation is that masculinity is given monopoly on violence, and the violent and militarised masculinity is idolised by the society. This creates an increased risk for sexual violence, even if it is only on a latent level. Men are often expected to deny and supress feelings that are regarded 'feminine', like gentleness and sensitivity. Inevitably, these feelings will at some point need to be expressed and then they risk being disguised in anti-feminine actions. The forth explanation is already touched upon, that the aim of the sexual violence is to destroy the culture of the enemy. The last explanation that Seifert gives is that sexual violence occurs because the 'culturally ingrained' hatred of women is acted out in extreme situations and thus results in orgies of sexual violence.[169]

Wood states that we do not know why violence is sometimes sexual and sometimes not. Neither do we know exactly if nor how sexual violence correlates with sexuality. There is a long list of questions additional to these that are unanswered and that are likely to remain so. What is clear is however, that sexual violence in armed conflicts is not comparable to civilians caught in crossfire. Not all armed organisations take part in the conduct. This means that 'rape is not inevitable during war [and] what is not inevitable can be ended'.[170]

The approach with categories of theories suggested by Gottschall was used at the UN Office for the Coordination of Humanitarian Affairs' research meeting on 26 June 2008. It was stated that it is not enough to perceive sexual violence as opportunistic or as a strategy in armed conflict. The mix of factors is too complex for such a view. The explanation for sexual violence in armed

[169] Seifert 'War and Rape' (n 144)
[170] Wood, 'Conflict-Related Sexual Violence…' (n 40) 477-478

conflict is a mix of individual and collective characteristics as well as premediated and circumstantial incidents.[171]

4.1.3 The Utility of the Theories

We cannot deny that sexual interaction for the purpose of reproduction is biological. So is men's generally stronger physique. Nevertheless, it can be questioned if sexual interaction for the sole purpose of pleasure is biological. It can be argued that this is a product of society. The sense of pleasure is only meant to keep us reproduce; it is not supposed to be a mean of recreation. With that said, I am not in any way trying to imply that this product of society is wrong it is just not biological. Sexual interaction for the purpose of reproduction and men's generally stronger physique is all that is biological about sexual violence. That the strength of men is combined with sexual interaction is a product of society, since both a man's ability to control a woman and his ability to reproduce was somehow allowed to become status symbols. Men decided that they had the right to take advantage of their physical strength towards women to show control, and reproduce or be pleasured at the same time, and thus the phenomenon of rape was born. As put by Brownmiller: 'When men discovered that they could rape, they proceeded to do it.' It has now left sexual desire as prime motivator and it is instead a show of strength to get status.[172] From this developed a view that the women you dominate belong to you, and if you can dominate another man's woman, you are stronger than that man. When the passing on genes loses its importance, like for both sexual violence as domination and as recreation, the different kinds of sexual violence can be explained.

This has worked together with other aspects to give women a low social status with the result that if you want a man to feel as humiliated as possible, you should treat him as a woman. The consequence being that men are subjected to sexual violence to show them how little worth they have. In desperate tries

[171] 'Discussion Paper 1, Sexual Violence in Armed Conflict: Understanding the Motivations' UN OCHA Research Meeting 26 June 2008 Use of Sexual Violence in Armed Conflict: Identifying Gaps in Research to Inform More Effective Interventions
[172] Brownmiller (n 150) 14

to get out of oppression, women start behaving as men, believing that this is the only way to gain status. One of the behaviours adopted is the conduct of sexual violence. In sum, biology started it but why rape has been allowed to become a phenomenon is only due to society. Because of this, it can be questioned if biological and sociocultural factors should be equally emphasised, as argued by Gottschall.

Irrespective of the accuracy of the biosocial theory, it can be argued that it contributes very little when it comes to finding tools to combat sexual violence in armed conflict. Biology is biology and we cannot do anything to change it, we can only keep it from doing harm. Examples of strategies that would follow such an approach are to keep soldiers and possible victims separate, to supply the soldiers with prostitutes to let them act out 'their needs', and to keep punishing those who do commit sexual violence. The idea of separation is utopic for many reasons, but simply impossible. The access to prostitutes has according to Seifert previously shown to have very little effect.[173] It would also bring along serious issues concerning human trafficking. Moreover, as written by MacKinnon, 'the daily life of prostituted women consists of serial rape, war or no war'.[174] Punishment is the only reasonable solution, but its effectiveness can be questioned. For it to be effective, the fear of being convicted must be bigger than the sexual desire. Such fear is hard to attain since impunity is common and evidence of guilt is difficult to find. It can be suggested that the main reason why criminalisation is not effective is the low status of women. The criminalisation with appropriate punishment is important, but other tools are needed, tools that are not sprung from a view of sexual violence as half biological.

Emphasising biology in the work to combat sexual violence only undermines the efforts that are made by labelling some part of the act inevitable since it is due to factors that cannot be changed. It creates a loophole for individuals and militaries to claim that the perpetrators to some extent cannot help themselves. I argue that the underlying reason why soldiers commit sexual

[173] Seifert 'The Second Front' (n 145) 35
[174] MacKinnon (n 146) 12

violence in armed conflict is women's role in society. It is because of their lower status, their stigmatisation, and the view of them as property and symbols. The social structure as it is today falls within the feminist theory, while the reasons for its development falls within cultural pathology theory. The way that sexual violence is used falls within the strategic rape theory but it does not explain its actual existence. For this reason, to combat sexual violence in armed conflict, we need to influence societies to start respecting women and femininity as much as men and masculinity.

4.2 Correlation of Standards and Theories

It is evident from Ch. 2 that the Community of States is most focused on the field of criminalisation and prosecution. Those documents that recognises the connection between gender inequality, gender-based violence and sexual violence are difficult, and in most cases even impossible, to enforce. As with everything in international relations it is easy to talk big but hard to take action.

Pamela Scully comments on UNSC Resolutions 1325 and 1820 in her article *Vulnerable Women: A Critical Reflection on Human Rights Discourse and Sexual Violence*. She questions the language used in the resolutions and accuse it of reiterating 'older gender stereotypes'. It refers to the perpetrators as male and the victims as female and focuses on the public sphere and the occurrence of sexual violence in armed conflict. There is no acknowledgement of the connection between sexual violence in peacetime and in time of conflict. The Security Council is also reproducing women as vulnerable by repeatedly referring to them as victims in need of protection.[175]

Scully argues that this risks undermining the request for female empowerment and women's participation in peacebuilding and post-conflict work, which is also included in the resolutions. The subject in need of protection from sexual violence should not be defined as female.[176] Even though Scully's comments

[175] Pamela Scully, 'Vulnerable Women: A Critical Reflection on Human Rights Discourse and Sexual Violence' (2009) 23 Emory Intl L Rev 113, 116-118
[176] Ibid 120

concern the two first resolutions on sexual violence in armed conflict it is my opinion that they also apply to those that have been adopted later. The Security Council has to some extent recognised men as victims of sexual violence in armed conflict and noted that it is important to focus on the empowerment of women and not as their role as victims. Compared to how many times the resolutions refer to women and how often they are referred to as victims, these small acknowledgments are futile.

