Åbo Akademi University
Social Sciences, Business and Economics, and Law

Erika Canedo Barboza

Gender and the recognition of rights – Recognising rape as a *jus cogens* norm *per se* and defining its elements in international law

Master's Thesis
Supervisor: Magdalena Kmak
Master's Degree Programme in International Law and Human Rights
Faculty of Social Sciences, Business and Economics, and Law
Åbo Akademi University 2024
E-mail: erika.barboza@abo.fi

ÅBO AKADEMI UNIVERSITY – Faculty of Social Sciences, Business and Economics, and Law

Abstract for Master's Thesis

Subject: Public International Law, Master's Degree Programme in International Human Rights Law	
Writer: Erika Canedo Barboza	
Gender and the recognition of rights - Recognising rape as a *jus cogens* norm *per se* and defining its elements in international law	
Supervisor: Magdalena Kmak	Supervisor:

Abstract:

Rape has been used as means of war for as far as our civilization has engaged in conflicts and has, likewise, devastated societies in peacetime. In this regard, those who are most affected are women and girls. The theme has been treated extensively throughout literature, international treaties, declarations, resolutions, and domestic law and has frequently been described as one of the worst possible crimes that challenge the very existence of society. Why then it is not formally and legally recognised as such, as a norm from which no derogation is allowed, a norm so relevant that would trigger international and national consequences that would force States to properly take the subject into consideration? Nor has it been given a consistent gender sensitive and generally accepted definition in international law?

Jus Cogens norms are precisely those norms that are perceived as so important that they cannot be derogated, no matter the case and the prohibition of some heinous crimes are already recognised as such. Examples include torture, crimes against humanity, racial discrimination, and slavery. Rape might even be indirectly considered as *jus cogens* when it amounts, for instance, to torture or elements of genocide, but why not hold this classification on its own?

Gender has always greatly influenced numerous aspects of our society, politics, decision- and law-making processes, our behaviour, and priorities and, in this scenario, one perspective is constantly not being considered and repeatedly invisibilised, i.e. women's perspective, which leads to biased norms with limited reach that do not reflect the needs and voices of half of the world's population. If our international legal system were not gendered, would rape be given due consideration? Would it fulfil the criteria to be considered *jus cogens* by itself? Would it be afforded a common and accepted definition that considers gender within its core?

Through a feminist approach, this work aims to explore the gendered aspects of international law, by demonstrating its biases, and the possible answers to those questions, in addition to extensively examining the prohibition of rape internationally, including its definition (or lack thereof) by studying notorious cases from international judicial or *quasi*-judicial bodies, along with an analysis on *jus cogens* rights, how they are characterised and, finally, if rape meets the criteria to be considered *jus cogens* by itself.

Keywords: Customary International Law; Definition of rape; Elements of Crime; Feminist; Feminist Critics; Gender; Gender-Based Violence; Gendered System; Gender rights; Girls; Girls rights; Human Rights; Humanitarian Law; International Law; International Human Rights Law; International Humanitarian Law; *Ius Cogens*; *Jus Cogens*; Rape; Sexual Violence; Women; Women's Rights

Date: 15 April 2024	Number of pages: 81

Abbreviations

ACHPR - African Court on Human and Peoples' Rights

ASEAN - Association of Southeast Asian Nations

CAT - Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment

CEDAW - Convention on the Elimination of All Forms of Discrimination against Women

CIL - Customary International Law

CRC - Convention on the Rights of the Child

CRSV - Conflict Related Sexual Violence

ECOSOC - Economic and Social Council

ECtHR - European Court of Human Rights

EOC - Elements of Crimes

HRC - Human Rights Council

IAC - International Armed Conflict

IACHR - Inter-American Commission on Human Rights

IACtHR - Inter-American Court of Human Rights

ICC - International Criminal Court

ICCPR - International Covenant on Civil and Political Rights

ICJ - International Court of Justice

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

ILC - International Law Commission

NGO - Non-Governmental Organization

NIAC - Non-International Armed Conflict

OHCHR - Office of the High Commissioner for Human Rights

OIC - Organization of Islamic Cooperation

SCSL - Special Court for Sierra Leone

SGBV - Sexual and Gender-based Violence

UN - United Nations

VCLT - Vienna Convention on the Law of Treaties

TABLE OF CONTENTS

1. Introduction

1.1. Overview

The horrifying psychological and physical effects suffered by survivors of rape and other kinds of sexual violence are undeniable. In this scenario, women and girls are especially vulnerable and disproportionally affected, both in peacetime and during armed conflicts. Particularly in times of international armed conflict (IAC) and non-international armed conflict (NIAC), there is a substantial increase in sexual and gender-based violence (SGBV).[1] Rape is, therefore, an issue of universal concern that has been extensively treated within international and domestic legal systems, but despite all efforts made it continues to cause intense suffering, especially to women and girls.

Whether in peacetime or during armed conflicts, rape and other types of sexual violence are hardly ever about sex, they are about power and, as such, in contexts of armed conflict, are used as an extremely cruel means of war[2] to humiliate and harm the opponent, but those who are actually affected are mostly women and girls. The violence, however, is not restricted to the battlefield; survivors of sexual violence and rape have difficulty seeking help during armed conflict, as, for instance, access to even primary health care is limited, being exposed to sexually transmitted diseases and unwanted pregnancy, not to mention trauma.[3]

The violence continues after the conflict has ceased; international criminal courts and tribunals only seek to prosecute the most heinous and serious crimes, and SGBV might not be considered as such. Once they reach court, survivors are revictimised and have their lives exposed and the perpetrators are hardly ever convicted. This leads to a great sense of impunity and women and girls are, once again, left behind. In fact, not taking gender into account undermines accountability, and it is pressing that gender responsive strategies are implemented. [4]

[1] SGBV can be defined as *any act that is perpetrated against a person's will and is based on gender norms and unequal power relationships* as prescribed by the UNHCR Emergency Handbook – Sexual and gender-based violence (SGBV) prevention and response (2023).
[2] See, for instance, "Prosecutor Genera of Ukraine: Sexual violence committed by Russian soldiers has increased significantly" <https://yle.fi/a/3-12314941/64-3-126057> accessed 5 December 2022
[3] United Nations, A UNFPA Strategy for Gender Mainstreaming in Areas of Conflict and Reconstruction (2002)
[4] International Conference on Gender and International Criminal Law held online and on site at Leiden University on January 16 and 17 2024

In order to illustrate such lack of accountability and impunity some data can be shared: in Rwanda, during the genocide, an estimated 250,000 to 500,000 rapes had occurred,[5] but only 93 individuals were prosecuted in total by the International Criminal Tribunal for Rwanda (ICTR) in 75 cases, for crimes not necessarily connected to rape or other types of sexual violence, of which 62 were sentenced.[6] When examining the International Criminal Tribunal for the Former Yugoslavia (ICTY), an estimated 25,000 to 50,000 women and girls were raped;[7] the Court prosecuted 161 individuals in total, of which 78 had charges of sexual violence, and of those, 32 individuals were convicted and 14 acquitted of sexual violence charges.[8] When considering the International Criminal Court (ICC), to date,[9] it has dealt with 31 cases in total, not necessarily connected to rape and sexual violence, of which 13 are closed, five are in a reparation/compensation phase, eight are in a pre-trial phase, and five are currently being tried.[10] The first rape conviction happened only in 2016, but the defendant, Jean-Pierre Bemba Gombo, was acquitted of rape charges on appeal;[11] the first confirmed case convicted for sexual crimes happened in 2021, in the Bosco Ntaganda case.[12]

When considering life outside an armed conflict situation the scenario does not improve. Worldwide one in three women and girls were subjected to gender-based violence, while one in 10 girls has been a victim of rape.[13] According to Amnesty International, in 2018 in Europe, only 16 of the 31 countries had "laws that define rape based on the absence of consent",[14] and around nine million women aged 15 and over have been raped.[15] In the United States, research from 2019 shows that every 68 seconds a person is sexually assaulted in the country and that women are the most affected.[16] In Brazil, 74,930 rape cases were registered in 2022, and over 60% of the cases happened

[5] SHATTERED LIVES - Sexual Violence during the Rwandan Genocide and its Aftermath (1996).
[6] The ICTR in Brief. <https://unictr.irmct.org/en/tribunal> accessed 16 January 2024
[7] ICIP Peace in Progress Award 2023 honors two organizations of Bosnian war victims. <https://www.icip.cat/en/icip-peace-in-progress-award-2023-honors-two-organizations-of-bosnian-war-victims/> accessed 16 January 2024
[8] In Numbers. < https://www.icty.org/en/features/crimes-sexual-violence/in-numbers> accessed 16 January 2024
[9] January 16, 2024
[10] ICC Cases. < https://www.icc-cpi.int/cases > accessed 16 January 2024
[11] The Guardian, *Jean-Pierre Bemba's war crimes conviction overturned*. <https://www.theguardian.com/global-development/2018/jun/08/former-congo-leader-jean-pierre-bemba-wins-war-crimes-appeal-international-criminal-court> accessed 16 January 2024
[12]Tanja Altunjan. The International Criminal Court and Sexual Violence: Between Aspirations and Reality (2021), *German Law Journal* 22, p. 887
[13] Report of the Special Rapporteur on violence against women, its causes and consequences, Dubravka Šimonović, 2021, A/HRC/47/26, para 8
[14] LET'S TALK ABOUT YES!, < https://www.amnesty.org/en/latest/campaigns/2018/11/rape-in-europe/> accessed 16 January 2024
[15] Ibidem
[16] Victims of Sexual Violence: Statistics, <https://www.rainn.org/statistics/victims-sexual-violence> accessed 16 January 2024

against children under 14 years old.[17] Even though those are national data concerning national laws, international public and human rights law, the international community and the events and circumstances that influence the international system, such as politics and international conferences and meetings, have a great impact on national legislation and policies and their developments. Rape is still one of the most widespread crimes, in which perpetrators commonly go unpunished and numerous victims do not report it.[18]

1.2. Research Question and Delimitations

The premise of this work is the fact that law, including international law, is a sexist and gendered system, as will be further debated and demonstrated, and that this fact generates serious consequences and has important impacts in the way international community perceives not only matters that essentially impact women's lives the most, but all topics related to society's life and international law. If international law in general were analysed through a different perspective and with gender lens, different outcomes would most likely be reached, and new conclusions would be made, allowing for a more inclusive and truly universal international law, as will be further developed.

As mentioned, rape and other types of SGBV are heinous crimes that afflict people all over the world and increase substantially in times of armed conflict. Rape, despite being extensively treated within international law, has not been afforded a common internationally accepted definition yet, which leaves for international tribunals to decide on its elements on a case-by-case basis and for national law to define what constitutes rape with almost no ground to base itself on. This scenario allows for definitions and norms that are limited and not gender sensitive to emerge. In addition, as it is well established, rape can amount to torture, crimes against humanity, genocide, among other violations, all serious and heinous crimes considered *jus cogens* norms, which requires greater attention from the international community, as they are seen as violating the very core structure of society. However, rape is still not considered as *jus cogens* norms on its own.

What if rape were to be afforded a comprehensive and gender sensitive definition generally accepted, and its prohibition were to be considered as a *jus cogens* norm *per se*? What would this

[17] 17º Anuário Brasileiro de Segurança Pública, 2023, p.1
[18] Report of the Special Rapporteur on violence against women, its causes and consequences (n 13), para 8

mean? Does the prohibition of rape have what it takes to be considered *jus cogens per se* today? Would a gender approach influence the perception we have of International Law? Noting these aspects, the aim of this thesis is to answer the following research question: *If the international law system were not sexist, would it be possible to reach a common gender sensitive international definition of rape, and would the prohibition of rape have what it takes to be considered jus cogens per se?*

These aspects will be analysed through a feminist approach, bringing gender to the centre of the discussion, and highlighting the fact that women and their perspectives are frequently not properly considered when discussing international law.[19] In order to answer the research question, this thesis will be divided into four chapters, in addition to an introduction and a conclusion. The first chapter will focus on setting the premise of this work, which is that international law is a gendered and sexist system. For the purpose of doing so, this chapter will cover several aspects of international law and demonstrate the impact gender has on it and that women are often at the margin of the system, which causes for such system to be gendered in essence and violence against women to be structural. In this matter, a revised international law could, in fact, bring progress and justice, especially when considering that discrimination and violence against women and girls are heavily embodied in our society.[20]

The second chapter will examine the norms regarding rape in the international arena and the historical background behind them, analysing: (i) the prohibition of rape from a humanitarian law perspective, where the most notorious treaties that refer to the topic will be detailed, in addition to the Security Council's resolutions concerning the Women, Peace and Security Agenda, (ii) the prohibition of rape in international human rights law (IHRL), exploring the main human rights norms about the subject, both through hard and soft law instruments and (iii) the prohibition of rape under Customary International Law (CIL). This chapter will serve to demonstrate the various instruments and areas of international law under which rape is forbidden and to show that the

[19] The aim of this work is not, of course, to invalidate and invisibilise the enormous number of men and boys that are victims of rape and other forms of sexual violence every day. However, since women are disproportionally and systematically affected by it and discussions and law itself frequently fail to consider women's point of view and needs, this work will be done through a feminist perspective, considering women's needs and the fact that the system more than often fails them. Nonetheless, should this thesis conclude that the prohibition of rape must, in fact, be considered *jus cogens per se* this would, of course, also be applicable to violations involving men and boys.

[20] Hilary Charlesworth and Christine Chinkin. *The boundaries of international law: A feminist analysis, with a new introduction* (Manchester University Press, 2022), p. 29

international community has actively engaged with the theme, being a topic whose importance is accepted and recognised by the international society.

After reviewing the main international provisions around the prohibition of rape under various perspectives (e.g. IHL, IHRL, and CIL) in the previous chapter, the third chapter will discuss the lack of a commonly accepted definition of rape. Although there is no discussion that rape is, in fact, a crime under international law, the chapter will explore what rape is. It will also explore what the elements of the crime of rape in international law are and allude to the problem that no common definition exists. This chapter will also address important elements that shall be present should a common definition emerge by analysing the issue from a gender sensitive perspective.

The fact that there is no common definition of rape can cause considerable problems for victims of rape, especially in times of numerous ongoing armed conflicts, for instance, the ones happening in Gaza, Congo, Syria, Ukraine, Yemen, Somalia, Iraq, Ethiopia, and amongst the several other conflicts happening worldwide.[21] Which definition of rape were to be used in case of an international trial? Even though there are several definitions, as will be further explored in Section 4, there is a lack of a common definition. This poses a serious gap for both prosecuting the crime of rape by international tribunals, which must first decide upon the definition to be used to establish if a crime was, in fact, committed, and for accountability, which has a direct impact on the survivors.

The issue of the absence of an internationally accepted definition is not, however, restricted to armed conflict situations. The domestic system is also profoundly affected by the absence thereof, since it affords complete freedom for States to determine what the elements of rape are under their internal regulations without binding grounds to base themselves upon. Such liberty provides space for restrictive and conservative definitions, which only helps harm survivors even more, to emerge. A broad and binding definition of rape would determine the basis for domestic law that would need to comply with, at least, the elements agreed upon internationally.

After discussing the topic of the lack of a common definition of rape, the fourth chapter will examine what *jus cogens* rights are, analysing what constitutes *jus cogens* norms, how they are established (relying especially on the 2022 report of the International Law Commission - ILC to do so), and if

[21] According to the Geneva Academy, as of January 16, 2024, more than 110 armed conflicts are happening worldwide. TODAY'S ARMED CONFLICTS. <https://geneva-academy.ch/galleries/today-s-armed-conflicts> accessed 16 January 2024

jus cogens norms also bear a gendered aspect in their definition. In addition, the chapter will explore the existing situations where rape can be considered *jus cogens* (e.g. when it is characterised as torture or as crime against humanity[22]), how judicial or quasi-judicial bodies perceive the seriousness of rape and investigate if rape fulfils the requirements established by the legislation, the ILC and the doctrine to be considered *jus cogens* by itself.

Should this work understand that rape, indeed, could be considered *jus cogens per se*, it would mean a great advancement regarding accountability, not only internationally, but also nationally, as it enhances the gravity of the crime and makes it even more important to prevent, investigate, prosecute and convict, reinforcing also the universal jurisdiction character of the crime, giving survivors a better chance to achieve closure of some sort.

Even though other kinds of sexual violence deserve as much attention and concern from the international community, this work will focus on rape and, hopefully, will act as a precursor for further analysis on other types of sexual crimes. The reason for the focus on rape is the fact that rape is broadly treated under international law and has been so for decades, affording, therefore, a strong understanding of the topic throughout the international community, providing a consistent approach towards rape.

By the end of this work, despite the possible challenges (e.g., the fact that the prohibition of rape can be indirectly considered *jus cogens* in case it is perceived as crime against humanity, torture, or through other *jus cogens* norms, which could lead to one's understanding that there is no need for rape to be considered *jus cogens* by itself, which this author completely disagrees) and limitations (not having the possibility to prepare a vast analysis of how rape is treated in domestic case law), this thesis will assess the importance of a comprehensive gender sensitive definition of rape to be established and of the specific recognition of rape as *jus cogens*. It is expected to conclude that the prohibition of rape has enough conditions to be considered *jus cogens per se*, regardless of being characterised as torture or crime against humanity or any other *jus cogens* norms. Considering it as such will be a step forward when it comes to prevention, protection, accountability and making women's voices heard.

[22] Article 7 (1) (f) and (g) – Crime against humanity of the Rome Statute in connection with the paragraphs (c) and (g) of the Annex of the Draft conclusions on identification and legal consequences of peremptory norms of general international law (jus cogens), 2022

One important and essential note should be made before moving forward. The theory that this work will intend to present will encompass all genders, binary or not, cis or trans. It is known that rape and other types of sexual violence are most often perpetrated against women, but it should not be forgotten that not only cis gender women are women, and that nonbinary people are also victims of such violence. I hereby recognise my unfortunate and most probable inability to produce a fully inclusive work. I acknowledge that, if cis gender white women are invisibilised, black women, trans women and nonbinary people are even more so. When discussing any topic, but especially gender-based violence, it is essential to analyse it through an intersectionality perspective, considering the nuances of gender, ethnicity, race, age, nationality, disability, and every vulnerability that might be attached to it and I hope all can benefit from the results of this work, despite its limitations. Moreover, this work hopes to be accessible for everyone, regardless of their areas of expertise.

1.3. Method and methodology

In order to achieve the goal proposed in this work, by applying a feminist approach throughout this thesis and critically interpreting the topics brought herein with a gender lens, an extensive critical examination of literature will be made, together with the analysis of international instruments about the topic – resolutions, reports, treaty law and CIL, therefore, having a doctrinal approach as its main methodology. Through a feminist perspective, this work will also have the task to deconstruct and reconstruct international law, as it will provide grounds to reevaluate the basis upon which international law itself is perceived, by demonstrating how women are invisibilised, marginalised and are not part of the construction of international law, being excluded from places of power, and by analysing the patriarchal structures embedded in our society. This analysis will make room for a more critical and gender sensitive international law to emerge by questioning the basis upon which international law is built and recreating it applying a gender sensitive approach. Except as otherwise described, *jus cogens* norms and peremptory norms will be used interchangeably.

Through a feminist perspective, this work will base its assessment on primary sources of international law, by discussing the main hard and soft law provisions around the prohibition of rape under international law, both in times of peace and during armed conflict, and general principles of law, as well as CIL, together with secondary sources of international law, such as articles, research of legal scholars, books, analysis of several cases regarding rape in the international sphere on both judicial and *quasi*-judicial bodies. In addition, reports from international organs, particularly the ones prepared by the Special Rapporteur on violence against women and the ILC, will have an

important role throughout this analysis. Furthermore, this work will also count on certain news concerning the topic to illustrate its importance.

Bringing a feminist critique is of extreme importance, yet it can be challenging considering that we, as individuals, are all embedded in a sexist society. As stated by Hilary Charlesworth citing Elizabeth Grosz, "Feminist analysis, says Grosz, is both a reaction to "the overwhelming masculinity of privileged and historically dominant knowledges, acting as a kind of counterweight to the imbalances resulting from the male monopoly of the production and reception of knowledges" and at the same time a response to the political goals of feminist struggles."[23] Also, "feminists are not faced with pure and impure options. All options are in their various ways bound by the constraints of patriarchal power."[24]

Women's experiences are not one, they are as diverse as can be, and so are feminists' theories, however, if we were to name one common trait, it is the fact that we all live within a patriarchal system.[25] In this sense, this work will not consider only one specific feminist approach, it will work with various views and authors to carry a feminist perspective throughout it and has intentionally focussed on female authors. Due to a restriction regarding the number of words, certain aspects of this work had their scope limited.

[23] Hilary Charlesworth, Feminists Critiques of International Law and Their Critics, *Third World Legal Studies - Vol 13 Women's Rights and Traditional Law: A Conflict*, (1995), pp. 4-5
[24] Elizabeth Grosz, 1990, *apud* Hilary Charlesworth, (n 23), p. 6
[25] Hilary Charlesworth, (n 23), p.12

2. Is this a "men's world"?

2.1. The sexism behind the law

"Patriarchy is not a temporary imperfection in an otherwise adequate system; it is part of the structure of the system and is constantly reinforced by it."[26] Patriarchy can be defined as "male-centered, male-identified, male dominated social structure"[27] that is nurtured by its craving for dominance.[28] This structure, presented in virtually every aspect of society, privileges men in regard to women and it is not different when analysing the international legal system, which places women on its margins,[29] having little to no voice in defining international law rules and principles.[30]

One of the core ideas of international law is that it is "an autonomous entity, distinct from the society it regulates",[31] however, the law, being created by people, more commonly men, cannot separate itself from the context in which it is embedded, which, due to its apparent neutrality and objectivity, makes inequalities seem natural.[32] This apparent neutrality reflects what happen to women in relation to international law; the rule as it is, a male system, built by men, focusing on men, perpetuates women's unequal position, but is constructed in a way that seems natural and neutral. Yet, "International law is a thoroughly gendered system".[33]

International law privileges men and women are set in marginal positions.[34] Women, in general, have not been part of the development of legal principles in the international sphere. From not being represented to standing at the margins of international law, women have constantly been silenced and women's realities invisibilised. Even though the growth of areas specialised on women must be recognised, when the focus is directed towards them, the way in which they are perceived is usually very limited. Normally, women are represented in conditions that reinforce stereotypical and socially constructed views of the "role" of women, for instance by constantly portraying women as mothers,

[26] Hilary Charlesworth, (n 23), p.9
[27] June Carbone and Naomi Cahn, Unequal Terms: Gender, Power, and the Recreation of Hierarchy, *Special Issues: Feminist Legal Theory (Studies in Law, Politics, and Society, Vol. 69,* (2016), p.195
[28] Ibidem
[29] Hilary Charlesworth and Christine Chinkin. (n 20), p. 142
[30] Ibidem, p. 30
[31] Hilary Charlesworth, Christine Chinkin and Shelley Wright, Feminist Approaches to International Law, *The American Journal of International Law*, vol. 85, (1991), p.613
[32] Ibidem
[33] Ibidem
[34] Ibidem

victims or somehow fragile and in need of protection,[35] which is an intrinsic part of the patriarchal structure of power inequalities. This structure is incompatible with the idea of democracy, since at the very core of democracy is the fact that people should be able to enjoy and exercise the same rights and that power should be distributed in a balanced and equitable way.[36] More importantly, if legal logic merely replicates male views, its own authority and objectivity are at stake.[37] As certain feminists have argued, when some, in this case men, have the power and ability to establish the world's priorities and do so for their own benefit, general needs, whether human, social or economic, are not fulfilled,[38] thus leading to great imbalances and inequalities.

According to Hilary Charlesworth, feminist studies, when discussing international law, have two key tasks: to deconstruct and to reconstruct.[39] The deconstructive aspect questions the objectivity and rationality that international law asserts to have due to the narrow views under which it is developed, relegating women's participation and ignoring their perceptions.[40] Deconstructing international law, thus, requires to reevaluate the notions learnt and to "unlearn" concepts and patterns that were taught almost by repetition without further analysis.

By excluding women from the creation of international law, notions that seem basic and gender neutral become problematic, as is the case of statehood that operates to constantly contemplate particular ideas (male ones) and to disregard others (female ones).[41] Also, statehood is built upon complex power relations, which are unbalanced towards women[42] and considers characteristics that are deemed as male for its construction. For example, the very idea of independence and the responsibility for the protection of those under its jurisdictions are understood as male features, as opposed to dependence and those in need of protection, which are perceived as female.[43] This notion, when implemented internally, is transferred to the international system.[44] As stated by Ann Sisson Runyan and V. Spike Peterson, "It is simply not possible to understand how power works in the

[35]Hilary Charlesworth and Christine Chinkin (n 20), p. 142. As suggested by Hilary Charlesworth, one example is the 1995 Beijing Platform for Action, that, even though brought great results and addressed important issues, when it refers to women experiences, ended up reinforcing the role of mother and care giver, but who now have to cope with work life.
[36] Luis Felipe Miguel, *Teoria Política Feminista e Liberalismo: O caso das cotas de representação, Revista Brasileira de Ciências Sociais*, vol. 15 no 44 (2000), p. 97
[37] Hilary Charlesworth, Christine Chinkin and Shelley Wright (n 31), p.613
[38] Ibidem, p.615
[39] Hilary Charlesworth, (n 23), 1995, p. 3
[40] Ibidem
[41] Ibidem
[42] Ibidem
[43] Hilary Charlesworth and Christine Chinkin, (n 20), p. 290
[44] Hilary Charlesworth, (n 39), p. 3

world without explaining women's exclusion from the top of all economic, religious, political, and military systems of power".[45] By questioning the very basic notions of international law, feminist scholars try to challenge our own perception of the system that we, as a society, usually take for granted, and just accept that "it is what it is", without analysing what this structure means and how it was built. Examining all aspects of law (and life) through gender lens shows us a reality that, once we see, we cannot unsee and forces us to challenge our perceptions and to question the world around us.