The resolutions mostly focus on the situation in and after armed conflict without considering how societies should change before the outbreak of conflict in order to combat sexual violence. It is possible that it is easier to change the way a country is run straight after a conflict. However, it can be argued that it is not be the optimal time to change society. I believe, based on my readings for this thesis that a context of stability offers the best possibility for a society to change. It is important that people can focus on other problems than staying alive one more day and putting food on the table. Scully explains that placing many women on legislative positions is not an effective way to combat sexual violence in post-conflict situations. She uses Northern Ireland and South Africa as examples and argue that additional to having female leaders the community must address the gender structures that are the roots of the behaviour.[177]

The essence of human rights is every person's equal status and worth. In this way, human rights demand empowerment of women. However, this is not sufficiently recognised and prioritised by many states. Human rights law focuses largely on criminalising the conduct under the provisions of torture or ill-treatment. Even though violence against women is considered gender-discrimination and is thereby addressed by CEDAW, this connection by association sends a weak message. To address sexual violence as gender discrimination is further hampered by the lack of successful means of enforcement. It is my opinion that human rights law as it is today is not effective enough to combat sexual violence. Sexual violence must be

[177] Ibid 117

explicitly recognised as a human rights violation in a treaty. This treaty must make it possible to take action against states that do not adopt effective arrangements to stop the conduct. It should also be very clear what these effective measure should be, they should not be suggestions that can be interpreted as optional. This is the only way we can capture the cases that do not fall within the scope of international crimes.

Documents from the UNSC and the UNGA mostly revolve around 'after work'. Monitoring, reporting, treating and prosecuting takes almost all the focus. The connection to the empowerment of women and the 'pre work' that it entails is in my opinion given too little attention. Purely to recognise that gender equality is important for conflict prevention is not enough. It must be recognised that it is important to end the conduct of sexual violence as well. It can be suggested that gender equality is the only way to end sexual violence, in peacetime or in armed conflict, and it should be acknowledged and treated as such. Instead of repeatedly stating that the perpetrators should be prosecuted and that women should take part in peacebuilding, efforts should be made to create a more detailed approach to female empowerment before conflicts break out.

It is often recognised that nothing is allowed to justify the use of violence against women and that states must work to eliminate it. It is for instance agreed that tradition or religion and so forth cannot excuse reluctance to work to eliminate violence against women. Still, it is not clear how far this stretches. It could be interpreted as meaning that states are not allowed to use such concepts to justify women's general subordination to men. That would be the widest interpretation and the one best addressing the root cause. An interpretation more likely to be argued by many countries is that it only urges them not to justify violence against women by referring to culture or religion. They are thereby ignoring the structure behind the violence.

When the Beijing Platform for Action emphasises that peace is important to achieve gender equality it only goes half way. Unquestionably, it is harder to work with women's human rights, as with any human rights, when there is an ongoing conflict. Nevertheless, it could be argued that gender equality is even

more important for peace than the other way around. If the feminine was as appreciated as the masculine, there would be no need to prove one's masculinity. As stated by Wood and Seifert[178] violence is a way to show masculinity. If masculinity was no longer the ideal, it can be suggested that there would be no need for violence. The consequence would be less violence and thereby less armed conflict. This is of course a very utopic idea, but I believe there is some truth to it.

Both the UNSCRs and the soft law succeed in stating the importance of women's equal rights and status. None of them can however be said to properly recognise it. Since the lack of gender equality is the root cause of sexual violence, both in peacetime and in armed conflict, more effort and more details are needed to be able to call the work proper. The importance of prosecution and women's participation in peacebuilding is expressed several times in every document. The importance of gender equality before conflict breaks out should be given at least as much attention.

Even though the conduct must be regulated by some sort of criminalisation of undesired actions this cannot be effective on its own. For an effective criminal legislation on sexual violence, it is important to change culture and mentality. Because of this, it can be argued that more efforts are needed on that area to promote female empowerment. It can be questioned if the international standards put enough obligations on states to change patriarchal societies and gender inequality. Violence is always directed at someone or something that the perpetrator does not respect. Consequently, as long as men do not respect women, they will keep violating them. Further, it will never be possible to achieve fair judicial processes for those who are subjected to sexual violence if action is not taken against the patriarchal societies. Only condemning and addressing the violence as such without changing the root cause is not enough.

The Community of States is only addressing the symptoms of something that goes far deeper. This is doomed not to have full effect. It is unreasonable that the work done by the Community of States focuses to such a large extent on

[178] (n 167 and 169)

a tool that is admittedly needed, but close to useless if the root cause, the gender-inequality, is not addressed.

Francoise Hampson stated in a working paper for the Sub-Commission on the Promotion and Protection on Human Rights in 2004 that 'it is unrealistic to expect the ICC to handle more than a fraction of the cases potentially coming within its jurisdiction'. To avoid acquittals states has to adopt the same definitions and rules as the Court. Examples of issues that exist in domestic legislation are that some jurisdictions do not acknowledge that men can be victims of sexual violence, and some do not recognise rape beyond the scope of penile penetration of the vagina or anus. Similarly, the level of required consent, force or coercion differs.[179][175]

As stated, I believe that the Community of States should not put most of their focus on criminalisation. This is, however, what Gottschall suggests when claiming that biology is half of the reason sexual violence occur. Since criminalisation is the only reasonable way to stop biology from making harm, half of the efforts would have to focus on this tool. The community seems to follow the biosocial theory, not expressly but it is evident when looking at the work that is being done. It can be argued that more than 50% of the focus is on criminalisation. This is futile since gender equality is needed for criminalisation to be effective. We will not reach gender equality through the international standards as they are today. More resources must be put on this area so that female empowerments is given at least as much attention as criminalisation, if not more. Additionally, as stated by Hilmi M. Zawati, the prohibition of sexual violence in armed conflict is not effective as long as there is a lack of political will to prosecute perpetrators.[180]

[179] Françoise Hampson, 'Working Paper by Françoise Hampson on the Criminalization, Investigation and Prosecution of Acts of Serious Sexual Violence' Sub-Commission on the Promotion and Protection of Human Rights Fifty-sixth session 20 July 2004 (E/CN.4/Sub.2/2004/12) <www.refworld.org/pdfid/4152ebe14.pdf> accessed 22 May 2016
[180] Hilmi M Zawati, *Fair Labelling and the Dilemma of Prosecuting Gender-Based Crimes at the International Tribunals* (OUP 2014) 117

5 Women's Rights in International Criminal Law

5.1 Sexual Violence as a Crime Against Humanity and Genocide

In the previous chapter, I found that women's social status needs to be the same as men's if we will ever be able to end sexual violence in armed conflict. To reach this, measures must be taken for the empowerment of women. As noted, this approach is not considered very important by the Community of States. The main topic is instead criminalisation. At the same time, the ICL has been criticised for undermining female empowerment. This is what will be discussed in the following chapter. The consequence of this is that not only does the Community of States focus on tools to combat sexual violence that only addresses the symptoms, these tools are also used in a way that is counter-productive to such measures that I believe has an actual possibility to make a difference.