The reconstruction aspect, in contrast, is more challenging, in the sense that we, as a society, do not have historically any experience to base ourselves upon to rebuild the international law system.[46] In this scenario, feminist theories are, therefore, "subversive strategies. They are "forms of guerrilla warfare, striking out at points of patriarchy's greatest weakness, its blindspots. They reveal the "partial and partisan instead of the universal or representative position" of patriarchal discourse."[47] The reconstructive aspect challenges society to, after deconstructing its beliefs, rebuild all its notions critically through gender lens, considering different aspects that were once taken for granted and hearing voices that were once silenced.

The fact that we, as a society, do not have experiences to base ourselves into the reconstruction task under no circumstances means that women lack agency. On the contrary, women have been fighting to have their voices heard and their interests acknowledged, with great advocacy work, despite the structural power imbalances and inequalities. Such agency has led to some important outcomes, although not being able to definitively tackle the structural inequality of international law yet, it has made it visible. One example, which will be further discussed in the following chapter, is the 1979 Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), which is undoubtedly one of the main human rights documents on the matter.

Regardless of the importance of CEDAW, it seems as if it is easier for the international community to focus on certain topics than others, and violence against women, which is a widespread problem that had increased substantially during the COVID pandemic lockdown,[48] has been the one that

[45] Ann Sisson Runyan and V. Spike Peterson, The Radical Future of Realism: Feminist Subversions, *Alternatives: Global, Local, Political 16, no. 1* (1991), p. 67
[46] Hilary Charlesworth (n 39), p. 4
[47] Ibidem
[48] UNWomen, Press release: UN Women raises awareness of the shadow pandemic of violence against women during COVID-19 < https://www.unwomen.org/en/news/stories/2020/5/press-release-the-shadow-pandemic-of-violence-against-women-during-covid-19> accessed 10 April 2024

gathers more attention, but with no actual consequence, while topics such as economic inequalities and structural features that allow violence against women to occur remain barely discussed.[49] This scenario makes one wonder whether the international community is willing to discuss just certain particular topics concerning women's rights and not necessarily address the structural inequalities in which such problems are embedded and that could lead to an extensive transformation in the way international law is perceived today.

The claim for recognition goes beyond the nation State, the slogan "women's rights are human rights" indicates the struggle to fight patriarchy and generate reforms both locally and internationally.[50] In order to achieve gender justice, it is not enough to redistribute the resources and recognise the inequalities, it is pressing to have representation where women's interests will be properly addressed.

In attempts to fulfil the deconstructive task mentioned above, the following sections will address other important issues regarding gender and international law with the aim of further demonstrate its biases and provide for a critical analysis of the very formation of international law and of the notions and principles that are continuously taught as neutral, but, in fact, bear a deep gendered aspect.

2.2. The imbalanced power structures

2.2.1. Not so much a neutral system

Sex and gender are an intrinsic part of international law and male interests and perceptions are rooted into it and are constantly being reinforced by it; to ignore this fact is to misapprehend international law itself.[51] This perception is also true when analysing national legal systems, which are, regardless on the basis such system is built upon (capitalist, socialist or religious), ruled by male elite.[52]

Gender and the notion of women are socially and culturally constructed.[53] Whilst gender encompasses a broader aspect, not connected only to male or female characteristics, but a set of

[49] Hilary Charlesworth and Christine Chinkin. (n 20), p. 30
[50] June Carbone and Naomi Cahn (n 27), p. 305
[51] Hilary Charlesworth and Christine Chinkin (n 20), p. 98 and 102
[52] Ibidem, p. 190
[53] Judith Butler, Problemas de Gênero – Feminismo e Subversão da Identidade (2017), p. 32

social constructions, the term has been used indiscriminately as a synonym of women,[54] which limits its scope by restricting its definition to the masculinity x femininity duality.[55] Similarly to the definition of gender, the idea of women and their "roles" also varies according to time and culture, but sexist and patriarchal discourses ascribe to women "fixed qualities on the basis of biological functions such as reproduction, or on other "natural" or psychological characteristics"[56] that "are used to justify women's subordination to men".[57] These notions are transferred to the international law system that, in turn, reproduces them, reinforcing the gendered aspects of international law by affording women marginal roles and silencing their voices.

International law, it can be argued, deserts all (groups of) women, which are seen as the "other", different from the norm – the men, and are subordinate to and in a disadvantageous position towards them in more ways than one, economically, politically, legally, culturally and socially.[58] In this scenario the idea of neutrality, universality and objectivity of the law (nationally or internationally) is only true if someone is part of the group that designed it, only if someone is a man.[59] Therefore, male interests are perceived as general and as a synonym for human and the gendered perception of it gets (almost) invisible.

The fact that international law has States as its primary subjects also adds to the perception of neutrality, since States are supposed to be gender neutral. Nonetheless, the impacts of international law do not rest solely on States, men and women are affected by it, however women's experiences are usually disregarded and issues that concerns mostly them are often overlooked or undermined,[60] even affecting which matters are going to be subjected to regulations under international law. In other words, which topics the male dominant group will be willing to address under the international legal order.[61] In this sense, these systems – national and international, constantly reinforce the patriarchal features of each other and the assumption of neutrality, universality and objectivity creates the illusioned idea of universal rights, instead of "male" rights.[62]

[54] Hilary Charlesworth and Christine Chinkin (n 20), p.41-42
[55] Dianne Otto, The Exile of Inclusion: Reflections on Gender Issues in International Law Over the Last Decade, *Melbourne Journal of International Law, Volume 10, Issue 1*, (2009), p. 2
[56] Hilary Charlesworth (n 39), p. 9
[57] Ibidem
[58] Ibidem, p.79 and 81
[59] Ibidem, p. 81
[60] Hilary Charlesworth, Christine Chinkin and Shelley Wright (n 31), p.617
[61] Hilary Charlesworth and Christine Chinkin (n 20), p. 98
[62] Hilary Charlesworth, Christine Chinkin and Shelley Wright (n 31), p.644

These perceptions led to women's rights being consistently jeopardised in manners that men's are not and to the recognition that nearly all human rights law was and is created by men.[63] As a consequence, some of the most serious violations of rights are focused on men and male experiences and fears, that is the case, for example, of torture.

The right not to be tortured or suffer other forms of inhuman or degrading treatment is well settled in the international fora, whether as a civil and political right, through specialised instruments, by CIL or by being considered a *jus cogens* norm[64] – as it should. However, the focus on whom the norm originally referred to and in which circumstances is not as universal as it should. Under the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), one of the most important international instruments on the prevention of torture, inhumane or degrading treatment, being specifically established for such purposes and with monitoring mechanisms that seek to ensure the fulfilment of the obligations provided therein, torture is defined as

> any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted **on a person** for such purposes as obtaining from **him** or a third person information or a confession, punishing **him** for an act **he** or a third person has committed or is suspected of having committed, or intimidating or coercing **him** or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.[65] (intentionally highlighted)

As it is possible to perceive, even though the beginning of the definition indicates "person", its entire construction is based on men and male perspective. It is true that, nowadays, it is undisputable that women can also be subject to torture, but the definition established in 1984 does not formally include women. The CAT is not the only treaty where the prohibition of torture, inhuman or degrading treatment or punishment is addressed. For example, Article 7 of the International Covenant on Civil and Political Rights (ICCPR) states that "No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.",[66] apparently proving for a

[63] Hilary Charlesworth, Christine Chinkin and Shelley Wright (n 31), p. 13
[64] Ibidem, p.627
[65] Article 1 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, adopted 10 December 1984, entry into force June 26 1987
[66] Article 7 of the International Covenant on Civil and Political Rights, adopted 16 December 1966, entry into force 23 March 1976.

neutral application of the provision. However, the ICCPR does not further describe what constitutes torture.

Thus, language is also a way to reinforce patriarchal and sexist approaches in international law and the use of male pronouns reinforces the exclusion of women. As shown the very definition of torture uses mostly masculine pronouns instead of being worded in a more neutral way. Similarly, during the discussions for the elaboration of the United Nations Charter (UN Charter), some delegates felt like the inclusion of the wording of Article 8, which ensures women's right to work within the UN system and will be further discussed herein, was unnecessary, to say the least.[67]

Moreover, alleged neutral principles and rules operate in a different manner towards women and men and elementary concepts of international law, such as states and security, are embodied with gendered features that also ignores women.[68] Accordingly,

> This phenomenon does not emerge as a simple gap or vacuum that weakens the edifice of international law and that might be remedied by some rapid construction work. It is rather an integral part of the structure of the international legal order, a critical element of its stability. The silences of the discipline are as important as its positive rules and rhetorical structures.[69]

The use of masculine pronouns has a significant role on promoting and reinforcing the exclusion of women and the hierarchies built upon sex and gender, even when they are allegedly used as "generic" pronouns.[70] The choice of words matters and, while men are always certain to be covered when international law is written this way, women are not always that sure.[71]

2.2.2. The impact of the public/private sphere

The very construction of international law and IHRL emphasises the differences between public and private realms, which reinforces the silence of women.[72] Even though this distinction and, more

[67] See Note 127 below.
[68] Hilary Charlesworth and Christine Chinkin (n 20), p.143
[69] Ibidem
[70] Ibidem, p.434
[71] Ibidem
[72] Ibidem, p. 435

importantly, what this distinction means is understood to be socially constructed, and, therefore, changeable, the fact is that it influences and defines our society.[73]

International law is perceived to operate in the public arena, as it mostly regards the relation between States, privileging, therefore, men and their views and strengthening their dominance,[74] and, although IHRL slightly shifted this idea, since it governs not the relationship between States themselves, but the relationship between States and people under their jurisdiction, it still focuses on the public sphere, instead of thoroughly addressing the private realm.

By focusing on the public domain, international law can regulate areas such as workplace, economy, politics and so forth, but the actual interference in "family matters" is considered out of reach.[75] In fact, international law reinforces the traditional heterosexual idea of family, where the "natural" is for a woman and a man to get married and have kids. Such idea of family is the basis of the society, where the man works in the public sphere and is economically active and the woman is the care giver and focuses on the private – the home, and her work is not recognised as productive.[76] This structure and such assumption serves to, once again, strengthen the gendered aspect of international law and the structure of power within society.[77]

Women are, of course, occupying spaces outside home today, and the heteronormative structure of family has been constantly questioned, but these ideas continue to be rooted in our society and still govern most of our relations. Despite the fact that women had succeed on realizing one sense of equality, at least on paper, the patriarchal power still endures.[78] The idea that the law should not interfere in the private sphere allow for women, their needs, voices, and issues to be undermined, and violence against women becomes a serious and widespread problem that is not properly addressed under international law.[79]

In addition to the wording, as previously shown, the definition of torture under CAT left aside the place where women are most subject to violence: the private realm. Even though the violence

[73] Hilary Charlesworth, Christine Chinkin and Shelley Wright (n 31), p.627
[74] Ibidem
[75] Ibidem
[76] Hilary Charlesworth and Christine Chinkin. (n 20), p.434 and Hilary Charlesworth, Christine Chinkin and Shelley Wright (n 31), p.640
[77] Hilary Charlesworth and Christine Chinkin. (n 20), p.434
[78] June Carbone and Naomi Cahn, (n 27), p. 208
[79] Hilary Charlesworth, Christine Chinkin and Shelley Wright (n 31), p.627

women suffer at home could, in many times, be compared to torture due to the great harm inflicted, it is not formally considered as such, because its definition is restricted to the public aspect.[80] On this note, the UN Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (Special Rapporteur on Torture) had already indicated that "In terms of severity, the pain or suffering caused by domestic violence often fall nothing short of that inflicted by torture and other cruel, inhuman or degrading treatment or punishment".[81]

Still, CAT does not formally address domestic violence as torture under international law, but the Special Rapporteur on Torture recognised that this sort of violence goes beyond the private sphere and represents a significant human rights problem that is connected to the public domain.[82] In addition, its substantive perspective (e.g. violation of someone's integrity, whether physical, mental or emotional) "always amounts to cruel, inhuman or degrading treatment or punishment and very often to physical or psychological torture.".[83] Moreover, the Human Rights Committee, the body responsible for monitoring the implementation of the ICCPR, has already recognise the failure of States to address domestic violence with regard to Article 7 of the ICCPR.[84] Nonetheless, a lot still has to be done for women and girls to be truly protected with respect to matters concerning the private sphere.

Since international and domestic legal systems are influenced by each other and international law establishes the minimum ground for domestic legislation, the consequences of such approach and public/private divisions are transferred to domestic law that continues to reinforce the imbalances of the power structure nationally.

In this sense, it is sometimes hard to convince authorities that the violence that happened within the home constitutes criminal acts. One example that culminated in the creation, in 2006, of a very comprehensive law on domestic violence against women in Brazil (which is a State party to

[80] See note 65 above.
[81] United Nations, Domestic Violence and the Prohibition of Torture and Ill-Treatment. <https://www.ohchr.org/en/special-procedures/sr-torture/domestic-violence-and-prohibition-torture-and-ill-treatment> accessed 16 January 2024
[82] Interim report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Relevance of the prohibition of torture and other cruel, inhuman or degrading treatment or punishment to the context of domestic violence, A/74/148, 12 July 2019, para 4
[83] Ibidem, para 10
[84] Ibidem, para 12

CEDAW since 1984[85]) is the Maria da Penha case, whose husband attempted to killed her twice. The first time, in 1983, with a gunshot that left her paralyzed and the second by electrocuting her in the bathtub. The Brazilian justice system took 19 years to convict him. He was sentenced to eight years in prison but was out in one.

Meanwhile, Maria da Penha reached the Inter-American Commission on Human Rights (IACHR)[86] and Brazil was understood to be in violation of Article 2 (Right to equal protection under the law without discrimination) and Article 8 (Right to Justice) of the American Declaration on the Rights and Duties of Man, Article 1 (Obligation to Respect Rights), Article 8 (Right to a Fair Trail) and Article 25 (Right to Judicial Protection) of the American Convention on Human Rights and Article 7 (States' obligation to prevent, punish and eradicate Violence Against Women) of Convention on the Prevention, Punishment and Eradication of Violence against Women ("Belém do Pará Convention"), being recommended that the country, among other things, improved its legislation and policies on domestic violence.[87] Despite the important outcome, this example shows the neglect of the authorities with regard to violence that occurred within the private sphere but allows us to perceive that human rights law has created room for international law to enforce domestic legal provisions on violence against women.[88]

Another outcome of the public-private dichotomy is the reduction of women's right to self-determination; by self-determination it is meant the right to freely decide their political status and go after their economic, social, and cultural progress, which is largely harmed due to the control and marginalisation women face.[89]

[85] UN Treaty Body Database, Ratification Status for CEDAW - Convention on the Elimination of All Forms of Discrimination against Women. <https://tbinternet.ohchr.org/_layouts/15/TreatyBodyExternal/Treaty.aspx?Treaty=CEDAW&Lang=en> accessed 16 January 2024
[86] BBC News, Maria da Penha: The woman who changed Brazil's domestic violence laws, 2016. <https://www.bbc.com/news/magazine-37429051> accessed 16 January 2024
[87] LSE – Centre for Women, Peace and Security, Maria da Penha Maia Fernandes v. Brazil. <https://blogs.lse.ac.uk/vaw/landmark-cases/a-z-of-cases/maria-de-penha-v-brazil/> accessed 16 January 2024
[88] Karen Engle, Vasuki Nesiah and Dianne Otto, Feminist Approaches to International Law, *University of Texas Law, Public Law Research Paper No.716* (2021), p.5
[89] Hilary Charlesworth, Christine Chinkin and Shelley Wright (n 31), p.642

2.2.3. Women and the Generations of Rights

International law is not only silent with regards to the public/private dichotomy, it is actually build upon several other dichotomies that reinforces the "male"/"female" division, being the first one perceived as the dominant (male) and the second one, subordinate (female), such as: "objective/subjective, legal/political, logic/emotion, order/anarchy, mind/body, culture/nature, action/passivity, public/private, protector/protected, independence/dependence, binding/non-binding, international/domestic, intervention/non-intervention, sovereign/non-self-governing".[90] Terms that are seen as "male" have greater value than "female" ones, which are perceived as irrelevant, even when it comes to public security.[91] This also connects to the idea that the principles of international law are themselves gendered.[92]

The abovementioned dichotomy has implications on the division of generations of human rights. The first generation of rights, the Civil and Political Rights, are generally seen as the ones that are "easier" to fulfil and that should be prioritised. They focus on the public world and the idea that individuals should be free from State intervention in certain areas. Despite also bearing positive obligations that entail actions from States to ensure the protection and enjoyment of these rights, they are popularly known as "negative" rights, where States shall abstain from acting.[93] Even though those rights are essential to women's lives, they do not contemplate the specific needs of women to enjoy them. The right to be free to enjoy life, for instance, does not consider domestic violence women are subjected to and the need that women have to be accorded special legal protection to be able to enjoy their right to life, because such right is threatened for the sole fact that being a woman is life-threatening in many ways.[94]

The second generation of rights, in contrast, the Economic, Social and Cultural Rights, are perceived as "positive" rights, therefore "harder" to be implemented, given States greater liberty to "do their best" on their implementation (the European Social Charter, for example, allow States to choose which rights they are going to be bound to, it is an "à la carte" treaty). These are the rights that mostly affect women and touch upon the structural aspects of patriarchy and male power. For instance, if a woman does not have economic freedom and is financially dependent on a man, the

[90] Hilary Charlesworth and Christine Chinkin. (n 20), p.143
[91] Ibidem, p.144
[92] Ibidem, p. 291
[93] Ibidem, p.435
[94] Ibidem, p. 435-436

right to vote, although extremely important, will not provide for any substantive changes in her life. If she cannot properly attend school and receive a good education, how would the right to self-determination be truly enjoyed? If a woman is not given the opportunity to work, what good does the right to join trade union do to them? The protection of first-generation rights is significantly inefficient to women without proper regard to the economic, social, and cultural rights circumstances in which they run.[95]

The second generation of rights does not strictly fit in the state/individual division, and is perceived to be applicable in both spheres, public and private, which would, in theory, benefit women, but treaty provisions on the theme have weaker language and implementation methods. The structure of the International Covenant on Economic, Social and Cultural Rights creates the idea that all effective power is within the entity State, but fails to consider that, for most women, the subordination to the State is directly linked to subjection to men.[96]

Lastly, the third generation of rights, the right to development, that, as a group right, focuses on the welfare of the community over individual interests,[97] but also does not take women's realities into account. The Declaration on the Right to Development describes that

> 1.The right to development is an inalienable human right by virtue of which every human person and all peoples are entitled to participate in, contribute to, and enjoy economic, social, cultural and political development, in which all human rights and fundamental freedoms can be fully realized.
> 2.The human right to development also implies the full realization of the right of peoples to self-determination, which includes, subject to the relevant provisions of both International Covenants on Human Rights, the exercise of their inalienable right to full sovereignty over all their natural wealth and resources.[98]

Furthermore, Article 8 of the Declaration on the Right to Development established that women must be actively involved in the development process.[99] Despite this apparent will to bring women into focus, the Declaration fails to address structural problems that prevent women to participate and enjoy the development as described in the instrument. Also, as previously mentioned, the right to self-determination might be in jeopardy when it comes to women.[100]

---

[95] Hilary Charlesworth and Christine Chinkin. (n 20), p.417
[96] Ibidem, p. 440
[97] Ibidem, p. 443
[98] United Nations, Article 1 of the Declaration on the Right to Development, 1986
[99] Ibidem, Article 8
[100] See note 89 above.

Additionally, the Declaration fails to recognise that discrimination against women is a great hurdle to development[101] and that women are often accorded responsibility, or are at least the primary responsible, for domestic work and that such work is not perceived as productive or "actual" work.[102] In fact, women are disproportionally affected by the responsibility for unpaid care and domestic work, and perform around 75% of all unpaid care and domestic work worldwide – equivalent to around 13% of the Gross Domestic Product globally.[103] All this work, however, is not seen as economically important and women are perceived as economically inactive and unproductive,[104] not being, therefore, contributing to development, which privileges work in the public realm, the work performed, in general, by men.

The Declaration, thus, in spite of its neutral language, which actually reinforces the assumption that women's work is less valuable than men by disregarding the structural differences,[105] and apparent inclusion of women, does not consider the gendered aspect of international law and all the systematic barriers women face, including economically, to achieve and participate in the so-called development.

All the analysis made herein is not to say that women should not seek to have their rights fulfilled and properly implemented, and by no means to infer that women are not subject of rights. On the contrary, feminists' movements have fought tremendously to have women recognised as such and women are entitled to have their rights respected and protected. However, it is important to recognise that patriarchy and the power structures in which our society is embedded prevent for international law and, consequently, the creation of rights to be thought considering women's realities and interests.

2.2.4. The impact of cultural relativism

Since the adoption of the Universal Declaration of Human Rights, the universality aspect has been challenged by cultural relativism.[106] Relativist theories mainly challenges the fact that human rights were perceived considering Western ideas of the world, not properly regarding the perception from

[101] Hilary Charlesworth and Christine Chinkin. (n 20), p. 445
[102] See note 76 above.
[103] UN Women, DISCUSSION PAPER - Unpaid Care and Domestic Work: Issues and Suggestions for Viet Nam, 2016, p. 8
[104] Hilary Charlesworth and Christine Chinkin. (n 20), p. 445
[105] Ibidem, p. 446
[106] Walter Kälin and Jörg Künzli: The Law of International Human Rights Protection (2019) p 18

other societies. This criticism, especially regarding cultural relativism, even though of extreme importance, is being frequently misused to reinforce norms and patterns that are harmful to women and girls and to maintain structures of power that silences female voices. Groups are using a legitimate argument for illegitimate purposes, by shielding themselves behind cultural relativism to violate women's and girls' rights.

Those who rest in the Universalist theories may consider two ideas: (i) Legal Positivism, which, in summary, recognises that the rights arise from codification. Thus, as regard to human rights, as all State members of the UN have adopted the UN Charter, they are, therefore, bound to its principles, including respect for human rights and (ii) Natural Law, in contrast, reinforces the idea that human rights are inherent to human beings regardless of the legal system or codification, and the basis for being so is human dignity.[107]

The Relativist Theories, as opposed to the Universal understanding, encompasses three main theories: (i) Historical, which indicates that rights arise differently from each society due to its various historical perspectives, therefore, cannot be deemed the same for every community, (ii) Cultural, which defends that the universal idea of human rights are based on Western perspective of rights, community and individual, and (iii) Cognitive, which argue the validity of a universal standard to establish what human dignity is.[108] There are also alternative views regarding Relativist Theories, for example, the "overlapping consensus" theory, which is based on the consensus of a certain community and, as defended by John Rawls, a minimum consensus is enough in order for a right to be recognised by a certain society, allowing for "specific cultural traditions" to be "capable of endorsing specific human rights norms from their own perspective, whatever the grounds may be".[109]

Neither of these mainstream theories, though, questions the gendered aspects of human rights, which, despite being of ultimate importance and having a great role on establishing basic grounds for dignity and humanity, values men over women.[110]

[107] Walter Kälin and Jörg Künzli, (n 106), p. 18-23
[108] Ibidem, p. 23-27
[109] Ibidem, p. 25
[110] Hilary Charlesworth and Christine Chinkin, (n 20), pp. 417-418

Those who advocate for cultural relativism assert that human rights clash with particular cultural values, and that the latter should prevail in case of dispute.[111] The irony rests in the fact that the "culture" argument is often used on matters questioning women's rights more than any other area,[112] which makes one wonder: does the argument used truly reflects culture or is it just another form of ensuring patriarchal values and male power masked as something legitimate such as culture to support their claim while violating women's and girls' rights? As stressed by many feminists, it is pressing to analyse the gender of the "cultures" that benefits from relativism theories.[113] The use of "culture" to question the validity of (women's) rights has intensified as the scope of international human rights norms becomes wider, both nationally and internationally.[114]

Cultures are also socially constructed and, as such, they too are subject to male histories and traditions.[115] As argued by Arati Rao "the notion of culture favoured by international actors must be unmasked for what it is: a falsely rigid, ahistorical, selectively chosen set of self-justificatory texts and practices whose patent partiality raises the question of exactly whose interests are being served and who comes out on top".[116]

To use culture relativism as an excuse to justify violations of women's and girls' rights is to undermine and delegitimise the importance and influence that (actual) culture has on influencing societies structures and international law itself.

2.2.5. The issue of women presence and representation in International Law

One of the major areas of focus regarding the protection of women's rights has been connected to the right to equal treatment and non-discrimination,[117] being the topic treated extensively in international instruments. The UN Charter, the ICCPR, the CEDAW, and numerous other treaties, resolutions and declarations assert this idea and sought to afford women non-discriminatory treatment and recognise them as right barriers that should be treated with dignity and have the right to occupy spaces. However, merely having these provisions on paper has proven not to be enough.