What a crime is and the way it is charged are different things. Sexual violence can be charged in ways requiring additional prerequisites than those defining the crime in itself. To illustrate this, sexual violence could be charged as a crime against humanity, genocide, grave breaches of the GCs and 'a violation of the laws and customs of war applicable in international or non-international armed conflict'. The latter two are different ways to prosecute war crimes.[181] The following will focus on crimes against humanity and genocide while the next section will focus on war crimes. These are the three categories included in the Rome Statute.

Crimes against humanity cover many different violations of human rights as long as they 'concern the entire international community'. For sexual violence to be considered a crime against humanity, it has to be part of a widespread and systematic attack on the civilian population. It is thus only seen as part of

[181] Hampson (n 179)

something directed at humanity and not what it really is, 'a violation of the autonomy and integrity of a woman's body'.[182] Katie C. Richey claims that crimes against humanity fuse together 'the body and the rights of one person with the body and the rights of one polity'. In other words, classifying sexual violence as a crime against humanity means that women's integrity becomes one with the rights of the polity. She states that this is not a good way to strengthen women's rights under international law. [183]

Debra Bergoffen argues that identifying a crime against women as a crime against humanity is purely positive. She claims that it distances the law from the view of a woman's body as property and instead considers it 'the site of humanity, the species, the universal'.[184] This way the focus is the dignity of women, not the effect the crime has on men. It is also considered different from when sexual violence is regarded a part of ethnic cleansing. What is human is no longer determined through the masculine.[185] Richey presents critique on Bergoffen's arguments. '[I]t presumes the Tribunals decision does in fact equate violations of a woman's body with violations of the body polite.' She claims that this is not the case since there is a condition that the sexual violence is part of a systematic and widespread attack. In the *Akayesu* case, it is clear that sexual violence as a crime against humanity is not primarily considered as a violation of women's human rights. Richey contends that the law does not properly name what is at stake.[186]

According to Quénivet, feminists argue that men and women's different experiences in armed conflict are ignored when we refer to civilians in general when discussing crimes against humanity. She takes the example of the *Kunarac* case where the Tribunal distinguished by ethnicity, referring to the

[182] Katie C Richey, 'Several Steps Sideways: International Legal Developments Concerning War Rape and the Human Rights of Women' (2007-2008) 17 Tex J Women & L 109, 111-112 <www.heinonline.org.ludwig.lub.lu.se/HOL/Page?handle=hein.journals/tjwl17&div=6> accessed 22 May 2016
[183] Ibid
[184] Debra Bergoffen, 'Toward a Politics of the Vulnerable Body' (2003) 18(1) Hypatia 116, 118 <www.jstor.org.ludwig.lub.lu.se/stable/3811040> accessed 22 May 2016
[185] Ibid 132
[186] Richey (n 182) 114

'Muslim civilian population'. It was however not considered important to specify the 'female Muslim civilian population'. She explains that to feminists this means that the gendered attacks were only seen as attacks on the whole Muslim civilian population. Her conclusion is that '[i]t is a good illustration of feminists' claim that women not only be considered as "civilians" but as a specific category of civilians needing special protection'.[187] From my readings, I would argue that this is a view that few feminists would identify with. By claiming special protection they would claim that women are natural victims. Feminists ask for recognition of the damage the patriarchal society causes women, as well as men. The protection mechanisms that exists may be sufficient for women as well, but they need to be used in a different way to be effective.

I concur with Quénivet's opinion that if we specify crimes against women, we leave the men outside of the scope. It can however be argued that this does not mean what she to claim, that the reference to the civilian population in crimes against humanity that we have today is the most protecting approach.[188] She further writes about how the ICTY has considered that acts that constitute crimes against humanity should not be regarded in a way that 'over-sexualise' them. Instead, the Tribunal only focuses on the ethnicity ground, which has meant that the sexual violence is not considered a crime in itself. This is an approach Quénivet seems to praise.[189] Two problems with this approach can be identified. Even though ethnicity may be the motivator of an act, that does not mean that the victim experience it as such. This approach of the ICTY lack in considering the victim's opinion. It also looks past all those women who do not belong to the 'other' group but still fall victim to sexual violence. It can be argued that their suffering should be considered grave enough to fall within the scope of crimes against humanity.

Feminist scholars criticises the requirement for a certain amount of occurrence. This threshold for sexual violence to be considered a crime

[187] Quénivet (n 61) 115
[188] Ibid 117
[189] Ibid 124-125

against humanity is considered too high. Quénivet emphasises that irrespective of the act that is considered a crime against humanity the threshold is always the same. Additionally, she argues that considering sexual violence as a single crime would diminish all the other ways that women are suffering from armed conflict. To some women rape is not necessarily the most grievous crime committed against them. Quénivet holds that even though a case of sexual violence is prosecuted among crimes against humanity, the suffering of the survivor is still individualised because they get to tell their own story.[190] I concur that it is important not to put focus on sexual violence at the cost of other crimes. It can however be argued that sexual violence encompasses crimes that are less controlled by states themselves and for this reason it needs a clear language from the international law. Further, it can be questioned if it is enough for the survivor to get to tell their story. It is my opinion that the important part is that it is recognised that a crime has been committed against oneself. It cannot be satisfactory for the survivor to tell their story only to get the answer that it is not considered a crime directed at that person but as a crime directed at a group. That could be interpreted as the court acknowledging that the survivor is just a tool with no more worth than an object.