[111] Hilary Charlesworth and Christine Chinkin, (n 20), p. 422
[112] Ibidem
[113] Ibidem, p. 423
[114] Ibidem
[115] Hilary Charlesworth (n 39), p. 11
[116] Arati Rao, 1995, *apud* Hilary Charlesworth (n 39), p. 11
[117] Hilary Charlesworth and Christine Chinkin (n 20), p. 412

Society still lacks women occupying spaces of power and discrimination has shown to have several forms of expression, as will be further debated.

A great problem faced within IHRL is that it treats sexual and gender equality as equal treatment,[118] which is, by no means, the same thing. It could never be, as the starting point for women is different than men's and women are at the margins of international law. Saying that equality means equal treatment within a gendered system just reinforces male perspectives, as it was designed to address male experiences.[119] A clear demonstration of power imbalance is the absence of women in the international arena.[120]Sexual and gender equality should, thus, be treated as equitable treatment and recognise the need of certain differential treatments to be afforded in order to ensure women proper participation and enjoyment of rights. The failure to guarantee gender equality in all its forms, for example as ensuring women participation in politics, or as subject of rights, is a form of discrimination.

The idea that sexual and gender equality means equal treatment was challenged by the Committee on the Elimination of Discrimination against Women. For the Committee, discrimination is understood to:

> imply any distinction, exclusion, restriction or preference which is based on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status, and which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise by all persons, on an equal footing, of all rights and freedoms [121]

The Committee has also explicitly stated that equality does not mean equal treatment and that States might be required to take affirmative actions to allow the proper enjoyment of rights. Hence, not all differential treatment will constitute discrimination. If such differential treatment is done in a reasonable way to allow for the provisions of CEDAW to be fulfilled and in order to tackle the systemic and structural imbalances, they shall not constitute discrimination.[122] In this sense, "equality is not freedom to be treated without regard to sex but freedom from systematic subordination because of sex".[123]

[118] Hilary Charlesworth and Christine Chinkin (n 20), p. 430
[119] Ibidem, p. 144
[120] Ibidem, p. 143
[121] Ibidem, pp. 413-414
[122] Ibidem, p. 414
[123] Hilary Charlesworth, Christine Chinkin and Shelley Wright (n 31), p.632

The absence of women in the very formulation of international law instruments and the need for affirmative actions to ensure women's participation in politics, diplomatic missions, etc is not purely a theoretical analysis. For instance, during the conferences to discuss the Geneva Conventions and its protocols (the main humanitarian law treaties that regulates armed conflicts and attempt to restrict its consequences), even though it was not possible to find the list of diplomats present at the time, with exception from the 2005 conference, while examining pictures and paintings from the 1864, 1929 and 1949 Conferences it is not possible to identify any women present, whereas on pictures from the 1974-1977 and on the list of representative presents on the 2005 Conferences, some women can be identified within a majority of men.[124] The lack of women presence in the discussions can indicate that women's point of view were not properly considered while drafting such instruments that still regulates International Humanitarian Law (IHL).

Women's representation is questioned even when it is directly connected to issues and rights regarding themselves. The Committee on the Elimination of Discrimination against Women, vastly composed by women, was criticized by the UN Economic and Social Council (ECOSOC) due to its "disproportionate" representation of women, a comment that was never made when committees were disproportionately represented by men.[125]

The UN Charter, on its Article 8, addresses the problem of female presence on its bodies and staff by asserting that "The United Nations shall place no restrictions on the eligibility of men and women to participate in any capacity and under conditions of equality in its principal and subsidiary organs".[126] The importance of this inclusion was not, however, unanimously recognised, and some delegates stated that the provision was "absurd" and "self-evident" on the Charter, but, due to the hard work of the Committee of Women's Organizations, the article was added, even though it was written in the negative form and not in a way that obligates States to appoint women.[127]

[124] Pictures available at: https://www.icrc.org/en/doc/resources/documents/misc/57jnvt.htm, https://avarchives.icrc.org/Picture/7278 , https://blogs.icrc.org/cross-files/40th-anniversary-of-the-1977-additional-protocols/, https://blogs.icrc.org/law-and-policy/2022/02/17/history-geneva-conventions/ . List of representatives present at the 2005 Conference available at: https://library.icrc.org/library/docs/CD/CD_2005_DOCUMENTS_OFFICIELS_ENG.pdf, p.92- 132, all accessed October 2023.
[125] Hilary Charlesworth, Christine Chinkin and Shelley Wright (n 31), p.624
[126] Article 8 of the Charter of the United Nations
[127] Hilary Charlesworth, Christine Chinkin and Shelley Wright (n 31), p.622

Until today the presence of women in the high levels of the UN can be questioned: in addition to the fact that the UN has never had a woman as Secretary General,[128] out of all member States that maintain permanent missions to the UN in New York, in January 2023, only 41 permanent State representatives ("Ambassadors") were women.[129] Furthermore, regarding UN staff members, as of December 31, 2021, although on entry level positions it is possible to notice a majority of women (i.e. 66% of P-1 and 59% of P-2), the higher the position, the lower the presence of female staff (i.e. 42% of D-1 level, 37% of D-2 level and 47% of UG level - which encompasses several positions above D-2 level).[130]

If the structure of international courts is analysed, the same problem can be verified. The International Court of Justice (ICJ) elected its first women judge only in 1995, Judge Rosalyn Higgins,[131] and, as pointed out by Nienke Grossman in her research, in mid-2015, on nine of 12 international courts, women represented 20% or less of the judges positions.[132] She went on to investigate if States with higher number of women lawyers had similar percentages of women judges appointed to international courts, and the answer was "no".

Using France, United Kingdom, Russia and China as an example she concluded that: despite the fact that around 50% of French lawyers were estimated to be women, no French women has served, up to that point, as permanent judge for neither the European Court of Justice, the ICJ, European Court of Human Rights (ECtHR), ICC, ICTR, ICTY, or International Tribunal for the Law of the Sea, while 25 men had. As for the United Kingdom, in which 50% of the lawyers were also women, 24 men and one woman were appointed as judges to the above-mentioned organs. In the case of Russia, that also had 50% of women lawyers, no women had been appointed to any of the courts. Finally, with respect to China, where about one-fifth of lawyers were women, it had appointed one women to serve to each the World Trade Organization Appellate Body and ICJ, and seven men to the ICJ, ICTR, and ICTY.[133] Similarly, the absence of proper women presence within international courts allows us to question the very legitimacy of the decision making and the integrity of the selection process.[134]

---

[128] United Nations, Former Secretaries-General <https://www.un.org/sg/en/content/former-secretaries-general> accessed October 2023
[129] Protocol and Liaison Service, Permanent Missions to the United Nations, No 311, January, 2023, ST/PLS/SER.A/311
[130] UN Women, REPRESENTATION OF WOMEN IN THE UN SYSTEM, 2022
[131] Hilary Charlesworth and Christine Chinkin (n 20), p. 192
[132] Nienke Grossman, Notes and Comments - Achieving Sex-Representative International Court Benches, *American Journal of International Law*, (2016), p. 82
[133] Ibidem, p. 85
[134] Ibidem, p. 88

These were just a few examples of the underrepresentation of women in the international arena that clearly amount to discriminatory treatment. Women should be assorted the same positions to represent their interests; women are part of the society with their own views and are also impacted by laws and policies. As a consequence of the underrepresentation, issues faced by women are not addressed comprehensively.[135] Representation and presence are not necessarily the same thing, as indicated by Anne Phillips "it is only when there are mechanisms through which women can formulate their own policies or interests that we can really talk of their "representation"",[136] but increasing presence is a good way to achieve proper representation.

In this scenario it is important, to distinguish between formal and substantive equality. Formal equality stands for the "equality on paper", thus the suspension of discriminatory laws and policies, for instance, by assuring in instruments that women and men are "the same",[137] which, even though is important, does not solve the problem, as it was demonstrated above. Various major instruments recognise that women shall be treated equally and be accorded the chance to have the same opportunities, but the practice shows otherwise. Substantive equality, in turn, recognises the structural problems and considers the disadvantages suffered by a group and the damaging consequences of such issues.[138] Substantive equality acknowledges that differential treatment is needed to allow certain people to enjoy their rights, it can even be called transformative equality that challenges the dominant system and seek to transform its harmful structure. Therefore, it is not enough to ensure equality on paper, actual polices and changes are necessary to make structural transformation. According to Sandra Fredman, there are four dimensions of equality that uphold transformative equality:

> first, the redress of disadvantage, which may require redistributive measures. Second, recognition of the prejudice, stereotyping and violence that are caused by inequality. A third aspect of equality is ensuring the participation of people in decisions that affect them. The achievement of structural or transformative change is the fourth dimension of equality. This involves, for example, understanding the way that reproduction and other markers of gender interact with access to the public world of work and recognised 'productivity' and changing patterns of caregiving.[139]

---

[135] Karen Celis, Substantive Representation of Women (and improving it). What is and should it be about?, *Annual meeting of the American Political Science Association Panel 31-18 ' The Construction of Gendered Interests'*, (2008), p. 9

[136] Anne Phillips, 1991 *apud* [136] Hilary Charlesworth and Christine Chinkin. (n 20), p. 374

[137] Sandra Fredman, Substantive equality revisited, *International Journal of Constitutional Law, Volume 14, Issue 3,* (2016), p. 713

[138] Ibidem, p. 728-729

[139] Hilary Charlesworth and Christine Chinkin (n 20), p. 32

The fact that women have been excluded from most areas of international law development and the discriminatory treatment is an expression of a larger problem: the absence of real power, which is in itself a human rights issue,[140] that led to women occupying inferior positions,[141] and allows to question the very validity of international law universality.[142]

It is important to stress that women's interests, needs, and issues are not the same, they are as plural as it can be, however, all women face the same problem of power imbalance and live within a patriarchy society. In this sense, having women in the debate would allow those perspectives to emerge, events to be interpreted in a different way and dominant groups to, at least, deal with perspectives outside their own way of thinking.[143] For Lena Wängnerud, representing women comprises three aspects: "1) the recognition of women as a social category; 2) the recognition of a power imbalance between men and women; 3) the wish to implement a policy that increases the autonomy of female citizens".[144]

One of the problems of having international institutions composed mostly by man is that "Long-term domination of all bodies wielding political power nationally and internationally means that issues traditionally of concern to men become seen as general human concerns, while "women's concerns" are relegated to a special, limited category".[145] This is not to say, however, that the solution would be simply to "add" more women to the equation as, in this case, they would still operate in a male system,[146] built upon the biased structures described earlier, which demands deeper changes in the system. Although it is an important step, further changes must be made, but it is fair to say that increasing female presence and representation is a good way to start, especially considering that the lack of women is not just statistical, it leads to the reinforcement of gendered international law and the distinction of public and private.[147]

[140] Hilary Charlesworth (n 23), p.8
[141] Hilary Charlesworth and Christine Chinkin (n 20), p. 431
[142] Hilary Charlesworth, Christine Chinkin and Shelley Wright (n 31), p.616
[143] Karen Celis (n 135), p. 5-6
[144] Lena Wängnerud, 2000 *apud* Karen Celis (n 135), p. 9
[145] Hilary Charlesworth, Christine Chinkin and Shelley Wright (n 31), p.625
[146] Hilary Charlesworth and Christine Chinkin (n 20), p. 433
[147] Hilary Charlesworth, (n 23), p.13

2.2.6. A (slight) shift on the perception of women in International Law: The Women, Peace, and Security Agenda

The Women, Peace, and Security Agenda made its debut in the Security Council in 2000 with Resolution 1325, the first of several resolutions adopted under the Agenda. This Agenda, in general terms, focuses on the participation of women in armed conflicts having four main pillars: (i) women's participation in all levels of decision-making in conflict related matters, (ii) protection of women and girls from SGBV during conflict and crisis situations, (iii) prevention of violence against women and girls during conflict and (iv) relief and recovery measures in times of crisis established considering a gender specific approach.[148]

The implementation of the Agenda settled the arrival of gender mainstreaming in the organ and was the result of great efforts of feminists' movements and NGOs.[149] Resolution 1325 was groundbreaking in many levels: first, by recognising (some) feminist's agendas after long years of being ignored, it also highlighted the importance of women being part of the decision-making process as regard to conflict prevention and resolution[150] and of supporting women participation on places usually occupied by men. Additionally, it recognised the seriousness of sexual violence and demystified the idea that it is a "normal" demonstration of masculinity but instead is the result of social and cultural norms that must be urgently modified.[151]

In general, the Resolutions[152] connected to the Women, Peace and Security Agenda provided a shift in the perception of women solely as victims. It recognised women as subjects of rights, full of autonomy, that should be present in all instances of power on conflict prevention, during conflict and post conflict, and, to some extent, tried to deal with structural aspects that prevent women to do so.[153] It extensively discussed sexual violence, as will be further shown on Section 3, recognising its use as a tactic of war that can worsen armed conflicts and as a tactic of terrorism, stressing the

[148] The Four Pillars of United Nations Security Council Resolution 1325. <https://www.un.org/shestandsforpeace/content/four-pillars-united-nations-security-council-resolution-1325 > accessed November 2023
[149] Dianne Otto, Power and Danger: Feminist Engagement with International Law Through the UN Security Council, *Australian Feminist Law Journal, Volume 32,* (2010), p. 100
[150] Karen Engle, Vasuki Nesiah and Dianne Otto (n 88), pp.5-6
[151] Dianne Otto, (n 149), p. 100
[152] Security Council's Resolutions 1325 (2000), 1889 (2009), 2122 (2013), 2242 (2015), 2493 (2019), 1820 (2008), 1888 (2009), 1960 (2010), 2106 (2013) and 2467 (2019).
[153] Dianne Otto, (n 149), p. 101-103

need to end impunity.[154] These resolutions also impersonated the creation of several new roles, including the UN Secretary General's Special Representative on Sexual Violence in Armed Conflict.[155]

Despite the great and undeniable value of the resolutions from the Women, Peace and Security Agenda, it is important to critically analyse them. The first important point is that these resolutions serve institutional purposes and only contemplate specific feminists' ideas,[156] especially disregarding anti-war feminists' beliefs.[157] Another important absence is the lack of accountability mechanisms and, in some resolutions, the re-emerge of the fragile women stereotype that needs protection.[158]

A series of other downsides regarding the Agenda can be found. Notwithstanding the formal recognition of, for instance, the need of increasing women participation and ending impunity regarding sexual violence, no actual change was perceived so far; the Agenda, even though it has great focus on sexual violence, does not properly address the inequalities that leads to such violence. Although it focuses on women participation, it does not delve into women's agency. Women were also not involved in the definitions of the elements of terrorism, strategies to counter it, and in the discussions on how it affects women's lives, albeit the fact that they were called to fight against it. Certain aspects of the Agenda also simplifies feminists' ideas[159] and use gender as a synonym of women.[160]

The Women, Peace and Security Agenda represents progress on addressing women's rights, and it also holds a symbolic importance by bringing such issues to the discussion within the Security Council, the main international organ regarding peace and security. However, the efforts cannot be restricted to paper; the resolutions need to be properly implemented, must not reinforce stereotypes, should address the structural problems regarding women's rights and participation and the Security Council ought to use its power to ensure that States implement the Agenda.

[154] Hilary Charlesworth and Christine Chinkin. (n 20), p. 44
[155] Ibidem
[156] Dianne Otto (n 149), p. 106
[157] Karen Engle, Vasuki Nesiah and Dianne Otto (n 88), p. 6
[158] Dianne Otto (n 149), p. 106
[159] Hilary Charlesworth and Christine Chinkin. (n 20), pp. 45-47
[160] See note 55 above.

2.3. Final remarks

Feminism is not simply a word; it carries with it values and conceptions that aim to achieve transformative equality.[161] One of the problems is, however, that with the system as it is, it seems that very little pieces of formal equality are given and the ones on power are satisfied. This demonstrates the urgent need of bringing women to the table,[162] and not just to sit there because today people are demanding their presence, but because women deserve to be there as much as any men and to have their voices heard and recognised. We need representation and not mere presence, although presence seems to be the first step. The difficulties of ensuring actual representation that would entail change within the system also poses a challenge to the reconstruction aspect, as it makes it harder for a "new" international law to emerge from inside the system.

A feminist analysis of international law is needed so it will be possible to see its gendered aspect in a deeper way, not only scratching the surface, but calling for structural change of a system that clearly has only one voice and marginalise women's. A system that ignores half of world's population cannot be truly universal, neutral nor objective.

The aim of this chapter was to demonstrate that international law is a gendered and sexist system, full of biases that does not properly consider women's existence, needs and narratives. On the contrary, its patriarchal structure allows for women to be constantly marginalised and invisibilised. This assumption allows this work to have such theory as a premise to investigate its main research question: *if the international law system were not sexist, would it be possible to reach a common gender sensitive international definition of rape, and would the prohibition of rape have what it takes to be considered jus cogens per se?*. The following chapters will then examine rape itself and its prohibition under international law, explore what constitutes rape in the international fora and, finally, analyse *jus cogens* rights, how they are established, the occasions when the prohibition of rape is indirectly considered as such, and if it fulfils all the legal requirements to be considered *jus cogens* by itself.

[161] Hilary Charlesworth and Christine Chinkin. (n 20), p. 32
[162] Ibidem, p. 55

3. Rape in International Law

3.1. Background

In order to consistently analyse the prohibition of rape in international law, the treatment given to rape victims and survivors, and to better understand the seriousness of the crime, it is imperative to examine how rape has been condemned internationally. The international community has united itself to express its reprehension towards this horrible crime, nonetheless, even though the prohibition of rape is treated extensively in human rights instruments and under domestic law, it is when assessing armed conflict situations that this crime gathers widespread attention from international tribunals and IHL.

Considering the rules of international law, States are the ones that bear the main responsibility to guarantee the protection, fulfilment and respect of human rights and humanitarian law to those under their jurisdiction. Therefore, international organs, such as the International Criminal Court (ICC), Inter-American Court of Human Rights (IACtHR), ECtHR, African Court on Human and Peoples' Rights (ACHPR), the Human Rights Council (HRC), etc, have subsidiary jurisdiction when an international norm is violated. This means that such organs can only be requested to solve a certain issue or prosecuting a crime when a State is unable or unwilling to do so or in case of systematic violation by a given State. This determination, however, does not prevent international actors from discussing the issue and creating norms around it, which, consequently, must be respected and upheld by States.

In this scenario, this chapter focuses initially on hard and soft law provisions concerning IHRL and IHL and then on CIL from both IHRL and IHL perspective, by examining the most important provisions in each area regarding the prohibition of rape, whether directly or indirectly. Customary International Law can be understood to encompass both IHRL and IHL, which would allow for CIL to be addressed together with each of these areas. However, for the purpose of this work it is important to discuss these spheres separately to emphasise the wideness of the prohibition of rape, which will further enhance the final argument of this thesis. In addition, this chapter will briefly investigate the historical background behind such norms, which will serve as further examples of the biases of international law described in the previous chapter.

3.2. Rape in International Humanitarian Law

According to the International Committee of the Red Cross (ICRC), IHL, also known as Law of War, Law of Armed Conflict, or "*jus in belum*, is the set of rules which seek, for humanitarian reasons, to limit the effects of armed conflict"[163] aimed to protect the ones who are not, or no longer, taking part in the hostilities and "restricts the means and methods of warfare".[164] IHL is, therefore, applicable mostly in situations of armed conflict or situations that have arisen because of it, while IHRL applies more often in peacetime, but does not cease to apply during armed conflicts. Rape has been extensively used as a means of war throughout time, amounting to unimaginable suffering and has been subject to numerous provisions under IHL.

The perpetration of sexual violence is widely understood to exacerbate the armed conflict and to prevent peace discussions to occur or agreements to be implemented.[165] It can be used as a tactic or method of war, including as means to displace persons, being systematically committed particularly against civilians or those not taking part in the hostilities, by State or non-State actors, causing extreme fear among the population.

The reasons for using sexual violence as such may vary, but it can be summarized as to exercise control: whether used as means to, using terror, control the population, dominate a certain territory or natural resources, or to exercise control over reproductive autonomy, etc. It is also used to punish those who are believed to support the opponent, or as pure humiliation tactic. Likewise, it can be used as means to destroy the social structure existing in a certain society.[166] Conflict Related Sexual Violence (CRSV), understood as sexual violence perpetrated in the context of or linked to armed conflicts, whether IAC or NIAC, can also be gender related.[167] In these situations women and girls

[163] International Committee of Red Cross, *What is International Humanitarian Law?*, 2004, p. 1
[164] Ibidem
[165] See, for instance, Security Council Resolution 2106(2013) - S/RES/2106 (2013), p.2
[166] United Nations, Handbook for United Nations Field Missions on Preventing and Responding to Conflict-Related Sexual Violence, 2020, p.11
[167]Ibidem, p.5. Also, the United Nations, by the Secretary-General report S/2019/280, para 4, defines CRSV as: "The term "conflict-related sexual violence" refers to rape, sexual slavery, forced prostitution, forced pregnancy, forced abortion, enforced sterilization, forced marriage and any other form of sexual violence of comparable gravity perpetrated against women, men, girls or boys that is directly or indirectly linked to a conflict. That link may be evident in the profile of the perpetrator, who is often affiliated with a State or non-State armed group, which includes terrorist entities; the profile of the victim, who is frequently an actual or perceived member of a political, ethnic or religious minority group or targeted on the basis of actual or perceived sexual orientation or gender identity; the climate of impunity, which is generally associated with State collapse, cross-border consequences such as displacement or trafficking, and/or violations of a ceasefire agreement. The term also encompasses trafficking in persons for the purpose of sexual violence or exploitation, when committed in situations of conflict".

are, once again, especially affected, particularly due to factors related to gender inequality and discrimination, the fact that they are frequently unaccompanied, are usually unarmed and are seen as symbols of purity and chastity in many cultures, making an attack on them a direct attack in a certain society structure and values.[168]

By limiting the means and methods of warfare, IHL prohibits every means and method that

> fail to discriminate between those taking part in the fighting and those, such as civilians, who are not, the purpose being to protect the civilian population, individual civilians and civilian property; cause superfluous injury or unnecessary suffering; cause severe or long-term damage to the environment.[169]

In this context, simply by analysing the general prohibition under IHL, the use of rape and other kinds of sexual violence as means of war would, logically, be automatically prohibited under humanitarian law, since it notoriously causes superfluous injury and unnecessary suffering. Nonetheless, the prohibition of rape does not rest solely in this general provision.

When discussing IHL, the main provisions nowadays[170] are prescribed within the four Geneva Conventions of 1949 and its Additional Protocols of 1977,[171] which almost every State has ratified, and is, therefore, bound to them. The Rome Statute is also an important treaty connected to international crimes, which, among other aspects, created the ICC and was also ratified by numerous States.

Historically, humankind has always been involved in conflicts, which has led to the necessity of creating certain principles and customs to regulate warfare, but it was only in the 19th century that

---

[168] United Nations (n 166)
[169] International Committee of Red Cross (n 163), p. 2
[170] The Geneva Conventions and its Protocols are not the only instruments that bring together IHL provisions, even though they are the ones that mainly touch upon rape and other types of sexual violence. Other treaties also bring up IHL, especially regarding the use of certain weapons, such as the 1954 Convention for the Protection of Cultural Property in the Event of Armed Conflict and its two protocols; the 1972 Biological Weapon Convention; the 1980 Conventional Weapons Convention and its five protocols; the 1993 Chemical Weapon Convention; the 1997 Ottawa Convention on anti-personnel mines and the 2000 Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict. In addition, another set of important instruments regarding Law of War are the Hague Conventions, however, since these agreements focus more on the means and methods of warfare, instead of treatment and protection of individuals, they will not be the object of analysis here, which in no way diminishes the importance of such instruments for international law.
[171] The First (the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field), Second (Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea), Third (Treatment of Prisoners of War) and Fourth (Protection of Civilian Persons in Time of War) Geneva Conventions were adopted in 1949, while the First (Protection of Victims of International Armed Conflicts) and Second (Protection of Victims of Non-International Armed Conflicts) Additional Protocol were adopted in 1977 and the Third in 2005 (Adoption of an Additional Distinctive Emblem).

the codification of IHL began,[172] motivated by Henry Dunant, a businessman who witnessed the horrors of the Solferino battle while attending a meeting with Napoleon III. He had the innovative idea of providing universal humanitarian relief for those wounded in the battlefield.[173]

The Committee of Five, that further became the ICRC, was established in 1863 to work on Dunant's idea, and was later joined in 1864 by 16 nations to negotiate an agreement on the topic, originating the first Geneva Convention, with 10 articles.[174] This first convention focused on the amelioration of the condition of the wounded in armies in the field, which was followed by diplomatic conferences to clarify and revise its provisions (1868, 1906, 1929, 1949, 1974-1977 and 2005).[175] The primary concern of States was, thus, for the combatants injured during armed conflicts. The provisions around civilians came after, including with the Additional Protocols, which incorporated some provisions regarding the prohibitions of rape.