It is not only in the context of crimes against humanity that focus is taken away from the survivors. Zawati describes that there are two discourses among feminist scholars. One side, the radical one, is based on a view of sexual violence as one of the tools for men to oppress women and that it is used in armed conflict for intentional destruction. In contrast, the other side, the liberal one, views sexual violence as 'a form of domination in a patriarchal society'. It is committed because women are women and when occurring in armed conflict it is nothing more than a habitual wrongdoing. According to Zawati the liberal side argues that if we accept sexual violence as part of genocide it undermines the way 'we recognize women's fate in warfare'. A consideration of sexual violence as genocidal can only be done on the basis of gender, seen as directed at all women. It cannot be based on anything else

[190] Ibid 132-133

or directed at any other group. The radical movement, on the other hand, encouraged the recognition of sexual violence as a tool of genocide. It is considered that there is a need to distinguish the horrors of sexual violence in genocide from other kinds of sexual violence, in armed conflict or in peacetime.[191] Zawati noted that the liberals claim that the view of genocidal sexual violence as unparalleled is not sufficiently based on facts and it risks 'rendering rape invisible once again'.[192]

According to Richey, considering sexual violence as a tool of genocide has the same result. Instead, focus is put on the perpetrator's motivation.[193] She argues that 'the legal discourse surrounding rape as a tool of ethnic cleansing and genocide has troubling implications for the way we understand rapes during war that are *not* official military policy.'[194] Doris E. Buss asserts that when sexual violence is repeatedly recognised as a tool of genocide it may limit the visibility of individual accounts of sexual violence. She continues by arguing that there is a risk of giving sexual violence a status of something natural to conflicts of an ethnic or nationalist character if sexual violence is considered a weapon of genocide or armed conflict. Even acknowledging the idea that sexual violence can have any instrumental purpose in a conflict establishes an attitude that this conduct is always available, 'that women exist as always raped or "inherently rapeable"'. Recognising sexual violence as a tool of genocide puts focus on the patterns. It is the kind of violence and the intent of the perpetrator that is important and any exceptions or variances are unseen. [195] Buss finds that this was an issue in the ICTR, more specifically in the *Akayesu* case. There, the Tribunal stated that only Tutsi women were victims of rape. She explains that this does not correlate with reality where women of different ethnicity were raped, and for different reasons.[196]

[191] Zawati (n 180) 96-97
[192] Ibid 99
[193] Richey (n 182) 111
[194] Ibid 119
[195] Doris E Buss, 'Rethinking "Rape as a Weapon of War"' (2009) 17 Fem Leg Stud 145, 154-155
[196] Ibid 158-159

Zawati argues, however, that if an act of sexual violence falls within the scope of the Genocide Convention, it must be regarded as an act of genocide. The intent of the perpetrator is of importance.[197] He continues by stating that to see sexual violence as purely a crime of gender, as suggested by the liberals, it is necessary that people believe that their sexuality is the most important ground for the perpetrators behaviour. However, the jurisprudence of the international criminal tribunals testify that it is the group belonging as defined in art. 2 of the Genocide Convention that is important.[198]

By not focusing on the violence directed at women as such but referring to it as part of something else or something symbolic, Kiran Grewal asserts that we undermine the human rights of women by not considering them important enough.[199] This signal is sent to states and individuals pulling focus away from the empowerment of women. Which is in this thesis argued to be one of the most fundamental cornerstones of fighting sexual violence.

5.2 The Necessity of Choosing

Richey argues that the most effective way to assure protection of women's human rights in international law is to perceive sexual violence as a grave breach of GCIV.[200] She continues that it sends a signal that sexual violence in armed conflict is inevitable if we do not include recreational sexual violence as a war crime. That will make the conduct and the exploitation of vulnerable women go on.[201] Françoise Hampson argues that it is not appropriate to convict someone for rape where the circumstances means that it is e.g. a crime against humanity or a war crime. This is just as wrong as a conviction for sexual assault where there has been a rape.[202] I concur with this when it regards war crimes, but not when it concerns crimes against humanity nor

[197] Zawati (n 180) 99
[198] Ibid 102
[199] Kiran Grewal, 'Rape in Conflict, Rape in Peace: Questioning the Revolutionary Potential of International Criminal Justice for Women's Human Rights' (2010) 33 Austl Feminist L J 57, 74 <www.heinonline.org.ludwig.lub.lu.se/HOL/Page?handle=hein.journals/afemlj33&div=8> accessed 22 May 2016
[200] Richey (n 182) 126
[201] Ibid 120
[202] Hampson (n 179)

genocide. It can be argued that these latter crimes have other victims than the one actually subjected to sexual violence, which means it is a different crime. For this reason, it should be possible to give a conviction for both crimes based on the same conduct.

The *ad hoc* tribunals has found that in order to properly present the criminal conduct that has been committed multiple convictions based on the same facts (cumulative convictions) are sometimes needed.[203] Even if this should be done with many crimes, it can be suggested that it is especially important concerning sexual violence. The reason is that sexual violence takes place partly for the purpose of strategic gain and partly because of a system in society that turns women into victims. Additionally, there is a more established consensus in every society that other crimes are wrong and should be punished. Most societies do also agree that sexual violence is wrong, even though the definitions thereof differ. Still, these crimes are frequently not taken seriously because of the status of women and it is often the women who end up punished and stigmatised.

In the *Bemba* case, the ICC affirmed certain risks with cumulative convictions that has previously been identified in the *ad hoc* tribunals. First, cumulative convictions are likely to cause prejudice to the accused when they are tried for the second offense based on the same facts.[204] It can be questioned how this is an issue, at least when it comes to sexual violence. If it is found that the act as such has happened when tried for one crime, this fact will not change merely because the conduct is tried as another crime. It would rather be strange to look at the same evidence again and come to a different conclusion. Second, cumulative convictions have a tendency to cause a certain stigma in society.[205] It can be suggested that stigma is part of the whole idea of criminal law. That a conduct is viewed in a certain way and that other people look down on the perpetrators of such conduct is supposed to be a reason not to commit a crime. Nevertheless, it is important that societies

[203] *The Prosecutor v. Jean-Pierre Bemba Gombo,* ICC Trial Chamber III judgement 21 March 2016 Case No ICC-01/05-01/08 para 745
[204] Ibid
[205] Ibid

recognise that those who are released have received their punishment and their past should not haunt them (except when it is absolutely necessary to protect people). In these situations there can be no stigmatisation. Third, it may influence the possibility for early release depending on the state enforcing the sentence.[206] If the principle of *ne bis in idem* is followed, it will have been proven that a person committed two crimes. Without having researched domestic rules on sentencing, I believe that many states follow a principle that it is harder to get early release if you have committed more than one crime. It is not unreasonable that this approach is adopted for international crimes as well.