After the horrors of World War II, the international community felt the need to strengthen the grounds of armed conflicts to prevent similar tragedies from happening, updating, and expanding the existing rules, which enhanced the discussions around the Geneva Conventions as we know today and served as an incentive for States to ratify them. Hence, the Geneva Conventions are divided as follows: (a) the First Genevan Convention focuses on the protection of the soldiers who are wounded and sick on land, (b) the Second Geneva Convention protects injured, sick and shipwrecked military personnel at sea, (c) the Third Geneva Convention focuses on prisoners of war, (d) the Fourth Geneva Convention seeks to protect civilians, (e) Additional Protocol I sought to protect victims of IAC, (f) Additional Protocol II protects victims of NIAC and (g) Additional Protocol III discusses the ICRC distinctive emblem. Almost all those instruments discuss the prohibition of rape, whether directly or indirectly.

Considering IAC, the prohibition of rape can be found in the First and the Second Geneva Conventions, in their Article 12, and in the Third Geneva Convention, in its Article 13, which provides for a general obligation to treat persons humanely.[176] The Fourth Geneva Convention, in

[172] International Committee of Red Cross (n 163), p. 1
[173] American Red Cross, Summary of the Geneva Conventions of 1949 and Their Additional Protocols, 2011, p.1
[174] Ibidem, p.1
[175] International Committee of Red Cross, Diplomatic Conferences for the adoption of the Geneva Conventions and their Additional Protocols <https://blogs.icrc.org/cross-files/diplomatic-conferences/> accessed October 2023
[176] Article 12 of the Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field of 12 August 1949 and the Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea of 12 August 1949 and Article 13 of the Geneva Convention Relative to the Treatment of Prisoners of War of 12 August 1949

turn, in addition to the general provision obliging humane treatment, provides, in its Article 27, that women "shall be especially protected against any attack on their honour", particularly against rape.[177] Regarding this particular provision, even though the specific protection against rape is of extreme importance, it is imperative to accentuate the fact that rape is being considered as a violation of women's honour. Rape is not being, for instance, treated as a form of inhumane treatment or other violations, including to life, freedom, dignity, physical and psychological integrity, reproductive freedom, privacy, to name a few. This is an explicit reflection of society in 1949, but it does not change the fact that it is not properly considering women themselves and the impacts of such violence in women's lives. In a different perspective, Additional Protocol I, under the section that provides for specific provisions towards women and children, in its Article 76, establishes that "Women shall be the object of special respect and shall be protected in particular against rape, forced prostitution and any other form of indecent assault".[178]

Notwithstanding the fact that rape is a crime in both NIAC and IAC, the applicable provisions are not necessarily the same. While there is wide-ranging treaty law regulating IAC, IHL provisions applicable specifically to NIACs are less extensive, being mainly the Common Article Three of the Geneva Conventions, the Additional Protocol II to the Geneva Conventions and CIL, which is applicable in both IAC and NIAC and will be further discussed in the following sections. The fact that there are fewer provisions, however, does not exclude their importance nor their binding character, not even when discussing the responsibility of non-State armed groups in armed conflicts that may eventually have control over a certain territory, as it is understood that, in these situations, such armed groups would be obliged to comply with IHL.[179]

The Common Article Three of the Geneva Conventions provides for general obligations that should be respected in case of armed conflicts of a non-international character. Those who are not taking part in the hostilities must be treated humanely without discrimination, forbidding violence against life, cruel and degrading treatment, torture and attacks of one's dignity.[180] The Additional Protocol II, in turn, specifically prohibits rape in its Article 4.[181]

[177] Article 27 of Geneva Convention Relative to The Protection of Civilian Persons in Time Of War of 12 August 1949
[178] Article 76 of 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
[179] International Committee of the Red Cross. International Humanitarian Law A Comprehensive Introduction, 2019, p. 215
[180] Article 3 of the Geneva Conventions
[181] Article 4 of 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

Despite being extensively treated under IHL, rape is not explicitly listed as a grave breach (the most severe violations in IAC) by the Geneva Conventions, namely: "willful killing, torture or inhuman treatment, including biological experiments, willfully causing great suffering or serious injury to body or health, extensive destruction and appropriation of property not justified by military necessity and carried out unlawfully and wantonly, compelling a prisoner of war or a civilian to serve in the forces of a hostile power, willfully depriving a prisoner of war or a civilian of the rights of fair and regular trial, unlawful deportation or transfer or unlawful confinement of a protected person, and taking civilian hostages",[182] which would entail universal jurisdiction. However, the ICRC understood that rape is indirectly a grave breach, as it encompasses the idea of "willfully causing great suffering or serious injury to body or health".[183] Further, the Rome Statute has also established that rape is a grave breach of the Geneva Conventions.[184]

Moreover, the Geneva Conventions and their protocols are not the sole instruments that discuss the prohibition of rape under IHL. Whether in NIAC or IAC, sexual violence, including, but not limited to, rape can amount to crime against humanity, war crime and/or elements of genocide, among other crimes, being forbidden by the Rome Statute under the sections of crimes against humanity and war crimes. [185] In addition, rape and sexual violence are also recognised as causing "serious bodily or mental harm" when connected to genocide.[186] It is strongly advisable that States' legislation provide for the prohibition of rape on such terms as well, as one strategy to reduce impunity.

In order for sexual violence including rape to be characterised as a war crime, it shall be "committed in the context of, and associated with, an international or non-international armed conflict" against civilians or people who are not involved in hostilities and the "perpetrator was aware of the factual circumstances that established the situation as one of armed conflict".[187] As for crimes against humanity, rape may be considered as such "when committed in the context of a widespread or systematic attack directed against a civilian population, with the perpetrator's knowledge of the attack", it can also be "part of either a government policy or a widespread practice of atrocities committed, tolerated, or condoned by a government, de facto authority, or organized armed

[182] Sherrie L. Russell-Brown. Rape as an Act of Genocide, *Berkeley Journal of International Law, v. 21,* (2002), pp. 357-358
[183] Ibidem, p. 358
[184] Rome Statute, Article 8 (2)(b)(xxii)
[185] Rome Statute, Article 7 (1) (g) and 8 (2) (b) (xxii)-1
[186] Elements of Crimes of the Rome Statute, Article 6(b)(1) together with article 6(b)(1) footnote 3
[187] United Nations, (n 167), p. 22

group".[188] It is important to mention that in this case sexual violence and/or rape do not necessarily need to occur during an armed conflict for a crime against humanity to be characterised, but it is known that the occurrence of these crimes increases in the period before the conflict, during the conflict and in the post-conflict.[189] Lastly, in order to be perceived as an element of genocide, sexual violence and/or rape must be committed with the intent to "destroy, in whole or in part, a national, ethnical, racial or religious group".[190]

The widespread occurrence of sexual violence, including rape, in armed conflicts, the structural inequalities and discrimination faced by women and the fact that sexual violence can exacerbate armed conflicts and hinder the restauration of peace has caught the attention of several other actors in different occasions. For instance, the Beijing Declaration and Platform for Action, that will be further discussed herein, recognised, back in 1995, that rape was being systematically used in armed conflicts[191] and the UN Security Council, has, to this date,[192] already issued 10 resolutions discussing the theme in connection to the Women, Peace and Security Agenda, with the aim to expand women's participation on peace and security initiatives and strategies as means to reduce, not only sexual violence, but also the occurrence of armed conflict itself, along with improve the situation of women and girls in armed conflict,[193] as mentioned in the previous chapter.

One important factor to consider while discussing the Security Council's resolutions is the fact that, when a resolution is issued with regard to the responsibility provided by Chapter VII of the UN Charter, that deals with threats to and breaches of peace and acts of aggression,[194] they are generally applicable and binding to every State, whether a member of the Security Council or not. Despite the valid critics around the resolutions connected to the Agenda, as mentioned in the previous chapter, it is undeniable that they show the importance of this topic to international community and the urgent need to improve progress in the area, which entails the participation of States and non-State actors worldwide.

[188] United Nations, (n 167), p.22
[189] See, for instance, United Nations, (n 167), p.22
[190] Ibidem
[191] Beijing Declaration and Platform for Action (1995), para 11, 114, 131, 135
[192] October 22, 2023
[193] See United Nations Security Council Resolutions: 1325/2000, 1820/2008, 1888/2009, 1889/2009, 1960/2010, 2106/2013, 2242/2015, 2331/2016, 2467/2019 and 2493/2019
[194] UN Charter, Chapter VII

In spite of the prohibitions, rape and SGBV have continuously been used as means of war especially against the civilian population. Even though sexual violence including rape can also be committed against men and boys, women and girls are the most affected, including during armed conflicts. This scenario can be perceived as a reflection of huge gender inequalities and discrimination faced by women throughout the world.[195] An attack on women is also seen as an attack on the enemy party.[196] Those attacks, however, frequently rest unpunished, leaving women and girls in an even greater vulnerable situation, urging for IHL to be properly enforced.

3.3. Rape in International Human Rights

As mentioned, it is generally recognised that IHL is applicable in armed conflict situations, whereas, during peacetime, provisions of IHRL are more commonly applied.[197] However, it is undeniable that these spheres eventually intersect and mutually influence one another. States are the primary responsible to uphold human rights within their jurisdiction and should do so in accordance with the international provisions they are bound to. Within this section, the most notorious international human rights instruments focused on women's protection, especially regarding the prohibition of rape[198] will be examined.

The international community has taken important steps to recognise rape as a violation of human rights, being perceived as such in several spheres, including "the right to bodily integrity, the rights to autonomy and to sexual autonomy, the right to privacy, the right to the highest attainable standard of physical and mental health, women's right to equality before the law and the rights to be free from violence, discrimination, torture and other cruel or inhuman treatment".[199]

One of the most notorious instruments when discussing the protection of women is the CEDAW, from 1979, which, as of 21 February 2024, 189 States were party to, and its Optional Protocol,[200] which 115 States were party,[201] meaning they should enforce the provisions therein and update their

[195] United Nations, (n 167), p.6
[196] ICRC Addressing the Needs of Women Affected by Armed Conflict pp.25-26
[197] Human Rights Law is applicable in both situations, on armed conflict and on peacetime. See, for instance, United Nations, (n 167), p. 20
[198] General Human Rights instruments such as the Universal Declaration of Human Rights, ICCPR, International Covenant on Economic, Social and Cultural Rights, etc are, of course, also applicable when protecting women's and girls' rights, but they will not be further analysed herein, since the focus of this section is to explore instruments that specifically discuss the protection of women and girls.
[199] Report of the Special Rapporteur on violence against women, its causes and consequences, (n 13), para 2
[200] The Optional Protocol establishes the Committee on the Elimination of Discrimination against Women
[201] Information available at: https://indicators.ohchr.org/, accessed 21 February 2024

national legislation to reflect the provisions of the Convention. In that sense "Human rights law has also provided a site for the enforcement of domestic prohibitions on violence against women, in large part through the breakdown of the public/private distinction that had vexed feminism's early relationship to international law".[202] It is comprehendible that assembling such a comprehensive treaty would take time, but it took more than 30 years of work by the UN Commission on the Status of Women for this Convention to be established.[203] The Convention is one piece of a larger agenda to promote equality among women and men and pursue the end of discrimination within the scenario where women are frequently not afforded attention and are subject to various violations of rights.

The CEDAW does not explicitly mentions the words *rape* or *sexual violence* in its text, which does not mean, however, that it does not discuss the protection against these crimes in broader terms. For example, when establishing non-discrimination clauses and women's protection and enjoyment of rights, especially considering that violence against women is often rooted in societal structures that allows women to be perceived in an inferior position towards men.[204] In order to clarify that the CEDAW, in fact, aimed to prohibit rape, the Committee on the Elimination of Discrimination against Women, while acting on its role to interpreted CEDAW, issued General Comment 19, in 1992, which was further updated by General Comment 35, in 2017. The General Comments explicitly described Gender Based Violence and prohibited rape and other kinds of violence that violates women's physical, sexual, and psychological integrity, recommending that States implemented reparation systems to the victims and survivors and ensured that rape was considered crime under national legislation.[205]

With regards to the above-mentioned prohibition, the working group on Gender Based Violence of the UN Human Rights Office of the High Commissioner, published, on August 1, 2023, a report on *Rape & State Party Obligations under CEDAW*,[206] prepared by Marion Bethel.[207] The report

[202] Karen Engle, Vasuki Nesiah and Dianne Otto, (n88), p.5
[203] Convention on the Elimination of All Forms of Discrimination against Women, Introduction, < https://www.ohchr.org/en/instruments-mechanisms/instruments/convention-elimination-all-forms-discrimination-against-women > accessed 21 February 2024
[204] The prohibition of rape can be identified especially in articles 1 to 3 and 5 (a) of CEDAW, General Comment No 19 and 35.
[205] CEDAW GR No. 19 par. 6 / GR No. 35 par.12, 29 and 33
[206] WG on GBV AW of CEDAW, Rape & State Party Obligations under CEDAW, 2023
[207] For the report, Bethel used the definition of rape described at the International Criminal Court, Elements of crimes, which defines rape "as non-consensual [invasion of] the body of a person by conduct resulting in penetration, however slight, of any part of the body of the victim or of the perpetrator with a sexual organ, or of the anal or genital opening of the victim with any object or any other part of the body"(International Criminal Court, Elements of crimes, 2011, pp. 8, 28, 36). This definition will be further debated in the following chapter.

highlights several challenges regarding rape and gender-based violence against women, including the discriminatory patterns that allows gender-based discrimination to perpetuate.

The report emphasises that the "elimination of sexual violence against women and other forms of GBVAW[208] requires addressing the power dynamics between perpetrator and victims, often nurtured by patriarchal attitudes and perceptions about female inferiority, influenced by religion and culture",[209] in addition to the need to address stereotyping, inadequate legislation, which includes the lack of a proper definition of rape that is often described as a crime against morality, causing more burden to the victim and enhancing biases, [210] whereas "consent should be the defining element of the crime of rape, and lack of consent should lie at the centre of its definition".[211] The report also stress the necessity of debating impunity, ineffective access to justice, which also encompasses stereotyping in investigations and legal proceedings, the impact of intersectionalities on discrimination and violence, etc. It ends by preparing a set of recommendation based on CEDAW's provisions and jurisprudence aiming to increase the protection of women in several areas, reinforcing the recommendations previously made by the Special Rapporteur on violence against women, its causes, and consequences, in 2021.[212]

Another important treaty on the topic is the Convention on the Rights of the Child of 1989 (CRC), ratified by 196 States,[213] and its additional protocols, especially the Protocol on the Sale of Children, Child Prostitution and Child Pornography, ratified by 178 States,[214] which recognises that girls are at a bigger jeopardy of sexual exploitation. The CRC is focused on protecting children and, in this sense, provides for several clauses regarding sexual abuse and exploitation, demanding States to pursue all means, whether legislative, administrative, social, and educational, national and internationally, to protect children.[215]

---

[208] Gender-Based Violence Against Women
[209] WG on GBV AW of CEDAW, Rape & State Party Obligations under CEDAW, 2023, para 6
[210] WG on GBV AW of CEDAW, Rape & State Party Obligations under CEDAW, 2023, para 7
[211] Ibidem, para 9. Additionally, the idea of consent being essential to the definition of rape is particularly important in times of peace and under domestic law, whereas, as will be further shown, the discussion around consent during an armed conflict is irrelevant.
[212] Report of the Special Rapporteur on violence against women, its causes, and consequences (n 13). The Special Rapporteur recommended, among other things, that: States should criminalise rape and implement a comprehensive definition that encompasses all persons, States should also arrange proper services and support to survivals of rape and ensure proper training to members of the judiciary and law enforcement personnel on international human rights law regarding rape.
[213] See https://indicators.ohchr.org/, accessed 21 February 2024
[214] Ibidem
[215] Convention on the Rights of the Child adopted 20 November 1989, entry into force 2 September 1990, articles 19 and 34 and Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography, adopted 25 May 2000, entry into force 18 January 2002

One other essential document to be discussed herein is the Vienna Declaration and Programme of Action, of 1993, that recognised that States have the human right obligation to end violence against women, stating also that rape and sexual violence perpetrated during armed conflict were, in addition to violations of IHL, also breaches of principles and fundamental provisions of human rights law. This was a groundbreaking approach, considering the fact that IHL is generally understood to be applicable during armed conflicts and human rights law in peacetime. This declaration managed to "connect" both areas of law[216] highlighting the intersectionality and overlap between both "laws", indicating that they are interrelated, and one cannot be analysed regardless of the other, they provide for a complex and interconnected system. The Vienna Declaration also recognised the need of equal status and human rights of women, the special vulnerability of certain minority groups, and the need of a coordinated approach towards ensuring human rights.[217]

In the same line, a document that needs to be mentioned when examining the prohibition of rape and the protection of women's right is the Declaration on the Elimination of Violence against Women of 1993. This short Declaration, with only six articles, is of ultimate importance, since it was the first international instrument that established a definition of violence against women,[218] which included rape and marital rape.[219] In addition, it recognised the urgent need for application of principles such as equality, security, liberty, integrity and dignity towards women and that violence against women constitutes an additional challenge when discussing equality and peace. The Declaration also recognised that States "should not invoke any custom, tradition or religious consideration to avoid their obligations with respect to" eliminating violence against women.[220]

An also important instrument towards the realization of women's rights and the prohibition of rape is the Beijing Declaration and Platform for Action of 1995, which is seen as "the most progressive blueprint ever for advancing women's rights"[221] and the first-time gender mainstreaming was displayed as a global policy objective to be realised in all areas of development.[222] The opening ceremony counted with 17,000 participants and 30,000 activists, followed by a two-week political debate with representatives of 189 governments, while non-governmental activists discussed in

[216] Vienna Declaration and Programme of Action, adopted 25 June 1993, para 38
[217] Vienna Declaration and Programme of Action, 1993
[218] Report of the Special Rapporteur on violence against women, its causes and consequences (n 13), para 22
[219] Declaration on the Elimination of Violence against Women, adopted 20 December 1993, article 2
[220] Ibidem, article 4
[221] The Beijing Platform for Action: inspiration then and now < https://asiapacific.unwomen.org/en/beijing20/about-beijing20#:~:text=An%20unprecedented%2017%2C000%20participants%20and,empowerment%20of%20all%20women%2C%20everywhere.%20t > accessed October 2023
[222] Andrea Bianchi, *International Law Theories*, Oxford University Press, (2016), pp. 197-198

parallel forums.[223] Everyone was focused on discussing gender equality and women's rights. As outcome, several commitments were made, under 12 pressing areas (i.e.: Women and the environment, Women in power and decision-making, The girl child, Women and the economy, Women and poverty, Violence against women, Human rights of women, Education and training of women, Institutional mechanisms for the advancement of women, Women and health, Women and the media, and Women and armed conflict) with the input of governments and civil society, an important combination when designing effective policies.[224]

The Beijing Declaration and Platform for Action led to important progress on ending violence against women, especially rape. In addition to the ones previously mentioned herein,[225] it recognised, for instance, that rape, including marital rape and violence perpetrated or condoned by the State, were a form of violence against women,[226] also perceiving rape as manifestation of violence in the family and the community.[227] The Beijing Declaration also touched upon issues that are still very pressing, such as stereotyping, rape perpetrated within the family and community, lack of proper support for survivors, human trafficking, impunity, insufficient domestic legal provisions, and the strong link to unequal power relations, reinforcing the importance of an intersectional approach towards sexual violence against women and girls.[228] While extensively discussing violence against women and girls, especially rape, the Beijing Declaration also presented a thorough set of recommendations for States and the international community to address violence against women, that goes to alter internal law and promoting public policies considering a gender approach, to cooperation with human rights international organs.

The Vienna Declaration and Programme of Action, the Declaration on the Elimination of Violence against Women and the Beijing Declaration and Platform for Action are not binding instruments according to the rules of international law, however, their importance and vast support by the international community is undeniable. Soft law instruments are powerful tools considering the recognition of rights and to address issues regarding sensitive and pressing matters. These instruments allow for States and civil society to debate and establish provisions focused on ensuring human rights and States, even though not officially bound by those, have an unspoken moral

[223] Beijing Platform for Action (n 221)
[224] Ibidem
[225] See note 191
[226] Beijing Declaration and Platform for Action, para 113
[227] Report of the Special Rapporteur on violence against women, its causes and consequences (n 13), para 23
[228] Beijing Declaration and Platform for Action, para 117, 118, 119, 122

obligation to comply with such provisions in order to maintain a good international and diplomatic relation with each other.

Moving from the international level to the regional level, Inter-American, African, and European systems have also developed important instruments that address women's rights and the prohibition of rape, in addition to provisions from the Organization of Islamic Cooperation (OIC) and the Association of Southeast Asian Nations (ASEAN). The second part of this section will analyse: the Inter-American Convention on the Prevention, Punishment and Eradication of Violence Against Women – "Convention of Belém do Pará", the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, the Council of Europe Convention on preventing and combating violence against women and domestic violence – the "Istanbul Convention", the ASEAN Declaration on Violence against Women and Violence Against Children and the OIC Plan of Action for the Advancement of Women.[229]

The Inter-American Convention on the Prevention, Punishment and Eradication of Violence Against Women of 1994, or "Convention of Belém do Pará", was the first international convention focused on violence against women.[230] In addition to being a precursor on the theme, the Convention of Belém do Pará provided for a broad definition of violence against women, improving the definition given in the Declaration on the Elimination of Violence against Women of 1993, and recognising that such violence, including rape, could also occur within the family and community sphere.[231] It also ensured that every woman has the right to be protected and to fully enjoy all their civil, political, economic, social and cultural rights, having the right to be free from any sort of violence, affirming that any kind of violence against women is regarded as a violation of human rights and fundamental freedoms, calling upon States to adopt proper legislation and policies aimed to protect women. Also, for the first time, States were required to establish mechanisms to protect women's rights and combat violence against women.

The Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa was innovative as it expressly demands States to pass a legislation that makes violence against

[229] Similarly to the analysis of the international instruments, general regional instruments will not be further analysed, since they constitute a broader approach towards human rights, it does not, however, diminishes its importance when it comes to ensuring women's rights.
[230] Report of the Special Rapporteur on violence against women, its causes and consequences (n 13), para 25
[231] Inter-American Convention on the Prevention, Punishment and Eradication of Violence Against Women, or "Convention of Belém do Pará", adopted 9 June 1994, article 2

women, including rape, a crime.[232] The Protocol to the African Charter also brought prohibition of rape in its Article 11, while discussing the protection of women in armed conflict, calling upon States to protect women from all forms of violence, including rape.[233] Another very interesting and pioneering approach is perceived in Article 14, where, under health and reproductive rights, the Protocol to the Charter required States to take appropriate legislative measures to allow for women to perform abortions in case of rape, ensuring women's dignity.[234] The Protocol also presented a comprehensive definition of violence against women that included sexual violence or even the threat to cause harm to women, in peacetime and during armed conflicts, aiming for the eradication of such violence in all spheres of life, for example, family, school and workplace.

The Council of Europe Convention on preventing and combating violence against women and domestic violence (the Istanbul Convention) was the first legally binding instrument to describe conducts that were to be criminalised and would characterize sexual violence, which includes rape:

> Article 36 – Sexual violence, including rape
>
> 1 Parties shall take the necessary legislative or other measures to ensure that the following intentional conducts are criminalised:
>
> a engaging in non-consensual vaginal, anal or oral penetration of a sexual nature of the body of another person with any bodily part or object;
>
> b engaging in other non-consensual acts of a sexual nature with a person; c causing another person to engage in non-consensual acts of a sexual nature with a third person.
>
> 2 Consent must be given voluntarily as the result of the person's free will assessed in the context of the surrounding circumstances.
>
> 3 Parties shall take the necessary legislative or other measures to ensure that the provisions of paragraph 1 also apply to acts committed against former or current spouses or partners as recognised by internal law.[235]

The emphasises on consent is an advance, but it is important to ensure that the assessment made to analyse the "surrounding circumstances" will not fall on the victim, turning the burden of proof to the person who has suffered such violence. Additionally, as will be discussed further when

[232] Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, adopted 11 July 2003, entry into force 25 November 2005, article 4, (2), a and b
[233] Ibidem, article 11
[234] Ibidem, article14, (2), c
[235] Council of Europe Convention on preventing and combating violence against women and domestic violence, adopted 7 April 2011, entry into force 1 August 2014, article 36

examining the international definition of rape, focusing on penetration to determine a conduct of sexual violence has proven to be problematic, as it leaves several conducts out. Nonetheless, having such basic grounds defined in a legally binding instrument is important to make sure all States party to the Convention will criminalise at least the conducts described therein. The Convention also recognised that women and girls are disproportionally affected by sexual violence and rape, and this constitutes a great obstacle to reach equality and are intensified during armed conflict.

Moving to an Asian perspective, the ASEAN[236] Declaration on Violence against Women and Violence Against Children recognised that it is important to protect women and children from all forms of violence, abuse, and exploitation, including domestic violence and sexual exploitation, [237] even though the instrument does not expressly mention rape. Moreover, the instrument calls upon member States to strengthen their legislation and policies around the theme, focusing on the elimination of violence against women and children. Hence, highlighting the importance of a holistic approach to the matter. The Declaration also aimed for States to properly report and implement the recommendations of international bodies, such as those created by CEDAW and CRC,[238] which demonstrates an important endeavour towards implementing and ensuring women's rights, despite vast challenges.

Lastly, the OIC[239] Plan of Action for the Advancement of Women, from 2016, has as one of its objectives the protection of women from violence, aiming "to combat all forms of gender-based violence, human trafficking and other harmful traditional practices against women and girls",[240] including domestic violence, by "combating different forms of violence against women and girls including deprivation of opportunities and full enjoyment of their rights through preventive measures and provisions of rehabilitation to victims and punishment of perpetrators".[241] The document also indicated the importance of combating violence against women during armed conflicts and the need to approach this topic in several levels, national, regional and international, promoting cooperation between stakeholders, indicating that there is certain will within the region to address this important issue.

[236] See member States to the Association at: https://asean.org/member-states/, accessed October 2023
[237] ASEAN Declaration on Violence against Women and Violence Against Children, p.2
[238] Ibidem, para 4
[239] Member States of OIC can be found at: https://www.oic-oci.org/states/?lan=en, accessed October 2023
[240] OIC Plan of Action for the Advancement of Women, 2016, p.4
[241] OIC (n 240)

Notwithstanding massive challenges around the topic worldwide and the acknowledgement that women are constantly oppressed and silenced in various ways, including within international law, the vast realm of human rights instruments regarding women's rights and the prohibition of rape and sexual violence in all corners of the world demonstrates that this is a pressing issue that demands attention globally. It also shows that the international community has extensive instruments to address the subject, both internationally and regionally, what consequently influences the domestic approach States pursue internally, demonstrating a solid framework around the topic, despite of the critics around it.

3.4. Rape under Customary International Law

According to Article 38 of the Statute of ICJ treaties and conventions are not the only sources of International Law, "international custom, as evidence of a general practice accepted as law" [242]are also seen as such.[243] But what does this mean? For a norm to the understood as customary law it must fulfil two requirements, first, it shall be perceived as a general State practice and, second, such general practice must be accepted as law, it should be embedded with *opinion juris.*[244]

It is also important to analyse how other States react to such conduct; they should perceive it as a breach of a given norm. As indicated by ICJ during the Nicaragua v. the United States of America case, "sufficient that the conduct of States should, in general, be consistent with such rules, and that instances of State conduct inconsistent with a given rule should generally be treated as breaches of that rule, not as indications of the recognition of a new rule"[245] and, as per *opinion juris*, resolutions passed by at least the UN General Assembly or other international bodies are important indicators of how States react to a certain topic and are sufficiently convinced of legal character.[246] Another important source of State practice and *opinio juris* are the Universal Periodic Review, in which States member of the UN have to address their human rights challenges and accomplishments, providing a very detailed statement around their approach towards human rights.[247]

[242] Statute of the International Court of Justice, article 38 (1) (b)
[243] Article 38 of the ICJ Statute also describes as source of International Law: "the general principles of law recognized by civilized nations" and "judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law."
[244] Walter Kälin and Jörg Künzli (n 106), p. 58
[245] ICJ, Case concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v The United States of America), ICJ Reports 1986, para 186.
[246] Nicaragua v The United States of America (n245)
[247] Schabas, William A., The Customary International Law of Human Rights, Oxford University Press, Incorporated, 2021. p. 79

In this sense, norms with CIL status are binding to everyone, due to practices conducted by States that are accepted as law, without the need of being described in a treaty formally ratified. However, it is not necessarily easy to identify such norms. Regarding IHL, several of its provision have CIL status[248] (which means that, in addition to be binding to all States, they are also applicable in contexts of NIAC despite of treaties). In this context, the ICRC has prepared a document that synthetises CIL rules applicable to IHL indicating its applicability to IAC and NIAC- the *Customary International Humanitarian Law, Volume I: Rules*. In this regard, rape is prohibited under CIL, being explicitly and directly mentioned under Rule 93 – "Rule 93. Rape and other forms of sexual violence are prohibited"[249] and indirectly forbidden with respect to acts or threats that has the aim to spread terror among civilians (Rule 2), torture (Rule 90) and war crimes (Rule 156).[250]

Regarding CIL norms within international human rights, there is no such "guide" with vast acceptance as the one prepared by the ICRC in the context of IHL, which does not prevent the identification of which norms also have CIL status by analysing State practice and *opinio juris*.

International bodies have extensively recognised that States have certain obligations towards the international community, being bound to act humanely.[251] The ICJ, among other prohibitions, has acknowledged that the "prohibition of genocide"[252] and the prohibition of "violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture" and humiliating and degrading treatment are considered CIL, being applicable not only during armed conflicts, but also in peacetime.[253] As already shown, rape can constitute an element of genocide[254] and is also considered a form of cruel treatment that can amount to torture, as will be further debated herein, being, therefore, under the scope of the ICJ recognition of CIL.

The HRC, which has an extremely important role concerning the protection of human rights, has also a well-established understanding that even States that are not bound to treaties are responsible in case of serious and systematic violation of human rights,[255] which can also encompass rape.

[248] International Committee of Red Cross (n 163), p. 1
[249] International Committee of Red Cross. Customary International Humanitarian Law Volume I: Rules, 2009, Rule 93, pp. 323-327
[250] Ibidem, Rule 2 (pp.10-11), Rule 90 (pp.315-318) and Rule 156 (pp. 568-603)
[251] Walter Kälin and Jörg Künzli (n 106), p. 60
[252] ICJ, Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide (Advisory Opinion), ICJ Reports 1951, 23.
[253] Nicaragua v The United States of America (n245), para 220.
[254] See note 189
[255] Walter Kälin and Jörg Künzli (n 106), p. 60

Gender based violence, including rape are also seen as a violation of human rights and fundamental freedoms, which includes the right to life, and the need to protect women's dignity, some of the most fundamental human rights. Amounting this to the fact that rape is considered a violation to the right to physical integrity and can also constitute torture,[256] it is possible to infer the CIL status to its prohibition.

In addition, as it was possible to verify in previous sections, the prohibition of rape has been extensively treated under IHRL, both in hard law and soft law documents, and States have broadly expressed their condemnation of rape, including in domestic law, which allows to the conclusion that the prohibition of rape is not only established under IHL and IHRL, but also under CIL.

[256] Amnesty International. Rape And Sexual Violence - Human Rights Law and Standards In The International Criminal Court, 2011, p. 10, 41 and 43.

4. The (lack of a) definition of rape

4.1. What is rape?

While rape and other types of sexual violence are a widespread and systematic violations in peacetime, have been used as means of war throughout history, and various instruments discuss the issue nationally and internationally, both during war time and peacetime, as previously described, international community had not always addressed this crime with the seriousness it deserves. Until today rape does not have a common definition generally accepted under international law. It depends mainly on the jurisprudence to decide on its elements in international proceedings, which can cause uncertainty, especially for those seeking justice. Indeed, international tribunals have not always caried a gender perspective to charge and discuss sexual violence.[257] The lack thereof also enables domestic laws to describe rape in a conservative and restrictive manner, even requiring use of force or violence to occur, and excluding certain types of rape, for instance, marital rape, increasing the burden on the prosecution and the victim to prove that such violence had happened.[258]

In spite of the fact that a common definition under international law is not a requirement for a norm to be considered *jus cogens*, as will be further explained in the following chapter, discussing what constitutes (and what should constitute) rape under the international law system is important to this work as it has significant consequences in the way rape is perceived and allows for discussions that debate women's invisibility under international law, agency and accountability to occur. However, the analysis presented herein does not have the intention to exhaust the debate over the lack of a common definition of rape, but to bring certain aspects about it and start the discussion over this topic.

In this sense, this chapter will analyse how rape has been treated by the international community and what have been considered to be its elements, by examining the way it has been regarded both in conflict and peacetime, as it entails a different approach due to the specifics of each situation. In order to do so, notorious cases from judicial and *quasi*-judicial bodies and their rules of procedure and statutes will be assessed.

[257] International Conference on Gender and International Criminal Law held online and on site at Leiden University on January 16 and 17, 2024

[258] Even though States are responsible for establishing their own laws, international law sets an important basis for domestic law, which must be in compliance with the international rules States are bound to.

With respect to rape during war time, the initial international tribunals in modern history were the Nuremberg and Tokyo Tribunals, established to bring to trial those responsible for the atrocities committed during the World War II. Nevertheless, even though sexual violence was extensively present during this conflict, both statutes allowed for the prosecution of rape just indirectly as crimes against humanity. Although rape was not specifically listed as one of the provisions on crime against humanity,[259] throughout case law discussions it was understood that rape would also be considered as such.

Neither rape, nor other sorts of sexual violence were part of any case at the Nuremberg Tribunal; at the Tokyo Tribunal, in contrast, cases of sexual violence were tried under "inhumane treatment" and as a disrespect to the honour and rights of families,[260] though it left the forced prostitution faced by the "comfort women" out.[261] During the occupation of Germany, the four occupying States adopted the Control Council Law Number 10, designed so that German courts could trial, by their own, war crimes committed during the War. Within such Charter rape was expressly mentioned as crime against humanity, however it was not prosecuted in any domestic German court in this context.[262]

Conversely, the ICTR, the first court created to prosecute individuals for massive human rights violations, was established to bring to trial the ones responsible for the Rwanda genocide, and the ICTY, that aimed to judge those accused of serious violations perpetrated in the former Yugoslavia, were the forerunners with respect to trial cases of rape and sexual violence under international law. Yet, despite having the jurisdiction to try these types of crimes in connection with other violations (war crimes, crimes against humanity and genocide), neither of their statutes provided for a clear definition of what would constitute rape. This fact led to the courts having to decide on its elements on a case-by-case basis, a consequence that is clearly problematic with respect to legal certainty, as it can be reasonably inferred and will be further shown.

The first ICTY trial was also the first case that accusations were brought specifically on rape and sexual violence as war crime and crime against humanity: the Tadic case, a case against a guard of Omarska camp where women in captivity were systematically raped.[263] Whilst there could not be

[259] Sherrie L. Russell-Brown, (n 183), p.360
[260] Estupro de Guerra: O Sentido da Violação dos Corpos para o Direito Penal Internacional, *Revista de Gênero, Sexualidade e Direito v.3 n.2*, (2017), pp. 160-161
[261] Mark Ellis, Breaking the Silence: Rape as an International Crime, *Case W. Res. J. Int'l L. 225, vol.38*, (2007), p. 228
[262] Sherrie L. Russell-Brown, (n 183), p.360
[263] Catharine MacKinnon, Defining Rape Internationally - A comment on Akayesu, *Are women human? and other international dialogues. The Belknap Press of Harvard University Press*, (2006), p. 240

found enough proof to determine that he himself had committed rape,[264] he was convicted for assisting and encouraging sexual violence crimes, but not rape.[265]

The first-time in recent years that someone was convicted for rape by an international court was on Prosecutor v. Jean Paul Akayesu before the ICTR. This was also the first-time rape was considered to constitute one of the elements of genocide.[266] In addition to that, the court recognised rape as crime against humanity[267] and as a weapon of war,[268] being a landmark case that helped shape the perception of rape internationally, breaking the ground for the conviction of sexual violence, including rape, in the international arena.

On Akayesu the ICTR provided for a general, broad, and most comprehensive definition of what would constitute the crime of rape. It described rape as

> a physical invasion of a sexual nature, committed on a person under circumstances which are coercive. Sexual violence which includes rape, is considered to be any act of a sexual nature which is committed on a person under circumstances which are coercive. This act must be committed:
>
> (a) as part of a wide spread or systematic attack;
>
> (b) on a civilian population;
>
> (c) on certained catalogued discriminatory grounds, namely: national, ethnic, political, racial, or religious grounds[269]

Hence recognising rape as a form of aggression, under which the use of force is not essential to characterise coercion, and that armed conflict environments were coercive by themselves, making, therefore, impossible to even think about consent.[270] This view, however, was not very much accepted by future trials and tribunals.

---

[264] The charges on the count of rape were later dropped by the Prosecutor.
[265] Mark Ellis, (n 261), p. 226
[266] The ICTR recognised that rape can amount to genocide when "committed with the specific intent to destroy, in whole or in part, a particular group, targeted as such. Indeed, rape and sexual violence certainly constitute infliction of serious bodily and mental harm on the victims and are even, according to the Chamber, one of the worst ways of inflicting harm on the victim as he or she suffers both bodily and mental harm ... These rapes resulted in the physical and psychological destruction of Tutsi women, their families and their communities. Sexual violence was an integral part of the process of destruction, specifically targeting Tutsi women and specifically contributing to their destruction and to the destruction of the Tutsi group as a whole", Sherrie L. Russell-Brown, (n 183), p.372
[267] Mark Ellis, (n 261), p. 234
[268] Sherrie L. Russell-Brown, (n 183), p.371
[269] Prosecutor v. Akayesu, Judgment, Case No. ICTR-96-4-T, T.Ch.I, 2 September 1998, para. 598
[270] Catharine MacKinnon, (n 263), p.238

Sometime after the Akayesu trial, the ICTY was called upon deciding on the Anto Furundzija case, under which rape was considered a war crime[271] and was the first case containing solely rape charges.[272] Nevertheless, instead of using the ICTR definition of rape provided on Akayesu, this case established another definition, focused on the "mechanical" aspect of rape. It provided that rape would consist of, without the victims' consent:[273]

> (i) the sexual penetration, however slight: of the vagina or anus of the victim by the penis of the perpetrator or any other object used by the perpetrator;
> (ii) or of the mouth of the victim by the penis of the perpetrator;
> (iii) by coercion or force or threat of force against the victim or a third person.[274]

The Furundzija definition is a very problematic one as, by focusing on the "mechanics of rape", it disregards several important aspects of the crime, for example, the coercive environment of an armed conflict and its impact on the situation were not properly considered, it is not gender neutral and it also gives the illusion that consent can be given, a very different perspective from the Akayesu definition. This was not the first time the ICTY missed an opportunity to address rape in a satisfactory way; in the Tadic case mentioned above, the only count of rape of a woman had to be removed. [275]

Nonetheless, as regards to consent, the ICTY's Rule 96[276] established that consent could not be freely used as a defence strategy. This Rule, however, was changed during the course of ICTY's trials allowing for the possibility of consent to be used as such.[277] In order to do so, judges would have to be previously convinced of its importance in a closed session.

The discussions around the concept of rape did not stop there. After the Furundzija case, the ICTY provided for a different definition of rape on the Dragoljub Kunarac case, the first-time rape was prosecuted as enslavement[278] and that the ICTY convicted someone for crime against humanity,[279]

---

[271] Mark Ellis, (n 261), p. 237
[272] Sandra Fabijanić Gagro, The Crime of Rape in the ICTY's and the ICTR's Case-Law, *Collected Papers of Zagreb Law, vol 60*, (2010), p. 1319
[273] Catharine MacKinnon, (n 270), p. 239
[274] Prosecutor v. Furundzija, Judgment, Case No. IT-95-17/1-T. T.Ch.I, 10 December 1998, para. 185
[275] Catharine MacKinnon (n 270), p. 240
[276] Rules of Procedure and Evidence for the International Criminal Tribunal for the Former Yugoslavia, R. 96, Doc. IT/32
[277] Catharine MacKinnon (n 270), p. 240 and Rules of Procedure and Evidence for the International Criminal Tribunal for the Former Yugoslavia, R. 96, U.N. Doc. IT/32/REV.38
[278] David S. Mitchell. The Prohibition of Rape in International Humanitarian Law as a Norm of Jus Cogens: Clarifying the Doctrine, *Duke Journal of Comparative & International Law, vol. 15* (2005), p.254
[279] Mark Ellis, (n 261), p. 234

which is seen as an extremely important case under international law. The Court continued to address the penetration aspect, but some changes were made with regards to coercion. The Court focused on the element of consent, making coercion, use of force or its threat not an essential aspect of the crime, but as means to prove the absence of consent.[280] The Trial Chamber understood that "sexual penetration will constitute rape if it is not truly voluntary or consensual on the part of the victim".[281] In this case, it was indicated that rape would be characterised as:

> the sexual penetration, however slight:
> (a) of the vagina or anus of the victim by the penis of the perpetrator or any other object used by the perpetrator; or
> (b) of the mouth of the victim by the penis of the perpetrator; where such sexual penetration occurs without the consent of the victim.
> Consent for this purpose must be consent given voluntarily, as a result of the victim's free will, assessed in the context of the surrounding circumstances. The *mens rea* is the intention to effect this sexual penetration, and the knowledge that it occurs without the consent of the victim. [282]

This definition continues to be challenging, as, in addition to focus on penetration and mechanical aspects of rape, it highlighted the importance of consent, which would ideally be of ultimate importance, however in the context of an armed conflict it is extremely problematic, as it is impossible to discuss voluntary and clear consent in such circumstances. In this sense, the lack of consent should be assumed in those situations, and the same should be applicable to coercion, as an armed conflict is *per se* a coercive environment. Assessing consent in situations of armed conflict while addressing rape is the same of evaluating consent of someone to be subject of torture, other crimes against humanity, genocide, etc, which is not only unimaginable, but unreasonable and cruel.

The definitions provided by the above-mentioned Tribunals were perceived by considering the most notorious definitions of rape under domestic laws [283] that were accommodated in the context of

[280] Alexandra Adams, The Legacy of the International Criminal Tribunals for the Former Yugoslavia and Rwanda and Their Contribution to the Crime of Rape*, European Journal of International Law, vol 29*, (2018), p. 757
[281] Catharine MacKinnon (n 270), p. 241
[282] Judgment, Kunarac, IT-96-23-T, IT-96-23/1-T para 460
[283] See, for instance, Alexandra Adams (n 280), p. 750 and Prosecutor v. Furundzija, (n 274), para 180, which states: "In its examination of national laws on rape, the Trial Chamber has found that although the laws of many countries specify that rape can only be committed against a woman, others provide that rape can be committed against a victim of either sex. The laws of several jurisdictions state that the actus reus of rape consists of the penetration, however slight, of the female sexual organ by the male sexual organ. There are also jurisdictions which interpret the actus reus of rape broadly. The provisions of civil law jurisdictions often use wording open for interpretation by the courts. Furthermore, all jurisdictions surveyed by the Trial Chamber require an element of force, coercion, threat, or acting without the consent of the victim: force is given a broad interpretation and includes rendering the victim helpless. Some jurisdictions indicate that the force or intimidation can be directed at a third person. Aggravating factors commonly include causing

international criminal law. Nevertheless, domestic situations cannot be compared to contexts of armed conflict where standard regulation should not apply due to the very unusual circumstances of such scenarios. Both the ICTY and the ICTR provided for some other rape definitions, but the ones mentioned herein are deemed as the most important when working on establishing what would constitute rape and are subject to analysis of various scholars as provided in this work.[284]

Even though the definition of rape was not a consensus, the ICTR and ICTY jurisprudence were of ultimate importance regarding the creation of the ICC.[285] The ICC expressly recognises rape as an international crime that can amount to crime against humanity and/or war crimes,[286] but the Rome Statute also does not provide for the elements of rape, which was left to a side document of the Court, the Elements of Crimes (EOC).

According to the EOC of the ICC, rape is perceived as:

> 1. The perpetrator invaded the body of a person by conduct resulting in penetration, however slight, of any part of the body of the victim or of the perpetrator with a sexual organ, or of the anal or genital opening of the victim with any object or any other part of the body.
> 2. The invasion was committed by force, or by threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power, against such person or another person, or by taking advantage of a coercive environment, or the invasion was committed against a person incapable of giving genuine consent.[287] [288]

The ICC made a clear effort to ensure that the definition of rape would be comprehensive and gender neutral. The inclusion of "taking advantage of a coercive environment" allows for the perception of an armed conflict situation as coercive *per se*, despite giving a lot of focus on the "force" and

---

the death of the victim, the fact that there were multiple perpetrators, the young age of the victim, and the fact that the victim suffers a condition, which renders him/her especially vulnerable such as mental illness. Rape is almost always punishable with a maximum of life imprisonment, but the terms that are imposed by various jurisdictions vary widely."

[284] For example, generally, Alexandra Adams (n 280), David S. Mitchell, (n 278), Mark Ellis, (n 261), [284] Catharine MacKinnon (n 270) and other scholars and works provided herein.

[285] One important characteristic of the ICC is that, different from other intentional judicial or *quasi*-judicial bodies existing today, it is responsible for prosecute individuals instead of States, which allows for personal responsibility of crimes committed, whether by the person itself or by people under its command.

[286]Rome Statute, Articles 7 (1) (g), 8 (2) (a) (xxii) and (e) (vi)

[287] Elements of Crimes of the Rome Statute, Articles 7 (1) (g), 8 (2) (a) (xxii) and (e) (vi)

[288] Those are the common provisions that would amount to rape both as crime against humanity and war crime. Moreover the EOC also establishes that the conduct should respect the elements that would amount to either crimes against humanity or war crimes (e.g. a systematic attack against civilians or as part of a plan during wartime) and that the perpetrator should be aware of such scenario. The definition also recognises that certain people may be incapable of giving consent due to certain circumstances, such as natural or age-related incapability.

"violence" elements. The definition is still not ideal and can be improved, but it reflects the effort made throughout the years on the topic.

The first rape conviction within the ICC occurred during the Bemba trial in 2016 (who was further acquitted of rape crimes). In this case the ICC implemented the definition described at the EOC and brought some interesting elements: (i) while describing that the definition was made to be gender neutral, the decision stated that: "Accordingly, "invasion", in the Court's legal framework, includes same-sex penetration, and encompasses both male and/or female perpetrators and victims.".[289] Despite being gender neutral an essential characteristic, the reasoning on the decision revealed a misconception around gender by limiting it to only two genders, male and female, a frequently mistaken notion that reduces the idea of gender, as provided in this work; (ii) the Trial Chamber recognised that rape also encompasses the invasion of the "victim's mouth, by a sexual organ", highlighting that such conduct "can amount to rape and is a degrading fundamental attack on human dignity which can be as humiliating and traumatic as vaginal or anal penetration.";[290] (iii) the case established a wide range of coercive environment and circumstances, like "military presence of hostile forces among civilians", amount of people participating in the crime, if rape is perpetrated together with other crimes or right after a combat takes place, [291] basing itself on the Akayesu[292] definition of coercive environment; [293] (iv) the decision reinforced that lack of consent is not an element of the crime of rape, therefore, the prosecution does not have to prove non-consent "beyond reasonable doubt, on the basis that such a requirement would, in most cases, undermine efforts to bring perpetrators to justice."[294] and (v) the Chamber explained that the perpetrator had to have had the intent to commit rape and that it should be "aware that the act was committed by force, by the threat of force or coercion, by taking advantage of a coercive environment, or against a person incapable of giving genuine consent".[295] The ICC still had not dealt with a lot of cases, but such aspects provide important guidelines on the court's behaviour when discussing rape.

[289] Situation in the Central African Republic in the Case of the Prosecutor v. Jean-Pierre Bemba Gombo, Trial Chamber III, ICC-01/05-01/08, Judgment pursuant to Article 74 of the Statute, 21 March 2016, para 100
[290] Ibidem, para 101
[291] Ibidem, para 104
[292] Coercive circumstances were described as: "coercive circumstances need not be evidenced by a show of physical force. Threats, intimidation, extortion and other forms of duress which prey on fear or desperation may constitute coercion, and coercion may be inherent in certain circumstances, such as armed conflict or the military presence of Interahamwe among refugee Tutsi women at the bureau communal." Akayesu Trial Judgement (n 269) para 688
[293] Bemba Case, (n 289), paras 102-104
[294] Bemba Case, (n 289), para 105
[295] Bemba Case, (n 289), paras 110-112

The first ICC case with a final rape conviction was the Ntaganda case, who was tried in 2019 and the appeal's decision confirming the conviction was given in 2021. The trial decision also applied the elements described at the EOC, recognising that the definition was designed to be broad enough so that cases that encompass at least one of the coercive circumstances or conditions would be satisfactory for rape to have been committed in case penetration occurs and reinforced that use of physical force was not needed for the crime to happen.[296] The case was also important in the sense that it clarifies that members of the same armed group can also be subject to rape.[297]

Even though the Rome Statute itself is binding among the States party and has been widely ratified, being, therefore, of mandatory application to those States, which means that they should comply with its provisions and that individuals under the jurisdiction of those States are subjected of being prosecuted by the ICC, the EOC is not. The EOC is not a treaty or an annex thereof, it is an additional document voted by the States parties and that can be subject to amendment upon approval. This means that the EOC is applicable internally within the ICC cases, but not binding upon other international tribunals nor providing for the obligation to be applied domestically.

Despite being a good starting point and broadly accepted, the EOC cannot be perceived as providing a unified, universal, and binding definition of rape internationally, which allows for new definitions of the crime to emerge even within States that have ratified the Rome Statute. This is the case, for instance, of what happened at the Special Court for Sierra Leone[298] (SCSL), that adopted a new definition of rape on its cases, even though Sierra Leone is a party to the Rome Statute. The SCSL held in one of its cases in 2009 that the elements of rape were described as:

> (i) The Accused invaded the body of a person by conduct resulting in penetration, however slight, of any part of the body of the victim or of the Accused with a sexual organ, or of the anal or genital opening of the victim with any object or any other part of the body;
> (ii) The invasion was committed by force, or by threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power against such person or another person or by taking advantage of a coercive environment, or the invasion was committed against a person incapable of giving genuine consent;

[296] Situation in the Democratic Republic of the Congo in the Case of the Prosecutor v. Bosco Ntaganda, Judgment, Trial Chamber VI, ICC-01/04-02/06, 8 July 2019, paras 933-935
[297] Situation in the Democratic Republic of the Congo in the Case of the Prosecutor v. Bosco Ntaganda - Second decision on the Defence's Challenge to the Jurisdiction of the Court in respect of Counts 6 and 9, Trial Chamber VI, ICC-01/04-02/06, 4 January 2017, paras. 47-53
[298] The SCSL was established jointly by the country's government and the UN to bring to justice those responsible for committing IHL and Sierra Leonean law violations during the civil war.