According to the ICTY Appeals Chamber in the case *Delalić et al.*, cumulative convictions based on the same conduct are permissible if 'each applicable provision contains a materially distinct legal element not present in the other'. That something is 'materially distinct' means that it 'requires proof of a fact not required by the other offence.'[207] It is evident from the case law of the *ad hoc* tribunals that 'legal elements' also include the contextual elements.[208] It is not the acts or omissions of the accused that should be materially distinct.[209] The Trial Chamber in *Akayesu* stated that cumulative convictions for the same facts are acceptable under certain conditions. The offences have to have different elements, the provisions must be protecting different interests, or the two convictions are necessary '[to fully] describe what the accused did'.[210]

The ICTR stated that genocide, crimes against humanity and war crimes can never be co-extensive since they do not serve the same purpose.[211] Crimes against humanity requires, according to Art. 3 ICTR Statute and Art. 7 ICC

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[206] Ibid
[207] *The Prosecutor v Zejnil Delalić et al*, ICTY Appeal Chamber judgement 20 February 2001 Case No IT-96-21-A para 421
[208] *The Prosecutor v Goran Jelisić*, ICTY Appeal Chamber judgment 5 July 2001 Case No IT-95-10-A para 82 and *The Prosecutor v Alfred Musema*, ICTR Appeal Chamber judgement 16 November 2001 Case No ICTR-96-13-A para 363
[209] *Prosecutor v Dario Kordić and Mario Čerkez*, ICTY Appeal Chamber judgment 17 December 2004 Case No IT-95-14/2-A para 1033
[210] *The Prosecutor versus Jean-Paul Akayesu* (n 91) para 468-469
[211] Ibid

Statute, proof that the crime was committed as a part of a widespread or systematic attack on a civilian population. Genocide requires, according to Art. 2 of the Genocide Convention, proof of intent to destroy, in whole or in part, a national, ethic, racial or religious group. Because of this, it is always possible to convict an act as both genocide and a crime against humanity if the prerequisites for both crimes are fulfilled.[212] In the *Kupreskic* case, the ICTY Appeal Chamber stated that it is acceptable to convict the same murder both as a crime against humanity and as a war crime. The former requires proof of a widespread and systematic attack while the latter require the context of an armed conflict.[213]

In the *Bemba* case, the Trial Chamber III of the ICC found that it was possible to convict Bemba for both crimes against humanity and war crimes based on the same underlying acts of rape. It was submitted by the defendant that *ne bis in idem* prohibits that the same conduct is convicted as more than one crime. The Chamber explains that this is not explicitly stated in the ICC Statute or any other framework for the Court, nor can it be read from the *travaux préparatoire*. In a previous judgement by the Court, in the *Katanga* case, Trial Chamber II concluded that cumulative convictions are acceptable if the offences are distinct. It ruled that an act of killing can be convicted as a war crime and as a crime against humanity at the same time. The Chamber in the *Bemba* case concurs with this conclusion. It establishes that 'the permissibility of multiple convictions turns on legislative intent'. It is considered that it is the intent of the drafters of the Rome Statute that the same act can be convicted as both war crimes and crimes against humanity at the same time.[214] From this, it can be argued that someone committing sexual violence could be convicted for both war crimes and genocide as well.

Sexual violence still needs to be considered a method of genocide and a crime against humanity when the context allows for this. It can be important to be able to prove that these two crimes have taken place. It could also be argued

[212] Schabas (n 92) para 35
[213] *Prosecutor v Zoran Kupreskic et al*, ICTY Appeal Chamber judgement 23 October 2001 Case No IT-95-16-A para 387-388
[214] *The Prosecutor v. Jean-Pierre Bemba Gombo* (n 203) para 743-750

that these crimes are worse since they are directed at many people, even though that is probably not the view of a survivor of sexual violence. Further, it is important to signal that women's bodies should not be used as symbols. When someone commits sexual violence for a wider purpose than to 'only' sexually violate this intention needs to be punished. Consequently, the act in itself should be punished as well as the intent to use it as something else.

5.3 Sexual Violence as a Violation of International Human Rights Law

If an act of sexual violence is not considered a war crime, a crime against humanity or a tool of genocide it is supposed to fall under IHRL. The purpose of this chapter is to problematize what happens to cases of sexual violence falling outside of the scope of ICL. As identified in Ch. 3.1.3 sexual violence as a human rights violation could either amount to torture or ill-treatment or constitute a way of discrimination. There is however no explicit human right not to be subjected to sexual violence. Quénivet stresses that it is important to note that states have a responsibility to prevent and prosecute acts that amount to human rights violations committed by individuals.[215]

It is argued that the public-private divide concerning torture means that women are not assured equal protection from torture as men. Women are not as often in situations where they could be subjected to torture by a public official. Yet, they are much more often in situations where they are subjected to sexual violence that would be considered torture if it was employed by a public official, but it is not because it is employed by private individuals.[216] Other critique that Quénivet means is directed at IHRL is that the sexual element is often overlooked. She uses the example of *Aksoy v. Turkey* from the ECtHR where violence to genitals was only seen as torture or ill-treatment without taking notion of the sexual character.[217] If there are any sexual elements, these should be considered aggravating circumstances. She does

[215] Quénivet (n 61) 57
[216] Ibid 50
[217] Ibid 72-73

however hold that no new legislation is needed. It only has to be clearer that sexual violence can be a type of torture or ill-treatment. The importance of sexual violence in torture ought to be more acknowledged.[218]

To amount to torture the conduct must, according to art. 3 CAT, be employed to obtain information or a confession, to punish, to intimidate or coerce, or for any other reason based on discrimination. As mentioned in Ch. 3.1.2 sexual violence is recognised as gender discrimination. Further, I would argue that in the eyes of the victim, all sexual violence is a type of punishment, maybe not for a specific behaviour but for being a woman, for being beautiful, or even for existing. From the perpetrators perspective it may be them having fun, taking what is rightfully theirs, without acknowledging the experience of the victim at all. The question is who gets to decide whether it is a punishment or not.

It is recognised that discrimination creates gender-based violence, which includes sexual violence. It can be suggested that only recognising is not enough – specified measures need to be developed by the Community of States so that we can really make people understand why we should not treat women as lesser beings. Randall and Venkatesh's claim that the prohibition on discrimination is a *jus cogens* rule is questionable. Even if it is, it is not clear what falls within this form of discrimination. There are things that we in Sweden consider discriminatory to women but other countries, even some Western, do not. It is hard to claim that any *jus cogens* exists within such areas. The human rights provisions under which sexual violence can be addressed are open for interpretation and most importantly, there is not an effective way to enforce them outside of the regional human rights systems.