(iii) The Accused intended to effect the sexual penetration or acted in the reasonable knowledge that this was likely to occur; and
(iv) The Accused knew or had reason to know that the victim did not consent.[299]

This definition, although inspired by the EOC in some points, adds new elements that are prejudicial to the definition, especially items (iii) and (iv). By adding the accused intent to the definition, the burden of proof becomes higher and gives room for impunity. It is extremely hard to discover one's actual intent and to prove if the accused had reason to believe that the victim did not consent. Such definition also places the victim on trial, since their actions would need to be analysed to verify if they were clear enough to make the perpetrator aware that the sex was not wanted, bringing back the discussion around consent, which, as it was established herein, is fallacious and does not have room in the context of armed conflict. The definition provided in this case, however, brings the idea of consent in an even more complicated way, as instead of stating that consent should be freely given, it requires for the victim to react to the perpetrators actions when there was not direct use of force.

The abovementioned example shows that even after the adoption of the Rome Statute and the EOC, which one could expect to be perceived as a universal definition of rape at least within IHL because of its importance and great acceptance despite not being binding, new understandings of what constitutes rape can emerge. The rising of new and different definitions of rape can be extremely problematic, especially depending on the approach used.

Stepping outside the humanitarian context and focusing on a human rights perspective during peacetime, even though international bodies cannot determine whether or not rape had occurred within a domestic case, they can analyse if a State has complied with its obligations under international law with respect to the topic.

Notwithstanding the efforts of the international community to establish a consent-based definition, as opposed to the need of use of force, violence or threat to do so or the need for any reaction by the victim, to ensure that rape has a gender neutral definition and that all types of rape are criminalised (including marital rape), States are free to specify rape under their domestic law as they wish, and there is barely no human rights treaty that clarifies what constitutes rape, as described herein.

[299] Prosecutor v. Issa Hassan Sesay, Morris Kallon and Augustine Gbao (the RUF accused), Case No. SCSL-04-15-T, 2 March, 2009, para 145

Nonetheless, some important steps have been taken to ensure State's accountability on the matter and to push for a better definition of the crime even internally.

The ECtHR, for instance, has dealt with the topic on numerous occasions. Even though the European Convention on Human Rights and Fundamental Freedoms (European Convention) does not address rape directly, its prohibition can be established in connection with several rights, as will be shown. In X and Y v. The Netherlands, the Court understood that The Netherlands was in violation of Article 8 (right to private life) of the European Convention by the failure of its law to address sexual violence of mentally disabled persons.[300] In SW & CR v. UK, while addressing the prohibition of marital rape also under Article 8 of the European Convention, the ECtHR reinforced that all forms of rape should be banned and that the "'essentially debasing character of rape' which it deemed 'so manifest' and, furthermore, that the immunity of husbands was not in conformity with the 'fundamental objectives of the Convention, the very essence of which is respect for human dignity and freedom".[301]

One of the most emblematic cases tried by the ECtHR is, perhaps, MC v. Bulgaria[302] in which, by comparing the State's law with several other countries' norms on rape, the European Court understood that Bulgaria was failing to "provide the necessary protection for victims of rape where there was no evidence of physical resistance by the victim". Therefore, it was taken that the State was in breach of its international obligations under Article 3 (prohibition of torture) and Article 8 of the above-mentioned convention, having the duty to effectively penalise rape and hold a proper

[300] Clare McGlynn, Rape, torture and the European convention on human rights, *International and comparative law quarterly, 58,* (2009), p. 570
[301] Ibidem, pp. 570-571
[302] MC v. Bulgaria, Application no. 39272/98, Judgment, 4 December 2003. In this case, in short, the applicant "submitted that P. had then pressed his body against hers, proposed that they "become friends" and started kissing her. The applicant had refused his advances and had asked him to leave. P. had persisted in kissing her while she had tried to push him back. He had then moved the car seat back to a horizontal position, grabbed her hands and pressed them against her back. The applicant had been scared and at the same time embarrassed by the fact that she had put herself in such a situation. She had not had the strength to resist violently or scream. Her efforts to push P. back had been unsuccessful, as he had been far stronger. P. had undressed her partially and had forced her to have sexual intercourse with him.", she had never had any sexual relation before and testified that it had hurt a lot. She was later alleged raped again in a house stating that "at that point A. had sat next to her, pushed her down onto the bed, undressed her and forced her to have sex with him. The applicant had not had the strength to resist violently. She had only begged the man to stop.". One decision on the case stated that: "There can be no criminal act under Article 152 §§ 1 (2) and 3 of the Criminal Code, however, unless the applicant was coerced into having sexual intercourse by means of physical force or threats. This presupposes resistance, but there is no evidence of resistance in this particular case. P. and A. could be held criminally responsible only if they understood that they were having sexual intercourse without the applicant's consent and if they used force or made threats precisely with the aim of having sexual intercourse against the applicant's will. There is insufficient evidence to establish that the applicant demonstrated unwillingness to have sexual intercourse and that P. and A. used threats or force."

investigation and prosecution. [303] The ECtHR also recalled that rape had been addressed as "any sexual penetration without the victim's consent" and that "consent must be given voluntarily, as a result of the person's free will, assessed in the context of the surrounding circumstances".[304]

Similarly, the Committee on the Elimination of Discrimination against Women, in the case Vertido v. Philippines understood that the numerous stereotypes and myths around rape had influenced the right of the victim to a fair trial, by placing the victim in a position of being scrutinised and questioned, in addition to infer that the absence of physical resistance would imply consent. Thus, the Committee suggested a change to Philippine law so that it would focus on the lack of consent or in the fact that the event had happened under "coercive circumstances"[305] – an example of the connection between IHL, international criminal law and IHRL.

Likewise, under R.P.B. v. The Philippines,[306] the Committee held that, once again, myths and stereotypes around rape had jeopardised the trial and that the State had failed to properly consider the victim's needs as a deaf girl, especially by not providing proper sign language interpretation. The Committee also recalled that the State had the obligation to "modify or abolish not only existing laws and regulations, but also customs and practices that constitute discrimination against women."[307] and, once more, recommended that the Philippine laws were amended.[308]

As regards to the adoption of a comprehensive definition of rape, since 1995 the UN Commission on Human Rights (replaced by the HCR[309]) has been recommending that rape's definition should be based on the lack of consent and include all forms of rape, without the need of demonstrating force or resistance by the victim.[310]Years later, the Istanbul Convention has made important advances on setting the basic grounds on the definition of sexual violence.[311] In a similar approach, Dubravka Šimonović, then Special Rapporteur on violence against women and girls, had prepared a "Model

[303] Clare McGlynn, (n 300), p. 571 and MC v. Bulgaria (n 302)
[304] MC v. Bulgaria (n 302) para 163
[305] Dubravka Šimonović, (n 13), paras 33-34
[306] R.P.B. v. The Philippines, Committee on the Elimination of Discrimination against Women, Communication No. 34/2011, Views adopted by the Committee at its fifty-seventh session, 10-28 February 2014
[307] Ibidem, para 8.8
[308] Ibidem, para 9
[309] The Commission were and the Council is, in general terms, the UN body responsible to protect and enhance human rights worldwide. After a reform in 2006, the Commission on Human Rights was replaced by the HCR, which is composed by 47 States and has the power to appoint specialists to analyse the situation of human rights globally.
[310] Lika Gegenava, The Evolution of the Legal Definition of Rape, (2021).<https://www.culawreview.org/journal/the-evolution-of-the-legal-definition-of-rape> . accessed 21 February 2024
[311] Istanbul Convention, (n 235)

Rape Law" to assist States on their efforts to harmonise their internal legislation. Throughout the document she presents the main aspects about rape, placing it as a crime against body integrity and sexual autonomy, suggesting a broad gender-neutral definition of the crime based on the lack of voluntary, genuine, and free consent, also asserting that in case of use of force, threat, or coercion the absence of consent is presumed.[312]

Current endeavours to place consent at the centre of the definition of rape had also risen. In March 2022, the European Commission proposed the Directive of the European Parliament and of the Council on Combating Violence Against Women and Domestic Violence, which, among other important topics regarding violence against women and domestic violence, determined, on its Article 5 that rape should be defined as follows:

[312] Dubravka Šimonović, Report of the Special Rapporteur on violence against women, its causes and consequences, A framework for legislation on rape (model rape law), A/HRC/47/26/Add.1, 2021. Under pages 7 and 8 of the mentioned document, Dubravka suggests the following definition of rape and its elements: "Article 1. Definition of rape. A person (the perpetrator) commits rape when they: (a) engage in non-consensual vaginal, anal or oral penetration of a sexual nature, however slight, of the body of another person (the victim) by any bodily part or object; or (b) cause non-consensual vaginal, anal or oral penetration of a sexual nature, however slight, of the body of another person (the victim) by a third person; or (c) cause the victim to engage in the non-consensual vaginal, anal or oral penetration of a sexual nature, however slight, of the body of the perpetrator or another person. Article 2. On consent. Consent must be given voluntarily and must be genuine and result from the person's free will, assessed in the context of the surrounding circumstances, and can be withdrawn at any moment. While consent need not be explicit in all cases, it cannot be inferred from: (a) silence by the victim; (b) non-resistance, verbal or physical, by the victim; (c) the victim's past sexual behavior; or (d) the victim's status, occupation or relationship to the accused. Article 3. Age of consent (a) A person is considered incapable of giving genuine consent when they are a person below the age of 16. (b) Consensual sexual relations between children younger than 16, or between a child younger than 18 years old and a child older than 14 and younger than 16 should not be criminalized. Article 4. On the incapability of giving genuine consent. A person is considered incapable of giving genuine consent: (a) when they are unconscious, asleep, or seriously intoxicated as a result of drugs or alcohol consumed voluntarily, involuntarily or unknowingly; (b) when the perpetrator is an adult, 18 years old or older and the victim is a child related to the perpetrator by blood, marriage, adoption, fostering or other analogous familial affiliation. Article 5. Use of force, threat or coercion. Lack of consent is presumed where penetration was committed by force, or by threat of force or coercion. There is a broad range of coercive circumstances, including, but not limited to, circumstances in which: (a) the victim was subject to abuse, violence, duress, deceit, detention or psychological oppression or intimidation that contributed to the victim's subjugation or acquiescence; or (b) the victim was subject to a threat (expressed or implied) of present or future physical or non-physical harm to the victim or a third person. Article 6. On presumed lack of consent. Lack of consent is presumed when: (a) The victim was intoxicated as a result of drugs or alcohol consumed voluntarily, involuntarily or unknowingly; (b) When an illness, bodily injury, or other particular vulnerability has an impact of the victim's ability to consent; or (c) When the perpetrator is in a position of power, trust, influence or dependency over the victim and may have taken advantage of that position to force participation. Lack of consent is also presumed when the perpetrator abuses a relationship or position of power or authority over the victim. The positions and relationships listed below include, but are not limited to, situations in which the perpetrator is in a position of power or authority, influence or dominance over the victim: (a) in a school, hospital, religious, correctional or care facility setting; (b) in a professional or occupational setting; (c) in a residential care facility, community home, voluntary home, children's home or orphanage; (d) in the context of providing the victim medical, psychological or psycho-social support or treatment; (e) in a guardian-ward relationship; (f) by acting as a member of law enforcement, worker, probation officer, sports coach, instructor, minister of religion, babysitter, child-minder or in any other position of welfare in relation to the victim; or (g) by otherwise being generally involved and responsible for the care, training or supervision of the victim."

Rape

1. Member States shall ensure that the following intentional conduct is punishable as a criminal offence:
(a) engaging with a woman in any non-consensual act of vaginal, anal or oral penetration of a sexual nature, with any bodily part or object;
(b) causing a woman to engage with another person in any non-consensual act of vaginal, anal or oral penetration of a sexual nature, with any bodily part or object.

2. Member States shall ensure that a non-consensual act is understood as an act which is performed without the woman's consent given voluntarily or where the woman is unable to form a free will due to her physical or mental condition, thereby exploiting her incapacity to form a free will, such as in a state of unconsciousness, intoxication, sleep, illness, bodily injury or disability.

3. Consent can be withdrawn at any moment during the act. The absence of consent cannot be refuted exclusively by the woman's silence, verbal or physical non-resistance or past sexual conduct.[313]

The concept is not gender neutral but sets important grounds for the definition of rape to be adopted by States members of the European Union, that would be bound by such directive having to amend their legislations accordingly. However, such article was completely removed from the Directive after France, Germany, the Netherlands, Poland, Hungary, Malta, the Czech Republic, Estonia, Bulgaria and Slovakia voted against it.[314] Until February 9, 2024, the final version of the agreement was pending approval from representatives of the European Union Member States at the Council of Europe and the adoption both in the Council and European Parliament.[315]

It is undisputable, as it was possible to verify throughout this work, that rape is extensively treated and prohibited under virtually all legal systems, but the way it has been done so varies tremendously. Religion and cultural values (if it is possible to call it that way) had played an important role on the definition of rape nationally and, consequently, internationally, as domestic and international legal systems influence each other simultaneously. Nonetheless, what was originally perceived as a crime

[313] Directive of the European Parliament and of the Council on Combating Violence Against Women and Domestic Violence, COM/2022/105 final, 2022, Article 5
[314] France, Germany, France, Germany, Netherlands side with Netherlands side with conservative EU countries in conservative EU countries in split over rape definition (2024). < https://www.euractiv.com/section/health-consumers/news/france-germany-netherlands-side-with-conservative-eu-countries-in-split-over-rape-definition/ > accessed 18 January 2024
[315] Deal on EU law on combating violence against women and domestic violence. < https://finlandabroad.fi/web/eu/current-affairs/-/asset_publisher/cGFGQPXL1aKg/content/deal-on-eu-law-on-violence-against-women/384951 > accessed 10 February 2024

against family (or even property) and honour (not necessarily of the women, but of the "man she belonged to"), has been shifting to a crime against sexual autonomy and determination.[316]

The need for a proper (comprehensive and gender neutral) definition of rape (during peacetime and conflict time) is pressing, as this crime, even though widely committed, goes broadly unpunished. Having a common definition that would need to be adopted by States would not only help on accountability but provide greater reassurance to the victims that would have their agency recognised and would not need to be scrutinised by the legal system and further revictimised. A proper definition should, of course, come together with a change on peoples' perception on the crime, with proper public policies, training (especially for law enforcement, medical staff, and member of the judicial system) and widespread knowledge on gender-based violence, particularly to avoid stereotyping and to end the myths around rape and sexual violence.

4.2. A feminist analysis on the rape definition

As demonstrated, applying gender lens is essential to every discussion to ensure appropriate outcomes. It has been defended that consent should rely at the centre of rape's definition, but consent is not a straightforward concept, and its layers should be analysed through a gender sensitive approach. Another essential part of any crime regards the intent (*mens rea*), which can also be particularly problematic concerning rape if focus is given to the perpetrator's point of view. From the feminist perspective, these two aspects can be perceived as the most crucial for the definition of rape and must urgently be assessed through gender lens. The fundamental idea of examining consent and *mens rea* through a feminist perspective is that women and girls must be at the core of the discussion. Their voices shall be heard, their views on the events and how they felt should be of ultimate importance to define whether rape has occurred.

Patriarchy, as established, is at the centre of our society, which allows for issues that affects mostly women to be surrounded with sexism and misconceptions, as is the case of rape. Rape myths are false ideas used "to justify, deny or normalize men's sexual aggressions against women" that turn the blame over to the victim and reduces the perpetrators',[317] which contributes to minimise the crime itself and influences the idea of how consent should be given.

[316] Maria Eriksson, Defining Rape - Emerging Obligations for States under International Law?, (2010), p. 47
[317] Carol Murray, Carlos Calderón and Joaquín Bahamondes. Modern Rape Myths: Justifying Victim and Perpetrator Blame in Sexual Violence, *Int. J. Environ. Res. Public Health*, (2023), p.2

As previously mentioned, consent should be truly, genuinely, and freely given, and the use of force or threat thereof should not be a requirement to prove rape, but merely one more way to demonstrate lack of consent. However, how can consent be given? One approach commonly used is the lack of resistance or not actively refusing.[318] This approach has been highly criticised by feminists [319] since it does not consider the reality of such violence and requires women and girls to actively confront their aggressor.

Different views on consent have emerged. For instance, the idea that it can be as attitudinal or performative. Attitudinal perspective understand consent "as a mental state of affirmation or willingness",[320] which can be problematic considering that rape myths, such as the way a woman is dressed or if she is alone, are used by man to argue that a woman was willing to have sex, being, therefore, consensual.[321] This concept has also been rejected by feminists.[322] The performative approach, in turn, requires an action or express declaration of willingness in order for consent to be given, being more accepted among feminists.[323] One aspect that should be addressed regarding this view is the fact that, in a patriarchal society, men are usually on power positions which can lead to "nonviolent coercive pressures", making consent impossible to be genuinely and freely given.[324] Analysing the circumstances under which a performative consent was given is also essential to ensure its validity. If it was done so under any form of pressure it must be understood that the sexual relation happened without consent, being, thus, rape.

Another aspect that should be examined to establish whether rape had occurred is the perpetrator's *mens rea*, which means the intention to or knowledge of committing a crime. One understanding on this topic states that a man would only have the *mens rea* to commit rape if he thinks that the woman is not consenting.[325] Hence, if a man truly considers that a woman was consenting, no matter how preposterous the situation might be, then he would not be guilty of rape, because he would not have had the intent to commit it.[326] Another view establishes that a man would have *mens rea* "if he either believes the woman is not consenting or believes unreasonably that she is consenting", considering

[318] Rebecca Whisnant. Feminist Perspectives on Rape, *The Stanford Encyclopedia of Philosophy*, (2021). < https://plato.stanford.edu/archives/fall2021/entries/feminism-rape/ > accessed 15 March 2024
[319] Ibidem
[320] Ibidem
[321] Ibidem
[322] Ibidem
[323] Ibidem
[324] Ibidem. See also note 312
[325] Rebecca Whisnant, (n 318)
[326] Ibidem

what an average man would do.[327] Both these views places men at the centre of the crime and undermines women's experiences. In the words of Catherine MacKinnon, "Rape is only an injury from women's point of view. It is only a crime from the male point of view, explicitly including that of the accused.".[328]

A gender sensitive approach towards consent would entail different attitude. MacKinnon argues that considering men's point of view to establish whether rape has been committed is to treat the problem from the perspective of who creates it, and so does considering what would be reasonable accepted as consent in a given situation, as our society is based on male experiences.[329] Rape *mens rea* should, therefore, rely not on men's state of mind, but women's. [330] The question of reasonableness should then be problematised, reasonable to whom? And the answer should rely on women's experiences in a patriarchy society.[331] Moreover, it is imperative to give due value to the victim's perspective, how was the experience to her and if she felt violated.

It is not enough for a comprehensive rape definition to be establish. Its interpretation and application should always bear a gender aspect that places women and girls on its centre, which requires society, especially those closer to judicial and law enforcement systems, to deconstruct their views on rape and reconstruct them through a new perspective. This change of the perspective would also influence the way rape is perceived more generally in international law, including its treatment as a *jus cogens* norm.

[327] Rebecca Whisnant, (n 318)
[328] Catherine MacKinnon. Toward a Feminist Theory of the State, (Cambridge, MA: Harvard University Press, 1989), p. 180
[329] Ibidem, p. 181
[330] Ibidem, p. 182
[331] Ibidem

5. *Jus Cogens* Rights

5.1. What are *jus cogens*?

History plays an important role when assessing today's reality and understanding society's biases, which includes the interpretation of *jus cogens* norms. The origins of *jus cogens* dates back to medieval and post-Medieval times and is based on Eurocentric values of state community, which considers European notion of countries, not taking into account experiences from other parts of the world, as does international law itself. [332] In that scenario, the two main principles of international law were state sovereignty and state equality, thus allowing States to enter treaties and represent their interests.[333] In order to ensure norms that would be beneficial to and respected by the whole community of States, the idea of peremptory norms started to emerge. The first ones to arise were related to the freedom of the seas and the facilitation of the movement of diplomatic missions between States.[334]

Nowadays, peremptory norms of general international law - *jus cogens* are regulated by the Vienna Convention on the Law of Treaties (VCLT) that establishes, under its Article 53 that

> A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law. For the purposes of the present Convention, a peremptory norm of general international law **is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.**[335] (intentionally highlighted)

The VCLT also determines that, in the event a new *jus cogens* norm emerges, any treaty in conflict with such norm will become void and terminate.[336]

One interesting note is that the inclusion of the idea of *jus cogens* within the VCLT was widely supported by socialist States and countries from the Global South, that identified this notion as a protection in comparison to *pacta sunt servanda*.[337] They believed that this concept would serve as

[332] Patricia Viseur Sellers. Sexual Violence and Peremptory Norms: The Legal Value of Rape, *Case W. Res. J. Int'l L., vol. 34*, (2002), p.290
[333] Ibidem
[334] Ibidem, p. 291
[335] Article 53 of the Vienna Convention on the Law of Treaties of 1969
[336] Ibidem, Article 64
[337] Christine M. and Hilary Charlesworth. The Gender of Jus Cogens, *Women's Rights: A Human Rights Quarterly Reader*, (2006), p. 64

guarantee that basic rights would be protected, as opposed to some Western countries that thought that this concept would challenge State sovereignty.[338] Nevertheless, those who support its existence argue that it focuses on the collective good in lieu of the individual one.[339]

Hence, *jus cogens* norms are non-derrogable, binding to all international community especially States, regardless of a formal ratification, creates *erga omnes* obligations, are hierarchically superior to other norms[340] and have the purpose to "identify and to uphold what is deemed to be the most serious and essential values of the community of states",[341] having, therefore, a huge symbolic impact, in addition to a legal and practical one.[342] In the words of Jordan Paust "those who make claims about the inclusion of certain norms into the matrix of peremptory norms are actually participating in an effort to shape attitudes and, perhaps, human behavior".[343]

Despite the recognition of *jus cogens* norms appearing to be straightforward according to the VCLT, there is no consensus on how to identify them and which legal theory and method to be used to do so. According to Matthew Saul, most of the scholars' debates lies on the possible use of three theories to justify which norms would be considered *jus cogens*: natural law, public order law and CIL. There are also some scholars that defend that none of those three theories provide enough support to the identification of *jus cogens* norms.[344]

Natural law theory is related to intrinsic values of human beings, so *jus cogens* norms would be those inherent to humankind and would be connected and transformed in accordance with the changing needs of international community.[345] The public order theory, in turn, "proposes that exalted normative status should be derived through reference to the common values of the international community",[346] and would be supported by domestic legalisation of States. The CIL

[338] Christine M. and Hilary Charlesworth, (n 337), p. 64
[339] Ibidem, p. 65
[340] David S. Mitchell, (n 278), pp.228-229
[341] Patricia Viseur Sellers, (n 332), p.293
[342] Christine M. and Hilary Charlesworth, (n 337), p. 66
[343] Jordan Paust, 1991 *apud* Mary H. Hansel. "Magic" or Smoke and Mirrors? The Gendered Illusion of Jus Cogens, forthcoming in *Peremptory Norms of General International Law (Jus Cogens): Disquisitions and Disputations*, (2021), p.5
[344]Matthew Saul, Identifying Jus Cogens Norms: The Interaction of Scholars and International Judges, *Asian Journal of International Law*, (2014), p.5
[345] Ibidem, p.6
[346] Ibidem

theory is the one that seems more accepted generally, under which *jus cogens* norms would derive from norms that are already perceived as having CIL status.[347]

Mary H. Hansel, in turn, argues that the recognition of *jus cogens* norms relies, generally, in two ideological fields: positivism and normativism.[348] The positivism theory, as mentioned in Section 2.2.4 of this work,[349] is the idea that norms and rights emerge from codification, therefore, law in general, for instance treaties or CIL, would be the sources of international law. Consequently, the public order theory and the CIL theory mentioned above would be connected to positivism. Whereas normativism "is rooted in value judgment and lays no claim to neutrality.[…] Under a normativist approach, one refers to a theoretical touchstone in deciding which norms are deserving of jus cogens status.",[350] whereby natural law and fiduciary theory[351] would be examples of such touchstones.[352]

Judicial decisions also might help understand how to identify *jus cogens* norms, as is the case, for instance, of the ICJ case Belgium v. Senegal, where the court stated that:

> 99. In the Court's opinion, the prohibition of torture is part of customary international law and it has become a peremptory norm (jus cogens). That prohibition is **grounded in a widespread international practice and on the opinio juris of States**. **It appears in numerous international instruments of universal application** (in particular the Universal Declaration of Human Rights of 1948; the 1949 Geneva Conventions for the protection of war victims; the International Covenant on Civil and Political Rights of 1966; General Assembly resolution 3452/30 of 9 December 1975 on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment), **and it has been introduced into the domestic law of almost all States**; finally, acts of torture **are regularly denounced within national and international fora**.' [353](intentionally highlighted)

However, it is important to note that international scholars and jurists frequently do not explain why certain norms have attained *jus cogens* status, and merely replicate rules that are already widely recognised as such.[354]

---

[347] Matthew Saul (n 344), p. 6
[348] Mary H. Hansel. (n 343), p. 1
[349] See note 107
[350] Mary H. Hansel. (n 343), p. 1
[351] The fiduciary theory, in general, states that "jus cogens norms flow from a fiduciary relationship between the State and its people and thus reflect the priorities of the latter." - Ibidem, p. 25. In other words, the State should act in accordance with peoples' best interest and to their protection.
[352] Ibidem
[353] Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal), Judgment, I.C.J. Reports 2012, para. 99
[354] Matthew Saul, (n 344), p.16

By adopting a positivist approach,[355] the ILC, the UN body responsible for analysing international law matters and develop the area,[356] has tried to explain and interpreted *jus cogens* norms throughout its sessions. Nonetheless, the process on how to identify *jus cogens* norms still faces critiques from scholars.[357]

The ILC has established a non-exhaustive list of *jus cogens* norms, namely: "(a) The prohibition of aggression; (b) the prohibition of genocide; (c) the prohibition of crimes against humanity; (d) the basic rules of international humanitarian law; (e) the prohibition of racial discrimination and apartheid; (f) the prohibition of slavery; (g) the prohibition of torture; (h) the right of self-determination".[358]

The ILC reinforces the idea of the universal applicability and hierarchical superiority of *jus cogens* norms and that they "reflect and protect fundamental values of the international community".[359] The Commission also recognises that, in spite of the fact that States are the primary subjects of international law, with respect to international community, other actors pose important influence on determining the above-mentioned fundamental values [360] and are also bound by it.[361] In this sense, the idea of *jus cogens* is also incompatible with the persistent objector rule. Thus, it is not possible for a State to argue such exception when it concerns the compliance with *jus cogens* norms, which the entire international community is bound to.[362]

The ILC goes on to establish the criteria to recognise *jus cogens* norms. Guided by the VCLT, the ILC states that:

> Conclusion 4
>
> Criteria for the identification of a peremptory norm of general international law (jus cogens)

[355] Mary H. Hansel. (n 343), p. 1
[356] The International Law Commission is composed of 34 members, representing diverse countries of the world. As of January 1st, 2023, only 5 members of the Commission were women. See https://legal.un.org/ilc/ilcmembe.shtml . Accessed November 2024
[357] As will be further discussed in the following session.
[358] International Law Commission, Draft conclusions on identification and legal consequences of peremptory norms of general international law (jus cogens), with commentaries, 2022, Annex
[359] Ibidem, Conclusion 2 and commentary 14
[360] Ibidem, Conclusion 2, commentary 9
[361] Ibidem, Conclusion 2, commentary 11
[362] International Law Commission, (n 358), Conclusion 2, commentary 13

> To identify a peremptory norm of general international law (jus cogens), it is necessary to establish that the norm in question meets the following criteria:
> (a) it is a norm of general international law; and
> (b) it is accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.[363]

In order to identify if such criteria is properly fulfilled, the ILC recognises the basis for *jus cogens* norms to be: CIL as the most common, treaty provisions and general principles of law, in addition to other sources established by Article 38, paragraph 1 of the ICJ Statute, which includes judicial decisions and doctrine.[364] When it regards to the "community of States as a whole", the ILC makes it clear that there is no need for a norm to be accepted and recognised by all States, being sufficient that a large majority of States do so.[365] It is also important to, once again, highlight that a common international definition of a norm's elements is not a requirement for a rule to be considered *jus cogens*.

As means to determine what constitutes evidence of acceptance and recognition, the ILC found that it could take several forms, such as public statements, constitutional provisions, legislative and administrative acts, decisions of courts, treaty provisions, resolutions adopted by international organizations, etc. In other words, any material sufficient to express a State position that a given norm has *jus cogens* status.[366] Importance is also given to decisions of international courts and tribunals, as well as to national courts and work of expert bodies, established whether nationally or internationally, in addition to legal doctrine.[367]

As a consequence of a norm being perceived as *jus cogens*, treaties, or treaty provisions, that are conflicting with it would be deemed void and null, rules of CIL incompatible with such norm would cease to exist, States would have to abstain from actions that are not in compliance with such rule and would have the obligation to prevent and forbid violations of such given norm (including alter domestic legislation). Also, States would be entitled to invoke the responsibility of another State in case of breach of a *jus cogens* norm,[368] allowing for universal jurisdiction to protect the community from *jus cogens* violations, among other outcomes. *Jus cogens* norms place an important role within international law and the protection of fundamental rights of society.

[363] International Law Commission, (n 358), Conclusion 4
[364] Ibidem Conclusion 5 and commentary 7
[365] Ibidem Conclusion 7 (2) and commentary 7
[366] Ibidem Conclusion 8 (2) and commentary 2
[367] Ibidem Conclusion 9 (1) and (2)
[368] Ibidem, Part III

5.2. Feminist's Critiques to the definition of *Jus Cogens* norms

As it has been established herein, particularly through the analysis made on Section 2 of this work, international law is a gendered system that privileges male experiences over women's. *Jus cogens* concept, being part of the same international legal system, would not be any different. Likewise, the experience within *jus cogens* has not provided women with the same protection as it accords to men, allowing to challenge its universality on this matter.[369] In this sense, Anne-Marie Levesque states that

> The theories of jus cogens are indeed at the crossroads of several vectors carrying an implicit male standard, which only makes their overlapping more difficult to unravel and counter. A first vector would be that of equivalence between man and human, which colors international human rights law and consequently jus cogens; a second would be that of the masculine character of the State and of other international legal institutions, which would influence the identification of imperative standards according to the masculine standard. Finally, the process of forming jus cogens itself, without necessarily favoring the male standard, would however help to maintain it by its very great propensity for the status quo.[370]

All *jus cogens* norms undisputedly identified as such[371] are undeniably serious and are rightfully recognised as peremptory norms, however, it is clear that such list is silent to women's experiences, allowing to the conclusion that they were not properly considered.[372] Even though race discrimination is listed as a *jus cogens* norm, gender discrimination is not, aside the fact that gender discrimination is as widely as (if not more) mentioned and forbidden within human rights instruments and represents a violation that inflicts more than half of world's population.[373] Matters such as reproductive freedom, freedom from endemic violence, or a right to peace, which mostly affects women are also out of the list,[374] while gender apartheid is not only off the list, but is not even codified as a crime yet.[375] Such differences on the treatment afforded to certain rights speaks to the public/private distinction already discussed within this work as the violations that mostly affects women (the "private") are seen as less fundamental.[376]

---

[369] Christine M. and Hilary Charlesworth, (n 337), p. 65
[370] Anne-Marie Levesque, 2014 *apud* Mary H. Hansel. (n 343), p. 22
[371] See note 358 above.
[372] Christine M. and Hilary Charlesworth, (n 337), p. 70
[373] Ibidem
[374] Patricia Viseur Sellers. Jus Cogens: Redux, *AJIL Unbound, 116*, (2022), p. 281
[375] Efforts are being made for the crime to be codified in the Prevention and Punishment of Crimes Against Humanity treaty currently under discussion.
[376] Christine M. and Hilary Charlesworth, (n 337), p. 74

As mentioned on the previous section, the positive approach towards the definition of peremptory norms, which, in sum, establishes that rights result from codification, is widely used and accepted, by referring to codified rules to support the election of which rights have attained *jus cogens* status, a process that would, in theory, be embedded with objectivity and neutrality. However, as shown herein, the process of developing (international) law, cannot be deemed neutral and genderless. Mary H. Hansel describes the positive approach to *jus cogens* as an illusion, not being what it claims to be (i.e. a neutral and objective analysis)

> This chapter seeks to disrupt this (false) dichotomy. It demonstrates that the positivist approach to jus cogens is not what it claims to be—indeed, it cannot achieve any semblance of objectivity due to its unsalvageable methodological deficiencies. The chapter reveals the positivist approach as a subjective, discretionary selection process. This process is largely opaque and may or may not be driven by instinct or moral considerations; a sense of jus cogens agnosticism is thus appropriate. Yet under the cloak of positivism, the selection process masquerades as a neutral assessment. Such is the illusion of jus cogens. This illusion, in turn, facilitates the exclusion of norms that reflect the interests of women, girls and gender minorities.[377]

Such illusion serves to, once again, marginalise women, being in accordance with the gender prejudices of the international system as a whole[378] and the identification process of *jus cogens* norms turns out to be "a discretionary exercise, ruled by subjectivity and potential biases".[379]

The approach used by the ILC does not establish significant criteria to evaluate if the *jus cogens* evidence would be enough. Another flaw of the method relies in the fact that none of the norms listed by the ILC as having *jus cogens* status has a complete assembling of evidence. It seems like only the evidences that are in favour of certain norms that the ILC wishes to recognise as *jus cogens* are properly analysed, and the unfavourable evidences are left out; the opposite applies to norms that the ILC does not desire to characterise as such (as was the case for gender discrimination).[380] In addition, the ILC does not explain how unfavourable evidences shall be considered as opposed to favourable ones and the weight each of them shall bear.[381]

This shows the pressing need of a review on how *jus cogens* norms are perceived so they can be truly universal and objective. including applying gender lens, with all its intersectionalities, on the

[377] Mary H. Hansel, (n 343), p. 2
[378] Ibidem, p. 3
[379] Ibidem, p. 13
[380] Ibidem, pp. 13-14
[381] Ibidem

analysis of such norms and recognising that the current views are not neutral in essence. [382]These are essential aspects to reconstruct the way *jus cogens* norms are perceived. This would mean an advancement towards universality.

The ultimate importance of *jus cogens* norms are undeniable. However, as they are understood to protect the most essential rights and are perceived to safeguard the fundamental values of international community, being those a reflection of male values due to male dominance over international community, the essential rights and fundamental principles it ought to defend are, consequently, male, leaving women, once again, to the periphery of society. Similarly to what occurs within the international law system more generally, if women's experiences were duly considered and if their lives impacted the formation of what those fundamental values are, the experience of *jus cogens* norms would be very different.[383]

5.3. Rape as jus cogens?

As previously mentioned herein, peremptory norms are those which the international community accepts and recognises as non-derrogable,[384] they also aim to protect the very core values of society. In order to be identified they should be extensively treated internationally and nationally through numerous means such as, treaty provisions, resolutions, national laws, decisions from courts, work of scholars, etc.[385] As described throughout this work, rape can frequently amount to torture, crimes against humanity, slavery or even elements of genocide. As also shown here, these violations are perceived as breaches of *just cogens* norms.[386]

When rape is considered as one of those violations it is, therefore, indirectly also considered as *jus cogens*. However, characterising rape as such is not that black and white, and entails an extensive (most of the time subjective) analysis to recognise if the elements of those crimes were fulfilled.[387] But does the prohibition of rape have what it takes to be considered *jus cogens per se*? This work argues that yes, and that the silence on the theme has roots on the gendered and sexist aspects of international law, as previously shown.

[382] Mary H. Hansel, (n 343), p. 24
[383] Christine M. and Hilary Charlesworth, (n 337), p. 68
[384] See note 335 above.
[385] See notes 362 - 367
[386] See note 358 supra.
[387] See, for instance, notes 188, 189, 190 and, generally, Chapter 4 -The (lack of a) definition of rape supra.

Furthermore, even though the characterisation of rape as encompassing the previously mentioned *jus cogens* norms is extremely important (especially considering the hard work of feminists throughout history to ensure that rape was perceived as a violation so serious that it should be accounted as the most grave offenses to humankind, and this work by no means wishes to undermine such important development), after years of progress it is vital to acknowledge that naming violations from what they are is of ultimate importance regarding recognition and to bring attention to gender invisibility. Hence, it is not enough for rape to be considered *jus cogens* indirectly, it is imperative that it is understood as *jus cogens* on its own.

This thesis defends that the prohibition of rape fulfils all the requirements established by law, the doctrine and the ILC to the characterisation of a peremptory norm, as will be shown herein. Additionally, it is unimaginable that any entity or State would, in any way, argue that rape is excusable or should be permitted under a particular circumstance. In fact, it is recognised that sexual violence and rape in addition to being forbidden, should be deemed impossible to be excused by military necessity, perceived as collateral damage during conflicts or overlooked through a siege.[388] Logically, it is fair to assume that the notion of non-derrogability would be fulfilled,[389] otherwise it would "force[s] one to make an inhumane, almost barbaric argument regarding why rape should not be expressly prohibited in all situations".[390] Rape, as stated above, is already indirectly considered as a violation of certain *jus cogens* norms, allowing to the conclusion that rape is amongst the most serious violations of rights.[391] Thus, if it reaches the severity in those cases, why shouldn't it be considered such a serious violation attaining *jus cogens* character by itself?

Rape, while sexual in nature, is not sexual in purpose. It is an act of power that is not connected to sexual satisfaction. It is a reflection of the unequal power distribution within society which aims for the preservation of male dominance over women and the destruction of women based on their identity.[392] In fact, if gender was not an important factor of this violence, it would not be largely committed against women. Even when it is infringed towards men, the main goal is to humiliate by "reducing" them to the status of women.[393] In that sense, a number of international cases have

[388] Patricia Viseur Sellers, (n 332), 2002, p. 289
[389] David S. Mitchell, (n 278), p.226
[390] James R. McHenry, 2002 *apud* David S. Mitchell, (n 278), p. 226
[391] David S. Mitchell, (n 278), p.235
[392] Clare McGlynn, (n 300), pp. 581-584
[393] Ibidem, p. 584

assessed the seriousness of rape and its connection to other *jus cogens* norms, as it will be shown by some examples.

The ICTY Trial Chamber, for instance, while assessing the Delalic case and analysing if rape could constitute torture, recognised that "rape of any person to be a despicable act which strikes at the very core of human dignity and physical integrity"[394] and that "Rape causes severe pain and suffering, both physical and psychological. The psychological suffering of persons upon whom rape is inflicted may be exacerbated by social and cultural conditions and can be particularly acute and long lasting".[395] The same Tribunal, in the Kunarac case, during its trial stated that "rape is one of the worst sufferings a human being can inflict upon another"[396] and its Appeals Chamber understood that there are some conducts that by themselves impose suffering and that rape was evidently one of these conducts. The Appeals Chamber also clamed that "sexual violence necessarily gives rise to severe pain or suffering, whether physical or mental, and in this way justifies its characterisation as an act of torture".[397] This statement allows for the logical conclusion that, once rape is committed, it should be considered that the threshold of torture is automatically fulfilled, recognising the seriousness of rape.[398]

The ICTR also recognised the gravity of rape. During the trial of Akayesu, the Chamber established that "Like torture, rape is used for such purposes as intimidation, degradation, humiliation, discrimination, punishment, control or destruction of a person. Like torture, rape is a violation of personal dignity".[399] This was an emblematic case in many areas, whether by its broad definition of rape, whether by recognising rape as means to destruct a person, or by being the first case to indicate that rape could amount to genocide. In that regard, the ICTR understood that rape could be inflicted to members of a group as means to destroy them.[400]

When analysing the regional human rights bodies, for example, the first time the ECtHR established that rape could amount to torture was on Aydin v. Turkey. In this case the Court understood that

[394] Prosecutor v Delalic, Judgment, IT-96-21-T, 16 November 1998, para 495.
[395] Ibidem
[396] Kunarac et al. Trial Judgment (IT-96-23-T& IT-96-23/1-T) Trial Chamber, 22 February 2001, para. 655
[397] Prosecutor v Kunarac, (IT-96-23 & 23/1) Appeals Chamber, 20 June 2002, para. 150
[398] A note is needed on this matter: despite the fact that this assessment by the ITCY was of extreme importance and corroborates with the idea that rape is serious enough *per se* for its prohibition to be considered *jus cogens* it is important to clarify that we cannot use the terminology indistinctively, as we would risk make women's experiences invisible, we should name rape as rape and recognise its seriousness.
[399] Prosecutor v. Akayesu, (n269), para. 597
[400] Sherrie L. Russell-Brown, (n 183), p. 352

rape of a detainee by an official was especially serious and recognised the extensive psychological consequences of rape towards its survivors[401] and, similarly to ICTY, took that rape could, by itself, be considered torture, a groundbreaking decision in this sense.[402] The IACHR recognised that rape can cause severe mental, psychological and physical harm, being also used to humiliate the victim and as a technique of psychological torture that can lead to further revictimisation in certain communities.[403]

Referring to the explicit recognition of rape as *jus cogens* by itself through case law, recently, the ICC, during the Bosco Ntaganda case, expressly confirmed that rape has reached the level of *jus cogens* norm and directly referred to the work of the scholars Kelly Dawn Askin and David S. Mitchell, [404] who recognised rape as such. Consequently, it is possible to conclude that rape would hold this status both in peace and war time. In doing so the ICC also affirmed that, even though death could be one of the outcomes of armed conflict, rape could never be excused:

> While international humanitarian law allows combatants to participate directly in hostilities, and as part of this participation, to target combatant members of the opposing forces as well as civilians directly participating in hostilities, and further provides for certain justifications for conduct that results in damage to property or the death of persons that may not be legitimately targeted, **there is never a justification to engage in sexual violence against any person; irrespective of whether or not this person may be liable to be targeted and killed under international humanitarian law**.(…)
>
> The Chamber further notes that **rape can constitute an underlying act of torture or of genocide** and that the prohibitions of torture and genocide are indisputably jus cogens norms. **It has further been argued, and the majority of the Chamber accepts, that the prohibition on rape itself has similarly attained jus cogens status under international law**(…)
>
> **As a consequence of the prohibition against rape and sexual slavery being peremptory norms, such conduct is prohibited at all times, both in times of peace and during armed conflicts, and against all persons, irrespective of any legal status**.[405]. (intentionally highlighted)

[401] Aydin v Turkey, European Court of Human Rights, Case 57/1996/676/866, 25 September 1997, para 83
[402] Clare McGlynn, (n 300), p. 568
[403] *Raquel Martí de Mejía v. Perú*, Case 10.970, Inter-American Commission on Human Rights (IACHR), 1 March 1996 - Analysis
[404] The ICC directly mentioned the following works: Kelly Dawn Askin, War Crimes against Women: Prosecutions in International War Crimes Tribunals (Martinus Nijhoff Publishers 1997), p. 242 and David S. Mitchell, (n 278), pp 219-257
[405] Prosecutor v. Bosco Ntaganda, (n 297), para 49-52

To this date,[406] few ICC cases have reached a final conviction on rape, but the statements made therein are important indicators of the court's perceptions and usher in a consistent jurisprudence on the theme. Another case that did so was the Ongwen's case that, in addition to recognising the seriousness of rape, placed it as a crime against sexual self-determination and integrity.[407] It also provided for the largest reparation order for the victims in the history of ICC so far, [408] acknowledging the horrifying and long-term effects that rape might have and the need for the victims to be properly assisted. Although these cases are of extreme importance regarding the recognition of the seriousness of rape, they are still not enough to say that there has been a shift in the way international law is perceived, nor that it is becoming less sexist, but they certainly can indicate a step towards it.

Considering that the work of scholars is a source of law as provided by article 38 of the ICJ Statute,[409] the fact that well known academics have recognised the prohibition of rape as *jus cogens* by itself [410] corroborates and strengthens the idea that the prohibition of rape has fulfilled the criteria established by law, literature and the ILC to be considered *jus cogens* on its own. Throughout their work, Kelly Askin and David Mitchell presented an extensive analysis on rape during conflict time and the vast provisions under international law forbidding and condemning rape, concluding that its prohibition has attained jus cogens status. Kelly Askin, in addition, discuss the gender aspects around international law and the evolution in the way women (and crimes against women) were treated.

With regards to universality and universal jurisdiction, rape has even been understood as a universal crime. In Kadic v. Karadzic, a case brought under the United States Alien Tort Claims Act, Croat and Muslim Bosnian women alleged numerous brutal crimes, including rape, torture and forced prostitution, among other felonies, against the Bosnian-Serb leader Radovan Karadzic. The case was analysed by United Stated civil courts that expanded their jurisdiction "to cover acts of sexual violence to the extent that they are committed in pursuit of genocide or war crimes, regardless of the location of the crimes or the nationality of the victims or the accused".[411] Additionally, it has been

[406] February 20, 2024
[407] Prosecutor v. Dominic Ongwen, Trial Chamber IX, ICC-02/04-01/15, Sentence, 6 May 2021, para 300
[408] Redress, ICC's Largest Ever Reparation Order Paves the Way for Reparations for Victims of Ongwen's Crimes, <https://redress.org/news/iccs-largest-ever-reparation-order-paves-the-way-for-reparations-for-victims-of-ongwens-crimes/> accessed 28 February 2024
[409] Statute of the International Court of Justice, article 38 (1) (d)
[410] In addition to the work indicated by the ICC, see also Kelly D. Askin, Prosecuting Wartime Rape and Other Gender-Related Crimes under International Law: Extraordinary Advances, Enduring Obstacles, *21 Berkeley J. Int'l Law*. 288 (2003).
[411] David S. Mitchell, (n 278), p.249

manifested that rape can also be considered as slavery and the U.N Special Rapporteur has made it clear that sexual slavery is slavery, being, thus, *jus cogens*.[412]

Cases regarding rape, internationally, regionally, and nationally, are numerous and it would be impossible to cover all of them within this work. The above-mentioned cases, together with other proceedings brought throughout this work, were just some examples of how the seriousness of rape has been addressed. If what was set out herein is not the description of a violation that goes against all fundamental values of humankind, what would?

As mentioned, for a norm to be considered *jus cogens* it must be extensively recognised and treated under international and national law. Violence against women, which encompasses rape, is widespread in every State. As regards to the criteria of being a general norm of international law, accepted and recognised as peremptory by a large majority of States, it "is one of those rare areas where there is genuinely consistent and uniform state practice"[413] being condemned by essentially every State, both internationally and within their domestic legislation,[414] regardless of the definition used for rape internally and other background aspects. This assertion is attested by the extensive prohibition of rape, directly or indirectly, in numerous areas of the international legal system, IHL, IHRL, CIL, whether by declarations, treaties, international courts statutes, General Assembly and Security Council resolutions, reports from specialised bodies and statements, as demonstrated throughout this work, particularly through Section 3. In addition to that, States have dispensed a great amount of effort, domestically and internationally, to regonise, prevent and eradicate such crime.[415]

All the abovementioned evidence and the aspects brought throughout this entire work supports the conclusion that the prohibition of rape has proven to have fulfilled every element outlined by the VCLT, scholars, jurists and the ILC to be undeniably considered *jus cogens per se* (i.e. a norm of general international law, accepted and recognized by the international community of States as a norm that does not allow for derogation, being extensively treated nationally and internationally). Additionally, being one of the most serious violations of one's rights, its prohibition would reflect the aim of *jus cogens* norms to protect the most important values of society and to guard "the

[412] David S. Mitchell, (n 278), p. 254
[413] Christine M. and Hilary Charlesworth, (n 337), p. 71
[414] David S. Mitchell, (n 278), p.247
[415] Ibidem, p.226

foundation of international society without which the entire edifice would crumble", [416] should the system properly take women's lives and experiences into consideration.

Duly and definitively recognising the prohibition of rape as *jus cogens* would unleash all the consequences attained by *jus cogens* norms. It would allow for universal jurisdiction, granting States the right to invoke the responsibility of another in case of breach, create an obligation for States to actively prevent and pursue the eradication of such crime, lead to the need for amendment of internal legislation to be in compliance with the seriousness of such conduct, make any conduct and norm in conflict with the prohibition to be deem void and null, and would create international obligations that would make it harder for States to ignore the occurrence of rape, whether internally or internationally. In sum, it could lead to proper accountability for perpetrators and justice for the victims and survivors of the crime as well as for more serious prevention policies and strategies and, last, but not least, would allow for women's experiences to be seriously considered.

[416] Eric Suy, 1967 *apud* Christine M. and Hilary Charlesworth, (n 337), p.67

6. Conclusions

Even though the discussions around gender, rape and other types of sexual violence have been present for years, progress has been inconsistent at best.[417] Despite some advancements, international law is still a highly gendered system and applying a gender perspective remains a great challenge. Discussing gender issues come with a wide range of difficulties, including the lack of contextual information about gender structures and how it intersects with other identities within a certain context and higher evidentiary burdens for gender-based crimes.[418] It all reflects the great imbalance of power and discriminatory hierarchy, as it was shown throughout this work. The fact that international law is a gendered system comes with great consequences, allowing to question its fundamental idea of universality.

In this sense, better accountability must come, inevitably, with real change in the structure. Everything needs to be analysed through gender lens, not only those subjects that are manifestly gender related. Approaching all themes with a gender perspective will allow not only for better decisions and policies but will also be a step further into actual universality. We are history, we are context, ignoring it will, ultimately, lead us to failure. We, as a society, need to consider our biases, our stereotypes, the structure we are embedded in and actively think about how these aspects influence ourselves, our beliefs, our system, and our decisions.

The prohibition of rape is extensively treated not only internationally, but nationally, and has been so for centuries, but the way it is forbidden varies and there is no common definition of what constitutes rape. On this basis, it is important to note that a definition of rape should not be the same in times of armed conflict and peacetime, as the circumstances surrounding each situation varies tremendously. In armed conflict contexts it is illogical to talk about consent, as no one could possibly give free and genuine consent under these situations, whereas, during peacetime, consent should rely at the centre of the elements of rape, and should be given freely and voluntarily. Any condition that harm the ability to do so, should lead to the understanding that it was not spontaneously given, resulting in an unwanted sexual relation, in other words, rape.