The provisions on sexual violence as a human rights violation are very important for situations where sexual violence is considered a crime against humanity or a tool of genocide outside the context of an armed conflict. When war crimes cannot be used to recognise the crime directed at the actual victim it is important that IHRL offers such a possibility. If not, the rights of the

[218] Ibid

victim are neglected. This means that a human rights violation that most times affect women falls in a lacuna. For international law to be complete, sexual violence needs to be considered a human rights violation in itself. This is however not always enough because even though a country with for example a genocide is not in an armed conflict, the overall situation in the state could mean that there is no Rule of Law. In such a situation, individuals cannot get any recognition that their human rights has been violated. Even if an international body is called upon for justice this will most likely not change what measures the state without a Rule of Law will take. A solution that could be considered would be to include certain human rights violations under the ICC Statute as international crimes.

5.4 Women's Human Rights

Brigid Inder writes in her chapter […] in the book Sexual Violence as an International Crime that:

> Violence against women is enabled and assured through the absence of effective legislation preventing such acts, and by laws which actively condone certain forms of gender-based violence. The low number of convictions for rape, discriminatory corroboration requirements and masculinised constructions of "consent" contribute to the ongoing impunity for gender-based violence. Similarly, inadequate police investigations, gender-biased attitudes on the bench, and the stigma associated with rape, all conspire to create a state of unwillingness and inability to genuinely prosecute gender-based crimes.[219]

The conduct of sexual violence is often recognised as the vile and horrendous act that it is, but the suffering of the victims is according to Buss mostly ignored.[220] For this reason, there is substantial critique on the prohibition regime against sexual violence. Among other things, it is considered 'a right development for the wrong reasons'. It is argued that legislation on sexual violence was possible only because the conduct was used in two armed

[219] Brigid Inder, 'Partners for Gender Justice' in Anne-Marie de Brouwer et al (eds), *Sexual Violence as an International Crime: Interdisciplinary Approaches* (Intersentia 2013) 315, p. 322

[220] Buss (n 195) 153-154

conflicts that were considered unjust, in Yugoslavia and Rwanda. There is still no emphasis on sexual violence being a violation of the human rights of women. Until this attitude changes, Inal claims that the prohibition on sexual violence will never be effective.[221]

There is a dichotomy in the view upon international criminal justice institutions. Human rights activists see them as 'enforcement mechanisms for human rights'. International criminal lawyers, on the other hand, emphasise that human rights violations and international crimes are two separate things. As put by the Trial Chamber in the *Kunarac* case, IHRL concerns protected rights and ICL concerns offenses.[222] Sometimes a human right can amount to an offence but not always. IHRL concerns state responsibility while ICL concerns individual responsibility. Strictly to keep to this division could be considered a bit strange since the way states protect many human rights is by making a violation by an individual a domestic criminal offence. That this cannot be done on the international level could be argued as purely based on how we are used to see the world.

As mentioned in Ch. 5.2, to protect women's human rights most effectively, sexual violence must be regarded as a grave breach of GCIV.[223] Even if many forms of sexual violence do fall within the grave breaches, it can be suggested that the fact that it is not explicitly mentioned sends an important message. For one, it is easy to still see sexual violence as a slightly lesser crime. Because of this, it needs not to be at the top of the list of issues to address. Further, it tells women that a crime that is strongly connected to their gender is not worthy of equal attention, which means that they are not worthy of equal attention. If sexual violence was no longer common in peacetime, it is likely that the occurrences in armed conflict would decrease as well. For this reason, it is essential to fight sexual violence in peacetime as a step in fighting the conduct in armed conflict. It can be argued that it is not even enough to consider sexual violence a grave breach is enough of the GCs. This only

[221] Inal (n 52) 184
[222] Grewal (n 199) 69
[223] Richey (n 182) 126

protects women's human rights in conflict situations and cannot be seen as the most effective way to protect their rights irrespective of context. This is a holdback for women's human rights and thereby a holdback in the fight against sexual violence in armed conflict.

In situations where sexual violence has been very widespread, it is common that it is referred to as a violation of the whole nation or territory. Examples are 'the rape of Nanking' and 'the rape of Bosnia'. Richey claims that such a way of speaking of it loses all acknowledgement of the fact that it is sexual violence directed at actual people – women – and thousands of them. She argues that by accepting that a woman's body is a metaphor for her nation or community, the international legal discourse supports the way the conduct is recognised by the perpetrators themselves. It accepts the idea that women can be considered a symbol for a whole group and in such a context, the attack against the woman is simply an attack against the group. This renders the rights of the woman herself unimportant. The only way to fully protect the human rights of women is to focus on the experience of the victim.[224] The acknowledgement that sexual violence in itself is a horrendous crime is of grave importance, but it should be equally punished that it is used as a metaphor. In that way we do not approve of how the perpetrators recognise the conduct and we tell them that they have no right to make that association. Only ignoring that it is happening is not a good option.

Despite a lot of evidence of the widespread sexual violence in Rwanda during the genocide, charges of rape were only included in 30% of the cases in the ICTR. Of these only 10% resulted in conviction. The crime was much ignored by investigators because it was seen as less serious. They also took for granted that women would not come forward and that it would thus be too hard to investigate. The survivor-witnesses were scorned and treated as if they were not worth taking seriously, by both judges and attorneys.[225] Up until December 2008, there had been 15 trials in the ICTR including charges on sexual violence. Five of the men were found guilty of sexual violence.

[224] Ibid 124-125
[225] Ibid 127-128

Another five pleaded guilty on other counts and were rewarded with getting the charges for sexual violence dropped.[226] Zawati holds that this shows that it is regarded as less important than other crimes.[227] This could indicate the general perception of sexual violence within the ICTR. It remains to be seen if the attitude concerning plea bargains in the *ad hoc* tribunals will be adopted by the ICC as well.

Analysists have identified many reasons for the low numbers in prosecution and conviction for sexual violence in the ICTR. According to Buss, some of these are that the political commitment of the Office of the Prosecutor is deficient, that the investigation unit is poorly trained, and that the survivors resist to testify due to cultural reasons.[228] Zawati holds that the response by the ICTY and the ICTR to the sexual violence in the conflicts was only symbolical.[229] The first Chief Prosecutor of the tribunals was very committed to achieve justice for the victims of sexual violence. He had, however, many obstacles, one being that the Community of States was lacking political will to arrest the responsible high-ranking leaders. Zawati gives a short description of the work of the following different Chief Prosecutors. From this it seems evident that they regarded sexual violence with different levels of importance. The most extreme being Carla Del Ponte (1999-2003) who, according to Zawati, intentionally ignored testimonies of sexual violence.[230]

Grewal argues that this does not send a strong message that one should not commit sexual violence because they will be convicted. It sends the message that one can continue to commit sexual violence because the risk that they will be prosecuted is rather small and the risk of conviction is minor. She explains that a similar selective approach can be found in the ICC. The first indictment issued by the Prosecutor in the latter court did not include any count of sexual violence. It was, however, included in the indictments of Katanga and Chui. Still, this was after intense criticism from human rights

[226] Buss (n 195) 151
[227] Zawati (n 180) 134
[228] Buss (n 195) 152
[229] Zawati (n 180) 117
[230] Ibid 120-121

activists regarding the first indictment, which might have affected the decision of the Prosecutor. The fact that pressure is needed to make sure that sexual violence is prosecuted gives, in Grewal's view, the impression that the status of these crimes remain at a secondary level.[231]

The international law is not deficient; Wachala argues that it provides efficient tools to combat impunity for sexual violence. Yet, there seems to be a lack in political and social will. The adequate law that exists is not being enforced, which shows that there is 'very little regard for women's human rights'.[232] It can be questioned if a change in prosecution tools will be able to fight impunity to such an extent that it influences the way sexual violence is used in armed conflict. Prosecutions have been tried and done without any ground breaking results for 20 years so maybe it is time to find optional measures that are effective. I do not mean that the idea of sexual violence in armed conflict as an international crime should be abandoned. My intention is that we must embrace how important it is that criminalisation and prosecution is complemented with big efforts put on gender equality. It can be argued as proven that criminalisation and prosecution by themselves are not very efficient on the big scale, and changes are needed.

Some scholars argue that it is not possible to make the distinction that has been created between sexual violence according to ICL and sexual violence in peacetime without hampering the feminist agenda. When focus is pulled away from the violence directed towards women and put on the relevant umbrella crime it harms female empowerment. For this reason, Grewal argues that sexual violence should be an international crime independent of the setting.[233] Inder contend that if prosecution is not possible, wanted or likely in a domestic setting, the ICC should have jurisdiction, irrespective of the context or the gravity of the offence. This would be true recognition of women's rights.[234] In peacetime, i.e. in a functioning society, sexual violence should be prosecuted as a domestic crime by domestic courts. If that is not the

[231] Grewal (n 199) 66-67
[232] Wachala (n 90) 549
[233] Grewal (n 199) 74-76
[234] Inder (n 219) 322

case a regional or an international human rights body should demand that the state takes its responsibility, as with all other human rights breaches. In situations where this does not work, I am tempted to agree that a more radical approach might be needed.

Creating a court focusing on gender-based crimes, or including these crimes under the jurisdiction of the ICC sounds extreme. Many questions arise: are they that much worse than many other crimes? Should this not be a matter for states themselves? They are more adequate to work with their country's culture. At the same time, this suggested international body handling genderbased crimes would be flooded. I concur that gender-based crimes are probably not in themselves worse than all other crimes. It is however worse in that sense that it has a very high level of impunity and it is often the survivors that are punished. Few other crimes are as unaddressed by states today as gender-based crimes are. States have already had the opportunity to handle this internally but they lacked the political will or the means to change.

Further, an international court would most likely be very overwhelmed, but hopefully more would be happening compared to today. An approach with an international court would not nullify the possibility for domestic courts to act. Quite the opposite, it could make gender-based crimes international crimes, which means that universal jurisdiction would apply to them. That would make it easier to prosecute crimes committed abroad, for example forced marriages. To make sexual violence irrespective of context an international crime has some value because then acts occurring in the context of internal disruption that has caused the legal system in the state to break down can be addressed. This is highly unlikely with today's system.

Maybe we have to try to think beyond our rooted concepts of ICL. Maybe we are all so stuck in our way of thinking that we cannot see how absolutely natural it would be to have gender-based crimes as international crimes. Just because we consider it different does not mean that it must be wrong. That unfortunately seems to be the way of looking at things within the Community of States. A less radical action could be to create a lower level of international crimes that give universal jurisdiction without creating a separate court or let

the crime fall within the ICC's jurisdiction. It is after all important to remember that sexual violence in conflict situations is different in that it takes advantage of an already unsafe context. The context and the vulnerability makes it an even more heinous act than sexual violence in peacetime.

Conclusion

All the theories presented by Gottschall can be considered to have some sort of relevance when trying to explain why sexual violence is committed in armed conflict. It is impossible to completely disaffiliate the biological aspect. Purely biological is however only sexual violence where the sole purpose is to reproduce. Some people get sexual satisfaction from sexually violating another person. Sexual pleasure within the context of reproduction is biological. When sexual pleasure is sought for recreational purposes, it is only partly biological. The less possibility there is to pass on genes, the less biological is the act. When the purpose for sexual violence is not to reproduce nor to recreate, as with a lot of sexual violence that takes place in armed conflict, biology is no longer present.

The fact that sexual interaction without consent of the other party ('sexual violence'), for the purpose of reproduction or recreation has been allowed to become a phenomenon in society is solely due to the patriarchal society and women's low social status. It is a vicious cycle where the sexual violence both exist because of women's subordination and is used to maintain the structure. In furtherance of this, sexual violence has been adopted to influence people who are not directly affected by the acts. If it were not for the lack of gender equality, this would never have been possible. My theory can be summarised in three steps:

1. Sexual interaction is explained by the biological theory
2. Sexual violence is explained by the feminist theory and the cultural pathology theory but would not be possible without biology
3. Sexual violence for other purposes than reproduction or recreation is explained by the strategic rape theory but would not be possible without the patriarchal society

Even if biology is the base of everything, I believe that it is a minor part of the explanation. Moreover, biology is not the problem. Sexual interaction is not bad; there is no need to change it. Effective measures against biology are

scares; the only reasonable one is criminalisation. I do not believe in criminalisation where people are not taught to respect the reason for the legislation. The reason for a criminalisation of sexual violence cannot be found in biology, it can only be found in the idea of all human's dignity and equal rights. For a crime such as sexual violence, where women are the most common victims, this specifically means women's human rights. The reason is thus found within the feminist theory. The cultural pathology theory is important to know which bad choices in history that should not be repeated. This does however not offer any tools to combat sexual violence because we cannot change history. The third step, falling within the strategic rape theory, is not the cause of sexual violence in armed conflict; it only describes how it is used. Similar to biology this can only be addressed by criminalisation. The reason for the criminalisation would yet again be human rights, especially those of women.

We are unlikely ever to find one true explanation to why sexual violence is committed in armed conflict; there could be as many explanations as there are perpetrators. In this thesis, the purpose of finding the reason why is to be able to adopt as effective measures as possible to combat the conduct. For such a purpose I believe that the explanations should be seen from a utilitarian perspective. The feminist theory is the only one offering other effective measures apart from criminalisation. It is also the fairest one since it recognises the victim in a way that the other theories do not. The biological theory is more concerned with the perpetrator and the strategic rape theory is focusing on everything affected by the crime but the victim themselves. For this reason, I believe that women's subordination to men and the low status of everything feminine is the root cause to sexual violence in armed conflict.