[417] International Conference on Gender and International Criminal Law held online and on site at Leiden University on January 16 and 17, 2024.
[418] Ibidem

The aim of *jus cogens* norms is to protect the most essential rights, the rights that are central to the very existence of humankind. In that vein, rape is perceived as one of the most serious violations someone can suffer, being forbidden under international and national law through numerous provisions. From hard to soft law, and CIL, to judicial decisions and literature, the prohibition of rape has been considered as a norm that no derogation is allowed, no matter what, and has attained all the requirements prescribed by the ILC to be considered as a *jus cogens* norm by itself, not merely indirectly through crimes against humanity, torture, etc. The fact that it is still not considered as such is intrinsically connected to the sexism surrounding the international legal system.

The fact that rape does not have a common definition under international law (which can also be the result of the gendered aspects of international law) does not affect the fact that it fulfils the requirements for its prohibition to be considered *jus cogens per se* and should be considered as such regardless of the definition chosen by a State or court. However, having a broad internationally accepted and binding definition of what constitutes rape would certainly add to the equation and help the pursue of justice and accountability, both nationally and internationally. In other words, the prohibition of rape has what it takes to be considered *jus cogens per se*, during peacetime and in armed conflict situations, regardless of the definition used. Every time it is concluded that a rape has been committed, a *jus cogens* norms has been violated.

It is not that rape should be named as torture, genocide or otherwise (even though it should encompass all those violations), but certainly all rapes should be seen with the same severity by itself under the name of rape, without an extra layer of requirements needing to be added to it. It is important to recognise and properly name the violations suffered mostly by women. If we fail to do so, we will, once again, invisibilise women, silence their voices and marginalise their experiences.

Simply put, if the international law system were not sexist, would it be possible to reach a common gender sensitive international definition of rape, and would the prohibition of rape have what it takes to be considered *jus cogens per se*? This work has demonstrated that yes.

Not ignoring the systemic change we, as a society, need to seek within the international system, establishing rape as a violation of *jus cogens* rights *per se* and recognising a gender sensitive common definition of rape are steps further towards the recognition of women under international law.

Bibliography

Books and Journal Articles

Adams, A. (2018, August). The Legacy of the International Criminal Tribunals for the Former Yugoslavia and Rwanda and Their Contribution to the Crime of Rape. *European Journal of International Law, vol 29*, pp. 749–769.

Altunjan, T. (2021). The International Criminal Court and Sexual Violence: Between Aspirations and Reality. *German Law Journal, v 22*.

Askin, K. D. (1997). *War Crimes against Women: Prosecutions in International War Crimes Tribunals.* Martinus Nijhoff Publishers.

Askin, K. D. (2003). Prosecuting Wartime Rape and Other Gender-Related Crimes under International Law: Extraordinary Advances, Enduring Obstacles. *Berkeley Journal of International Law. vol 21*, pp. 288-349.

Bianchi, A. (2016). *International Law Theories.* Oxford University Press.

Carbone, J., & Cahn, N. (2016). UNEQUAL TERMS: GENDER, POWER, AND THE RECREATION OF HIERARCHY. *Special Issues: Feminist Legal Theory (Studies in Law, Politics, and Society, Vol. 69)*.

Carol Murray, C. C. (2023). Modern Rape Myths: Justifying Victim and Perpetrator Blame in Sexual Violence. *Int. J. Environ. Res. Public Health* .

Celis, K. (2008). Substantive Representation of Women (and improving it). What is and should it be about? *Annual meeting of the American Political Science Association Panel 31-18 ' The Construction of Gendered Interests'*.

Charlesworth, H. (1995, January 1). Feminists Critiques of International Law and Their Critics. *Third World Legal Studies - Volume 13 Women's Rights and Traditional Law: A Conflict*.

Charlesworth, H., & Chinkin, C. (2022). *The boundaries of international law: A feminist analysis, with a new introduction.* Manchester University Press.

Charlesworth, H., Chinkin, C., & Wright, S. (1991, October). Feminist Approaches to International Law. *The American Journal of International Law Vol. 85, No. 4*, pp. 613-645.

Ellis, M. (2007). Breaking the Silence: Rape as an International Crime. *Case W. Res. J. Int'l L. 225, vol.38*, pp. 225-247.

Engle, K., Nesiah, V., & Otto, D. (2021, April 6). Feminist Approaches to International Law. University of Texas Law, Public Law Research Paper No. 716.

Eriksson, M. (2010). Defining Rape - Emerging Obligations for States under International Law?

Fredman, S. (2016). *Substantive equality revisited. International Journal of Constitutional Law, Volume 14, Issue 3*, pp. 712–738

Gagro, S. F. (2010). The Crime of Rape in the ICTY's and the ICTR's Case-Law. *Collected Papers of Zagreb Law, vol 60*, pp. 1309-1334.

Gegenava, L. *The Evolution of the Legal Definition of Rape*. Retrieved from https://www.culawreview.org/journal/the-evolution-of-the-legal-definition-of-rape. Accessed 21 February 2024

Grossman, N. (2016). Notes and Comments - Achieving Sex-Representative International Court Benches. *American Journal of International Law*.

Hansel, M. H. (2021). "Magic" or Smoke and Mirrors? The Gendered Illusion of Jus Cogens. Forthcoming in *PEREMPTORY NORMS OF GENERAL INTERNATIONAL LAW (JUS COGENS): DISQUISITIONS AND DISPUTATIONS*, pp. 471–508.

International Committee of Red Cross. (2009). Customary International Humanitarian Law Volume I: Rules. Cambridge University Press.

International Committee of Red Cross. (2019). *International Humanitarian Law A Comprehensive Introduction* .

Kälin, W., & Künzli, J. (2019). *The Law of International Human Rights Protection.* Oxford University Press.

M.Chinkin, C., & Charlesworth, H. (2006). The Gender of Jus Cogens. *Women's Rights: A Human Rights Quarterly Reader*, pp. 87-100.

MacKinnon, C. (1989). *Toward a Feminist Theory of the State.* Cambridge, MA: Harvard University Press.

MacKinnon, C. (2006). Defining Rape Internationally: A Comment on Akayesu. In *Are women human? and other international dialogues.* The Belknap Press of Harvard University Press.

McGlynn, C. (2009). Rape, torture and the European convention on human rights. *International and comparative law quarterly, 58*, pp. 565-595.

Miguel, L. F. (2000, October). TEORIA POLÍTICA FEMINISTA E LIBERALISMO: O caso das cotas de representação. *Revista Brasileira De Ciências Sociais, Vol. 15 no 44*.

MITCHELL, D. S. (2005). The Prohibition Of Rape In International Humanitarian Law as a Norm of Jus Cogens: Clarifying the Doctrine. *Duke Journal of Comparative & International Law, V. 15*, pp. 219-257.

Otto, D. (2009, November). The Exile of Inclusion: Reflections on Gender Issues in International Law Over the Last Decade. *Melbourne Journal of International Law, Volume 10, Issue 1*, pp. Legal Studies Research Paper - No. 431 .

Otto, D. (2010). Power and Danger: Feminist Engagement with International Law Through the UN Security Council. *Australian Feminist Law Journal, Volume 32*, pp. 97-121.

Passos, K. R., & Losurdo, F. (2017). Estupro de Guerra: O Sentido da Violação dos Corpos para o Direito Penal Internacional. *Revista de Gênero, Sexualidade e Direito v.3 n.2*, pp. 153 – 169.

Runyan, A. S., & Peterson, V. S. (1991). The Radical Future of Realism: Feminist Subversions. *Alternatives: Global, Local, Political 16, no. 1*.

Russell-Brown, S. L. (2003). Rape as an Act of Genocide. *BERKELEY JOURNAL OF INTERNATIONAL LAW, v. 21*, pp. 350-374.

Saul, M. (2014, May). Identifying Jus Cogens Norms: The Interaction of Scholars and International Judges. *Asian Journal of International Law*, pp. 1 - 29.

Schabas, W. A. (2021). *The Customary International Law of Human Rights.* Oxford University Press.

Sellers, P. V. (2002). Sexual Violence and Peremptory Norms: The Legal Value of Rape. *Case W. Res. J. Int'l L., v. 34*, pp. 287-303.

Sellers, P. V. (2022). Jus Cogens: Redux. *AJIL Unbound, 116*, pp. 281-286.

Whisnant, R. (2021). *Feminist Perspectives on Rape.* Retrieved from The Stanford Encyclopedia of Philosophy: https://plato.stanford.edu/archives/fall2021/entries/feminism-rape/ . Accessed 15 March 2024

International Treaties

African Union. (adopted 1 June 1981, entry into force 21 October 1986). African Charter on Human and Peoples' Rights.

African Union. (adopted 11 July 2003, entry into force 25 November 2005). Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa. Maputo.

Association of Southeast Asian Nations. (2012). ASEAN Declaration on Violence against Women and Violence Against Children.

Convention on the Elimination of All Forms of Discrimination against Women, Introduction. Retrieved from https://www.ohchr.org/en/instruments-mechanisms/instruments/convention-elimination-all-forms-discrimination-against-women. Accessed 21 February 2024

Council of Europe. (adopted 7 April 2011, entry into force 1 August 2014). The Council of Europe Convention on preventing and combating violence against women and domestic violence. Istanbul.

Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field . (adopted 12 August 1949, entry into force 21 October 1950).

Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea. (adopted 12 August 1949, entry into force 21 October 1950).

Geneva Convention Relative to the Protection of Civilian Persons in Time of War. (adopted 12 August 1949, entry into force 21 October 1950).

Geneva Convention Relative to the Treatment of Prisoners of War . (adopted 12 August 1949, entry into force 21 October 1950).

International Criminal Court. (adopted 17 July 1998, entry into force 1 July 2002). Rome Statute of the International Criminal Court.

Organization of American States . (adopted 9 June 1994). Inter-American Convention on the Prevention, Punishment And Eradication of Violence Against Women "Convention of Belem do Para" .

Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts. (adopted 8 June 1977, entry into force 7 December 1978).

Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts . (adopted 8 June 1977, entry into force 7 December 1978).

United Nations. (adopted 10 December 1984, entry into force June 26 1987). Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

United Nations. (adopted 16 December 1966, entry into force 23 March 1976). International Covenant on Civil and Political Rights.
United Nations. (adopted 22 May 1969, entry into force 27 January 1980). Vienna Convention on the Law of Treaties. United Nations.
United Nations. (adopted 26 June 1945, entry into force 18 April 1946). Statute of the International Court of Justice.
United Nations. (adopted 26 June 1945, entry into force 24 October 1945). United Nations Charter.
United Nations. (adopted 4 December 1986). Declaration on the Right to Development.
United Nations General Assembly. (adopted 14 December 1974). Declaration on the Protection of Women and Children in Emergency.
United Nations General Assembly. (adopted 18 December 1979, entry into force 3 September 1981). Convention on the Elimination of All Forms of Discrimination against Women.
United Nations General Assembly. (adopted 20 December 1993). Declaration on the Elimination of Violence against Women.
United Nations General Assembly. (adopted 20 November 1989, entry into force 2 September 1990). Convention on the Rights of the Child.
United Nations General Assembly. (adopted 25 May 2000, entry into force 18 January 2002). Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography. A/RES/54/263.
World Conference on Human Rights in Vienna. (adopted 25 June 1993). Vienna Declaration and Programme of Action.

International Case Law

Akayesu Judgment, ICTR-96-4-T (International Criminal Tribunal for Rwanda September 2, 1998).
Aydin v Turkey, 57/1996/676/866 (European Court of Human Rights September 25, 1997).
Furundžija Judgment, IT-95-17/1-T (International Criminal Tribunal for the former Yugoslavia December 10, 1998).
International Court of Justice. (1951). *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide (Advisory Opinion).*
International Court of Justice. (1986). *case concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v The United States of America).*
International Criminal Court. (2012). Questions Relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal).
Kunarac et al. Trial Judgment, IT-96-23-T, IT-96-23/1-T (International Criminal Tribunal for the former Yugoslavia February 22, 2001).
M.C. v Bulgaria, 39272/98, (European Court of Human Rights December 4, 2003).

Prosecutor v Delalic, Judgment, IT-96-21-T (International Criminal Tribunal for the former Yugoslavia November 16, 1998).
Prosecutor v Kunarac, Appeals Chamber, IT-96-23 & 23/1 (International Criminal Tribunal for the former Yugoslavia June 20, 2002).
Prosecutor v. Issa Hassan Sesay, Morris Kallon and Augustine Gbao (the RUF accused), SCSL-04-15-T (Special Court for Sierra Leone March 2, 2009).
R.P.B. v. The Philippines, Communication No. 34/2011 (Committee on the Elimination of Discrimination against Women, Views adopted by the Committee at its fifty-seventh session February 10-28, 2014).
Raquel Martí de Mejía v. Perú, 10.970 (Inter-American Commission on Human Rights March 1, 1996).
Situation in the Central African Republic in the Case of the Prosecutor v. Jean-Pierre Bemba Gombo, Judgment pursuant to Article 74 of the Statute , Trial Chamber III, ICC-01/05-01/08 (International Criminal Court 21 de March de 2016).
Situation in the Democratic Republic of the Congo in the Case of the Prosecutor v. Bosco Ntaganda - Second decision on the Defence's Challenge to the Jurisdiction of the Court in respect of Counts 6 and 9, Trial Chamber VI - ICC-01/04-02/06 (International Criminal Court January 4, 2017).
Situation in the Democratic Republic of the Congo in the Case of the Prosecutor v. Bosco Ntaganda, Trial Chamber VI, Judgment, ICC-01/04-02/06 (International Criminal Court July 8, 2019).
The Prosecutor v. Dominic Ongwen, ICC-02/04-01/15, Sentence (International Criminal Court May 6, 2021).

Documents from International Organisations

American Red Cross. (2011). Summary of the Geneva Conventions of 1949 and Their Additional Protocols.
Amnesty International . (2011). Rape And Sexual Violence - Human Rights Law And Standards In The International Criminal Court.
European Parliament and of the Council of Europe. (2022, March 8). Directive of the European Parliament and of the Council on Combating Violence Against Women and Domestic Violence, COM/2022/105 final.
Human Rights Council . (2023). *A/HRC/52/62.*
International Committee of the Red Cross. (2004, March). Addressing the Needs of Women Affected by Armed Conflict.
International Criminal Court. (Revised version adopted at the 2010 Review Conference, 31 May -11 June 2010). Elements of Crime.
International Criminal Tribunal for Rwanda. (1994, February 11). ICTR Rules of Procedure and Evidence.
International Criminal Tribunal for the Former Yugoslavia. Rules of Procedure and Evidence for the International Criminal Tribunal for the Former Yugoslavia, Doc. IT/32.
International Criminal Tribunal for the Former Yugoslavia. Rules of Procedure and Evidence for the International Criminal Tribunal for the Former Yugoslavia, U.N. Doc. IT/32/REV.38.

International Law Commission. (2022). Draft conclusions on identification and legal consequences of peremptory norms of general international law (jus cogens), with commentaries.

Organisation of Islamic Cooperation. (2016). OIC Plan of Action for the Advancement of Women. Istanbul.

Šimonović, D. (2021). *Report of the Special Rapporteur on violence against women, its causes and consequences - A framework for legislation on rape (model rape law), A/HRC/47/26/Add.1.*

Šimonović, D. (2021). *Report of the Special Rapporteur on violence against women, its causes and consequences. A/HRC/47/26.*

Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment. (July 12 2019). *Interim report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment. Relevance of the prohibition of torture and other cruel, inhuman or degrading treatment or punishment to the context of domestic violence.* . A/74/148.

Statute of the International Criminal Tribunal for the Former Yugoslavia. (1993).

UN Women. (2015). *The Beijing Platform for Action: inspiration then and now*. Retrieved from https://asiapacific.unwomen.org/en/beijing20/about-beijing20#:~:text=An%20unprecedented%2017%2C000%20participants%20and,empowerment%20of%20all%20women%2C%20everywhere.%20t Accessed October 2023

UN Women. (2016). DISCUSSION PAPER - Unpaid Care and Domestic Work: Issues and Suggestions for Viet Nam.

UN Women. (2022). REPRESENTATION OF WOMEN IN THE UN SYSTEM.

United Nations. (1990). General Comment No. 3, The Nature of States PartiesObligations, adopted 13–14 Dec. 1990, U.N. ESCOR, Comm. on Econ., Soc. & Cult.Rts., 5th Sess., 49th & 50th mtg, U.N. Doc. E/C.12/1990/8 .

United Nations. (1995). Beijing Declaration and Platform for Action - Beijing+5 Political Declaration and Outcome. Beijing.

United Nations. (2002). *A UNFPA Strategy for Gender Mainstreaming in Areas of Conflict and Reconstruction.*

United Nations. (2008). General Comment No. 19, The Right to Social Security, U.N. ESCOR, Comm. on Econ., Soc, & Cult. Rts., 39th Session, U.N. Doc. E/C.12/GC/19 (2008).

United Nations. (2019). Report S/2019/280.

United Nations. (2020). Handbook for United Nations Field Missions on Preventing and Responding to Conflict-Related Sexual Violence.

United Nations. (2023, January). Protocol and Liaison Service, Permanent Missions to the United Nations, No 311, ST/PLS/SER.A/311. New York.

United Nations High Commissioner for Refugees. (2023, October 10). UNHCR Emergency Handbook – Sexual and gender-based violence (SGBV) prevention and response.

United Nations Security Council. (2000, October 31). S/RES/1325 (2000).

United Nations Security Council. (2008, June 19). S/RES/1820 (2008).

United Nations Security Council. (2009, August 20). S/2009/362.

United Nations Security Council. (2009, September 30). S/RES/1888 (2009).

United Nations Security Council. (2009, October 5). S/RES/1889 (2009).

United Nations Security Council. (2010, December 16). S/RES/1960 (2010).

United Nations Security Council. (2013, June 24). S/RES/2106 (2013).

United Nations Security Council. (2015, October 13). S/RES/2242 (2015).

United Nations Security Council. (2016, December 20). S/RES/2331 (2016).

United Nations Security Council. (2019, April 23). S/RES/2467 (2019).

United Nations Security Council. (2019, October 29). S/RES/2493 (2019).

United Nations Security Council. (2021). *S/2021/312.*

United Nations. *The Four Pillars of United Nations Security Council Resolution 1325*. Retrieved from United Nations: https://www.un.org/shestandsforpeace/content/four-pillars-united-nations-security-council-resolution-1325. Accessed November 2023

United Nations. *United Nations*. Retrieved from United Nations, Domestic Violence and the Prohibition of Torture and Ill-Treatment: https://www.ohchr.org/en/special-procedures/sr-torture/domestic-violence-and-prohibition-torture-and-ill-treatment. Accessed 16 January 2024

UNWomen, Press release: UN Women raises awareness of the shadow pandemic of violence against women during COVID-19 < https://www.unwomen.org/en/news/stories/2020/5/press-release-the-shadow-pandemic-of-violence-against-women-during-covid-19> accessed 10 April 2024

Other Material

International Criminal Tribunal for the former Yugoslavia. *In Numbers*. Retrieved from International Criminal Tribunal for the former Yugoslavia: https://www.icty.org/en/features/crimes-sexual-violence/in-numbers . Accessed 16 January 2024

Amnesty International . (2023, May). *LET'S TALK ABOUT YES!* Retrieved from Amnesty International : https://www.amnesty.org/en/latest/campaigns/2018/11/rape-in-europe/. Accessed 16 January 2024

Association of Southeast Asian Nations. *ASEAN Member States*. Retrieved from Association of Southeast Asian Nations: https://asean.org/member-states/. Accessed October 2023

BBC News. (2016). *Maria da Penha: The woman who changed Brazil's domestic violence laws*. Retrieved from BBC News: https://www.bbc.com/news/magazine-37429051. Accessed 16 January 2024

Euractiv. (2024, January 16). *France, Germany, France, Germany, Netherlands side with Netherlands side with conservative EU countries in conservative EU countries in split over rape definition*. Retrieved from https://www.euractiv.com/section/health-consumers/news/france-germany-netherlands-side-with-conservative-eu-countries-in-split-over-rape-definition/. Accessed 18 January 2024

Federal Department of Foreign Affairs FDFA . (2012). *Library ICRC.* Retrieved from International Committee of Red Cross:

https://library.icrc.org/library/docs/CD/CD_2005_DOCUMENTS_OFFICIELS_ENG.pdf. Accessed October 2023

Finland in European Union - Permanent representation of Finland to the EU, Brussels. (2024, February 9https://finlandabroad.fi/web/eu/current-affairs/-/asset_publisher/cGFGQPXL1aKg/content/deal-on-eu-law-on-violence-against-women/384951). *Deal on EU law on combating violence against women and domestic violence*. Retrieved from Finland in European Union. Accessed 10 February 2024

Fórum Brasileiro de Segurança Pública. (2023). *17º Anuário Brasileiro de Segurança Pública, 2023.* São Paulo.

Geneva Academy. *TODAY'S ARMED CONFLICTS.* Retrieved from Geneva Academy: https://geneva-academy.ch/galleries/today-s-armed-conflicts. Accessed 16 January 2024

Human Rights Watch. (1996). SHATTERED LIVES - Sexual Violence during the Rwandan Genocide and its Aftermath.

ICIP. *ICIP Peace in Progress Award 2023 honors two organizations of Bosnian war victims.* Retrieved from ICIP: https://www.icip.cat/en/icip-peace-in-progress-award-2023-honors-two-organizations-of-bosnian-war-victims/. Accessed 16 January 2024

International Committee of Red Cross. (2004). *International Committee of Red Cross - What is International Humanitarian Law?* Retrieved from https://www.icrc.org/en/doc/assets/files/other/what_is_ihl.pdf. Accessed October 2023

International Committee of Red Cross. (2017, June 8). *40th anniversary of the 1977 Additional Protocols*. Retrieved from International Committee of Red Cross: https://blogs.icrc.org/cross-files/40th-anniversary-of-the-1977-additional-protocols/. Accessed October 2023

International Committee of Red Cross. (2022, February 17). *Revisiting the history of the Geneva Conventions*. Retrieved from International Committee of Red Cross: https://blogs.icrc.org/law-and-policy/2022/02/17/history-geneva-conventions/. Accessed October 2023

International Committee of Red Cross. *Diplomatic Conferences for the adoption of the Geneva Conventions and their Additional Protocols.* Retrieved from International Committee of Red Cross: https://blogs.icrc.org/cross-files/diplomatic-conferences/. Accessed October 2023

International Committee of Red Cross. *ICRC Audiovisual Archives*. Retrieved from International Committee of Red Cross: https://avarchives.icrc.org/Picture/7278. Accessed October 2023

International Committee of Red Cross. *The ICRC and the Geneva Convention (1863-1864)*. Retrieved from International Committee of Red Cross: https://www.icrc.org/en/doc/resources/documents/misc/57jnvt.htm, https://avarchives.icrc.org/Picture/7278. Accessed October 2023

International Conference on Gender and International Criminal Law . (2024, January 16 and 17). Leiden.

International Criminal Court. *ICC Cases*. Retrieved from International Criminal Court: https://www.icc-cpi.int/cases. Accessed 16 January 2024

International Criminal Tribunal for Rwanda. *The ICTR in Brief*. Retrieved from https://unictr.irmct.org/en/tribunal. Accessed 16 January 2024

LSE. *Maria da Penha Maia Fernandes v. Brazil*. Retrieved from LSE - Centre for Women, Peace and Security: https://blogs.lse.ac.uk/vaw/landmark-cases/a-z-of-cases/maria-de-penha-v-brazil/. Accessed 16 January 2024

Organisation of Islamic Cooperation. *Organisation of Islamic Cooperation*. Retrieved from Member States: https://www.oic-oci.org/states/?lan=en. Accessed October 2023

RAINN. *Victims of Sexual Violence: Statistics*. Retrieved from RAINN: https://www.rainn.org/statistics/victims-sexual-violence. Accessed 16 January 2024

Redress. (2024, February 28). *ICC's Largest Ever Reparation Order Paves the Way for Reparations for Victims of Ongwen's Crimes*. Retrieved from Redress: https://redress.org/news/iccs-largest-ever-reparation-order-paves-the-way-for-reparations-for-victims-of-ongwens-crimes/. Accessed 28 February 2024

The Guardian. *Jean-Pierre Bemba's war crimes conviction overturned.* Retrieved from The Guardian: https://www.theguardian.com/global-development/2018/jun/08/former-congo-leader-jean-pierre-bemba-wins-war-crimes-appeal-international-criminal-court. Accessed 16 January 2024

United Nations Human Rights Office of the High Commissioner. *Status of Ratification*. Retrieved from United Nations Human Rights Office of the High Commissioner: https://indicators.ohchr.org/. Accessed 21 February 2024

United Nations. *International Law Commission*. Retrieved from Membership: https://legal.un.org/ilc/ilcmembe.shtml . Accessed November 2024

United Nations. *UN Treaty Body Database, Ratification Status for CEDAW - Convention on the Elimination of All Forms of Discrimination against Women*. Retrieved from https://tbinternet.ohchr.org/_layouts/15/TreatyBodyExternal/Treaty.aspx?Treaty=CEDAW&Lang=en. Accessed 16 January 2024

United Nations. *United Nations*. Retrieved from United Nations, Former Secretaries-General: https://www.un.org/sg/en/content/former-secretaries-general. Accessed October 2023

YLE. (2022, December 5). *Prosecutor Genera of Ukraine: Sexual violence committed by Russian soldiers has increased significantly (translated)*. Retrieved from YLE: https://yle.fi/a/3-12314941/64-3-126057. Accessed 5 December 2022.