Consequently, criminalisation is only a small part of the measures that must be taken to combat sexual violence in armed conflict. Not only must women be allowed in to every part of the community, as national leaders, legal clerks, landowners or any other area that is in some countries reserved for men. Society must also learn to respect all people's equal value and not afford women and the feminine a low status. Without this, criminalisation will never

be effective. The crime will not be taken seriously if the reason for the legislation is not respected. This means that police reports will not be adequately filed, investigations will not be adequately performed, indictments will not be adequate, the treatment of the victim in court will not be adequate and the judgement will not be adequate. In each of these steps, the number of cases will decrease resulting in only a few convictions.

Despite that it is obvious how vital female empowerment is to an effective criminalisation of sexual violence in armed conflict criminalisation is the focus in many international standards. There are standards that recognises that gender equality is needed to put an end to sexual violence. The demands they have on states is however not enough. When it is stated that the governments have to work for gender equality and female empowerment it can be interpreted in many different ways. Some clear and detailed rules on what measures to take are needed. Moreover, there ought to be an enforcing body. Sexual violence is a problem so deeply entrenched in many societies that only the most detailed and direct legislation can have an effect worth considering.

Furthermore, even though the link between gender equality and sexual violence is recognised the same is not done in relation to sexual violence in armed conflict. Nor is it acknowledged that if we end sexual violence in peacetime we are more likely to end sexual violence in armed conflict. These things can possibly be considered self-evident. Yet, to take such things for granted in international law is precarious. Cultural diversities or political will is likely to get in the way for some states' ability to see this 'evident' connection. In addition, it is important what message the Community of States sends, to states, to possible victims, to survivors, to perpetrators, to possible perpetrators and to people in general.

The international standards adopted by the Community of States up until now is not sufficient to end sexual violence in armed conflict. Criminalisation should definitely not be ignored, but it should not be getting as much attention as it does either. Instead, more focus is needed on gender equality. The process to reach equality should as far as possible start in peacetime. It makes no sense to specify that measures for female empowerment should be adopted

in the post-conflict context. I believe that this is a very difficult context to introduce new values in a society. The insecurity makes people cling to the old ways because they feel safe and familiar.

It is not only important that the Community of States adopt the tools most suitable to address the root cause of sexual violence in armed conflict. All these tools must be constructed in a way so that the whole system as far as possible has the same focus. This should be to enhance the social status of the feminine. The efforts put on criminalisation should be reviewed and changed were such an approach is lacking. Criminal law, domestic or international should emanate from the rights of the victims. The critique against how sexual violence is addressed in international criminal law shows that the rights of the victims and the crime committed against them disappears in the bigger picture.

It is found in this thesis that perpetrators of sexual violence can and should be cumulatively convicted for genocide, crimes against humanity and war crimes based on the same acts, if the contextual elements are fulfilled. For the sake of women's rights, it is important that this possibility for cumulative convictions is used. Survivors should be granted the right to see the perpetrators on trial for the crime committed against them. If this crime is part of a bigger crime with another victim – crimes against humanity or genocide – it should be a completely different part in order to avoid making the survivors feel like tools.

An issue arises when crimes against humanity or genocide are committed through sexual violence outside of the context of an armed conflict. An act can never be a war crime in this situation. Consequently, it is unlikely that it will ever be identified that a crime was committed against the actual victim and this person will not get the remedy that such an acknowledgement entails. The victims are left to fend for the recognition of the crimes against them in domestic courts in countries that are most likely torn apart by internal disturbances and lacking a rule of law. To avoid this lacuna the Community of States should regard human rights violations, at least those that would be

considered war crimes in an armed conflict, as international crimes within the jurisdiction of the ICC if they take place in a context without the rule of law.

Charges on international crimes should never be dropped due to a plea bargain. Such an approach would ignore the rights of the victim. This is especially important when it concerns sexual violence. How such acts are addressed within the ICL is vital for the empowerment of women since they are the most common subject of sexual violence. If charges for this crime is dropped because of a plea bargain, it sends a message that a crime directed at women is a secondary crime, meaning that women's issues are secondary issues. As stated several times in the text, such a view counteracts the fight against sexual violence in armed conflict.

No one can claim that the conduct of sexual violence in armed conflict should have been extinguished by now. 20 years of adopted measure is not enough to end such a rooted and socially accepted thing as sexual violence. It is however my opinion that we would have seen more progress by now if we were going in the right direction. For this reason, the Community of States must stop repeating itself and start considering new options. I suggest that we start striving for the adoption of a new treaty, addressing sexual violence in its full scope, both in peacetime and in armed conflict. It should contain detailed tools that must be adopted by contracting parties and specified goals that should be reached by the parties within a certain amount of years.

It should be clear in the treaty that to end sexual violence in armed conflict we must end sexual violence in peacetime and for that we need gender equality. In such a treaty, sexual violence can be an international crime, a domestic crime and a human rights violation, depending on the circumstances. There should be an international body to enforce the treaty and it should consist of two sections, one concerned with state responsibility and one with authority to prosecute individuals. It is also important that the treaty includes a provision stating that the crime of sexual violence falls under universal jurisdiction. This would create the widest possibility to prosecute as many perpetrators as possible and it would have a positive impact on the workload of the treaty body. At the same time, since it is focusing on female

empowerment it will change people's mind so that they do not want to commit the crime of sexual violence. Not because they might be punished, but because they believe that the act is wrong.

Universal jurisdiction can raise a few issues. It is always uncertain it any states would actually be willing to take on a case that it has no connection to. We can never know this, we can only wait and see. It is however likely that some would since it has been done in relation to other crimes. The question on what the universal jurisdiction for sexual violence should actually entail is a question for an essay on its own but I believe it should be very wide. Such an approach could entail that states have a responsibility to take on cases if they are requested to do so by, for instance, the survivor themselves, and this could cause problems for poor states. However, it is highly unlikely that a person would request a poor country with an ineffective judicial system to try their case.

I do not think that it is possible to create this treaty in a nearby future, if ever. Even if the Community of States would be able to see past cultural differences the question of economic resources still stands. The suggested treaty body would need a budget that could cope with the large amount of cases it would receive. We can already see how much the ICC struggles. In the best of worlds, where governments genuinely care about the thing that is most important of all, human rights, there would be enough money. That is precisely what this suggestion is about – what we should do in the best of worlds. It is for inspiration, it is a goal to reach for so that we can at least get some sort of change, because it is time for renewed strategies to combat sexual violence in armed conflict.

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